STATUTES AND COURT DECISIONS

FEDERAL TRADE COMMISSION

VOLUME IX

January 1, 1971 to December 31, 1975

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FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION

(December, 1975)

PAUL RAND DIXON, Democrat, born on September 29, 1913, in Nashville, Tenn. Educated in public schools of Davidson County, Tenn.; A.B., Vanderbilt University, Nashville, Tenn.; LL.B., University of Florida, Gainesville, Fla. Joined the Federal Trade Commission as trial attorney in July 1938 and subsequently engaged in both anti-monopoly and anti-deceptive practice work; February 1957, joined the Senate Antitrust and Monopoly Subcommittee as counsel and staff director; assisted subcommittee in developing and focusing attention of Congress and public on important problems in the field of restraints of trade, including administered prices in many major industries; appointed Commissioner and Chairman of the Federal Trade Commission on March 21, 1961. Reappointed on September 25, 1967, for a full seven-year term and has been reappointed for another seven-year term expiring on September 25, 1981. Served as Chairman until January 1, 1970, and as Acting Chairman from January 6, 1976 until March 23, 1976. Served with U.S. Navy from 1942 to 1945; commissioned Lieutenant (jg) and spent 23 months overseas participating in the occupation of Africa and the invasion and occupation of Sicily; entitled to wear three battle stars and is presently Lieutenant Commander, USNR (retired). Admitted to bars of Florida and Tennessee. Member: Federal Bar Association, Washington, D.C.; National Lawyers Club, Washington, D.C.; Honorary member of Phi Delta Phi, International Legal Fraternity; George C. Whiting Masonic Lodge No. 22, Washington, D.C.; Alpha Tau Omega; Kenwood Golf & Country Club, Bethesda, Md.; Metropolitan Memorial United Methodist Church, Washington, D.C. Former member: President's Committee on Consumer Interests; Committee of Experts on Restrictive Business Practices of OECD; Administrative Conference of the United States; Council of Section of Antitrust Law, American Bar Association; American Bar Association, Washington, D.C.; Executive Advisory Board, Junior Achievement Program of Metropolitan Washington, D.C.; Alumni Board of Directors, Commodore Boosters, Vanderbilt University, Nashville, Tennessee. Played quarterback, Vanderbilt University varsity football team; Assistant football coach, University of Florida while attending law college. Married to former Doris Busby of Laurel, Mississippi; two sons, David Leslie and Paul R. Jr.

ELIZABETH HANFORD DOLE was sworn in on December 4, 1973, as a Federal Trade Commissioner. The Senate unanimously approved the nomination on November 20, 1973 for a seven-year term expiring September 26, 1980.

Commissioner Dole was appointed Deputy Director for the Office of Consumer Affairs at the time of its creation in February, 1971. In that post, she served as deputy to the President's Special Assistant for Consumer Affairs. Before that time, she was Executive Director of the predecessor organization, the President's Committee on Consumer Interests. She joined the PCCI as

Associate Director for Legislative Affairs in 1968. Prior to that, she was engaged in the private practice of law defending indigents and also served as Staff Assistant to the Assistant Secretary of Health, Education, and Welfare.

Commissioner Dole, born July 29, 1936, in Salisbury, N.C., holds an LL. B. from Harvard Law School and an M.A. from the Harvard Graduate School of Education. She received her undergraduate degree with distinction in political science from Duke University where she was elected to Phi Beta Kappa and served as president of the Student Government Association. She also participated in a summer program of study at Oxford University.

In 1972, Commissioner Dole was the recipient of the Arthur S. Flemming Award for outstanding government service. She served as a member of the 1972 Nominating Committee for the American Stock Exchange.

She is a member of the Board of Trustees, Duke University, and is currently serving as the National Chairman for the Duke Loyalty Fund. She has been elected to serve a four-year term as a member of the Council of the Harvard Law School Association.

Commissioner Dole is a member of the American and District of Columbia Bar Associations and is a former member of the American Bar Association Bankruptcy Committee. She is an associate member of the American Newspaper Women's Club, and a member of the North Carolina Consumer Council.

Time magazine, in July of 1974, named Commissioner Dole as one of America's 200 "Faces for the Future."

She is married to Robert Joseph Dole, United States Senate, and they reside in Washington, D.C.

The following individuals also served as either Chairman or Commissioner during the five-year period, 1971-1975, covered in this publication.

Miles W. Kirkpatrick, *Chairman*
September 15, 1970 — February 20, 1973

Lewis A. Engman, *Chairman*
February 20, 1973 — December 30, 1975

Everette MacIntyre, *Commissioner*
September 26, 1961 — June 30, 1973

Mary Gardiner Jones, *Commissioner*
October 29, 1964 — November 2, 1973

David S. Dennison, *Commissioner*
October 19, 1970 — December 31, 1973

Mayo J. Thompson, *Commissioner*
July 2, 1973 — September 1, 1975

Steven A. Nye, *Commissioner*
May 29, 1974 — May 1, 1976

PREFACE

This ninth volume of "Statutes and Court Decisions of the Federal Trade Commission" includes selected statutes, as amended, administered by the Commission and court decisions construing them during the years 1971-75, inclusive. It contains the majority of the cases to which the Commission was a party.

The bracketed boldface figures in the text of Supreme Court cases are the page numbers of the official United States reports. In the opinions of the other courts, they indicate pagination in the respective official reporters.

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[1] Abbreviated as follows:

BA	Bankruptcy Act
CA	Clayton Act
FCRA	Fair Credit Reporting Act
FFA	Flammable Fabrics Act
FOIA	Freedom of Information Act
FPLA	Fur Products Labeling Act
FTCA	Federal Trade Commission Act
NEPA	National Environmental Policy Act
TILA	Truth in Lending Act
WPLA	Wool Products Labeling Act

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(C.A. D.C. 1975)	523 F. 2d 730	NEPA	1537
Gladstone, Emanuel; F.T.C. *v.*			
(D.C. N.D. Ga. 1971)	Not reported	FTCA9	6
(C.A. 5 1971)	450 F. 2d 913	FTCA9	167
Glen E. Jorgensen and C.I.T. Financial Corporation; F.T.C. *v.*			
(D.C. D.C. 1975)	Not reported	TILA	1352
Glenn W. Turner *v.* Lewis A. Engman, et al.			
(D.C. D.C. 1973)	Not reported	FTCA	766
Golden Grain Macaroni Co.; F.T.C. *v.*			
(C.A. 9 1972)	472 F. 2d 882	CA7	430
Certiorari denied (1973)	419 U.S. 918		
Goodhope, Andrew C.; Seven-Up Co. *v.*			
(D.C. E.D. Mo. 1972)	349 F. Supp. 551	FTCA	366
Goodyear Tire & Rubber Company, The *v.* F.T.C., et al.			
(D.C. Del. 1975)	396 F. Supp. 1125	FTCA	1293
Greater Kansas City Gas & Air Conditioning Company; U.S. *v.*			
(D.C. W.D. Mo. 1975)	Not reported	FTCA	1557
H. R. Gibson, Sr., et al.; F.T.C. *v.*			
(C.A. 5 1972)	460 F. 2d 605	CA2	290
H. R. Gibson, Sr., et al. *v.* Al Cohen, et al.			
(D.C. S.D. Texas 1975)	Not reported	FTCA	1510
H. R. Gibson, Sr., et al. *v.* Harold Hassenfeld, et al.			
(D.C. E.D. Tenn. 1975)	Not reported	FTCA	1530
Harbor Banana Distributors, Inc. *v.* F.T.C.			
(C.A. 5 1974)	499 F. 2d 395	CA2,7	1090
Hassenfeld, Harold, et al.; H.R. Gibson, Sr., et al. *v.*			
(D.C. E.D. Tenn. 1975)	Not reported	FTCA	1530
Heater, John Clifford *v.* F.T.C.			
(C.A. 9 1974)	503 F. 2d 321	FTCA	1099
Helene Curtis Industries, Inc.; U.S. *v.*			
(D.C. N.D. Ill. 1974)	Not reported	FTCA	1556
Hobart Corporation *v.* F.T.C., et al.			
(D.C. Del. 1975)	396 F. Supp. 1125	FTCA	1293
Hoffmann, Royce George, et al.; U.S. *v.*			
(D.C. Kansas 1971)	Not reported	FTCA	104
Holiday Magic, Inc., et al. *v.* F.T.C.			
(D.C. D.C. 1973)	Not reported	FOIA	602
Hollywood Film Studios; U.S. *v.*			
(D.C. C.D. Calif. 1973)	Not reported	FTCA	1555
Inland Steel Company *v.* F.T.C., et al.			
(D.C. Del. 1975)	396 F. Supp. 1125	FTCA	1293
Irving Rifkin; U.S. *v.*			
(D.C. S.D.N.Y. 1974)	Not reported	WPLA	1556
ITT Continental Baking Co.; U.S. *v.*			
(C.A. 10 1972)	462 F. 2d 1104	FTCA, CA7	306
(C.A. 10 1973)	485 F. 2d 16	FTCA, CA7	775
Certiorari granted (1974)	416 U.S. 968		
(Sup. Ct. 1975)	420 U.S. 223	CA7	1189

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ITT Continental Baking Company *v.* F.T.C.			
(C.A. D.C. 1975)	515 F. 2d 367	FTCA	1376
Jackson, Richard, et al.; F.T.C. *v.*			
(D.C. W.D. Wash. 1974)	Not reported	FTCA	842
J. B. Williams Company, Inc., et al.; U.S. *v.*			
(D.C. S.D.N.Y. 1973)	354 F. Supp. 521	FTCA	483
(C.A. 2 1974)	498 F. 2d 414	FTCA	938
J. B. Williams Co., Inc.; F.T.C. *v.*			
(D.C. S.D.N.Y. 1975)	Not reported	FTCA	1502
Jerome Blank, President, National Brands, Inc., etc.; F.T.C. *v.*			
(D.C. S.D. Fla. 1973)	Not reported	FTCA	814
Jerry L. Feldman and Checker Taxi Company, Inc.; F.T.C. *v.*			
(D.C. N.D. Ill. 1975)	Not reported	FTCA	1326
Jewel Companies, Inc., et al. *v.* F.T.C.			
(D.C. N.D. Ill. 1972)	Not reported	CA2	245
Jewel Companies, etc., et al. *v.* F.T.C.			
(C.A. 7 1973)	479 F. 2d 1323	CA2	598
John Bodner, Jr., and Shell Oil Co. *v.* F.T.C., et al.			
(D.C. D.C. 1974)	Not reported	FTCA, FOIA	1122
(D.C. D.C. 1975)	Not reported	FOIA	1161
(D.C. D.C. 1975)	Not reported	FOIA	1227
John Clifford Heater, et al. *v.* F.T.C.			
(C.A. 9 1974)	503 F. 2d 321	FTCA	1099
John Spector *v.* F.T.C., et al.			
(D.C. S.D. Calif. 1973)	Not reported	FTCA	612
Jorgensen, Glen E. and C.I.T. Financial Corporation; F.T.C. *v.*			
(D.C D.C. 1975)	Not reported	TILA	1352
Juniperwood Ranch, Inc.; F.T.C. *v.*			
(D.C. C.D. Calif. 1975)	Not reported	FTCA	1260
Kalin, Benjamin D.; U.S. *v.*			
(D.C. N.D. W.D. Ia. 1971)	Not reported	FPLA	1553
Kennecott Copper Corp. *v.* F.T.C.			
(C.A. 10 1972)	467 F. 2d 67	CA7	341
Koscot Interplanetary, Inc.			
(D.C. M.D. Fla. 1973)	Not reported	BA, CA, FTCA	786
Koscot Interplanetary, Inc.; U.S. *v.*			
(D.C. M.D. Fla. 1973)	Not reported	CA, FTCA	791
(D.C. M.D. Fla. 1973)	Not reported	CA, FTCA	805
Kroger Co. *v.* F.T.C.			
(C.A. 6 1971)	438 F. 2d 1372	CA2	9
Certiorari denied (1971)	404 U.S. 871		
La Salle Extension University *v.* F.T.C.			
(C.A. 7 1973)	Not reported	FTCA	793
Certiorari denied (1974)	417 U.S. 909		
Leila Mourning *v.* Family Publications Service, Inc.			
(Sup. Ct. 1973)	411 U.S. 356 93 S. Ct. 1652	TILA	638
Lever Bros. Co. *v.* F.T.C.			
(D.C. Me. 1971)	325 F. Supp. 371	FTCA	60
(C.A. 1 1971)	Not reported	FTCA	65

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L. G. Balfour Co. *v.* F.T.C. (C.A. 7 1971)	442 F. 2d 1	FTCA	26
Liggett & Myers, Inc. *v.* Lewis A. Engman, et al. (D.C. S.D.N.Y. 1975)	Not reported	FTCA	1446
(D.C. S.D.N.Y. 1975)	Not reported	FTCA	1525
(C.A. 2 1975)	527 F. 2d 115	FTCA	1542
Lipton, Thomas J., Inc. *v.* F.T.C., et al. (D.C. Del. 1975)	396 F. Supp. 1125	FTCA	1293
Litton Industries; U.S. *v.* (C.A. 9 1972)	462 F. 2d 14	FTCA	299
Loew's Theatres, Inc. *v.* Lewis A. Engman, et al. (D.C. S.D.N.Y. 1975)	Not reported	FTCA	1446
(D.C. S.D.N.Y. 1975)	Not reported	FTCA	1525
(C.A. 2 1975)	527 F. 2d 115	FTCA	1542
Love Television & Stereo Rental, Inc., et al. *v.* F.T.C. (C.A. 5 1974)	498 F. 2d 1088	FTCA	1158
Lukens Steel Co. and United States Steel Corp. *v.* F.T.C. (D.C. D.C. 1975)	Not reported	FTCA	1317
Manager, Retail Credit Company, Miami Branch Office; F.T.C. *v.* (D.C. D.C. 1973)	357 F. Supp. 347	FCRA	629
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Marco Sales Co. *v.* F.T.C. (C.A. 2 1971)	453 F. 2d 1	FTCA	174
Markin, David R., et al.; F.T.C. *v.* (D.C. W.D. Mich. 1974)	391 F. Supp. 865	FTCA	1138
Mellon National Corporation *v.* F.T.C., et al. (D.C. S.D.N.Y. 1975)	Not reported	FTCA	1551
Merck & Co., Inc. *v.* F.T.C., et al. (D.C. Del. 1975)	396 F. Supp. 1125	FTCA	1293
Mink, Patsy T., et al.; Environmental Protection Agency *v.* (Sup. Ct. 1973)	410 U.S. 73 93 S. Ct. 827	FOIA	457
Mississippi River Corp. *v.* F.T.C. (C.A. 8 1972)	454 F. 2d 1083	CA7	199
Missouri Portland Cement Co.; F.T.C. *v.* (D.C. W.D. Mo. 1972)	Not reported	FTCA	250
(D.C. W.D. Mo. 1973)	Not reported	FTCA	572
Mobil Oil Corporation; F.T.C. *v.* (D.C. D.C. 1974)	Not reported	FTCA	905
(C.A. D.C. 1975)	517 F. 2d 137	FTCA	1411
Morgan Guaranty Trust Company of New York, et al. *v.* F.T.C., et al. (D.C. S.D.N.Y. 1975)	Not reported	FTCA	1551
Mourning, Leila *v.* Family Publications Service, Inc. (Sup. Ct. 1973)	411 U.S. 356 93 S. Ct. 1652	TILA	638
Nabisco, Inc. *v.* F.T.C. (C.A. 5 1972)	459 F. 2d 1023	CA2	287
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Children's Apparel Salesmen, Inc., et al. *v.* F.T.C.			
(C.A. 5 1973)	479 F. 2d 139	FTCA	660
Certiorari denied (1973)	414 U.S. 1004		
National Bakers Services, Inc.; U.S. *v.*			
(D.C. S.D. Fla. 1971)	Not reported	FTCA	1553
National Brands, Inc., (Jerome Blank, President) Etc.; F.T.C. *v.*			
(D.C. S.D. Fla. 1973)	Not reported	FTCA	814
National Commission on Egg Nutrition; F.T.C. *v.*			
(D.C. N.D. Ill. 1974)	Not reported	FTCA	1109
(C.A. 7 1975)	517 F. 2d 485	FTCA	1344
National Dynamics Corporation *v.* F.T.C.			
(C.A. 2 1974)	492 F. 2d 1333	FTCA	862
Certiorari denied (1975)	419 U.S. 993		
National Outdoor Display, Inc.; U.S. *v.*			
(D.C. W.D. Tenn. 1973)	Not reported	FTCA	1555
National Petroleum Refiners Association, et al. *v.* F.T.C., et al.			
(D.C. D.C. 1972)	340 F. Supp. 1343	FTCA	260
(C.A. D.C. 1973)	482 F. 2d 672	FTCA	714
Certiorari denied (1974)	415 U.S. 951		
(D.C. D.C. 1974)	392 F. Supp. 1052	FTCA	1049
(D.C. D.C. 1975)	Not reported	FTCA	1384
(D.C. D.C. 1975)	Not reported	FTCA	1410
N.C. Freed, Inc., et al. *v.* Board of Governors of the Federal Reserve System, et al.			
(C.A. 2 1973)	473 F. 2d 1210	TILA	541
Certiorari denied (1973)	414 U.S. 827		
Norman J. Foucha, et al.; F.T.C. *v.*			
(D.C. N.D. Ala. 1973)	356 F. Supp. 21	FTCA	605
Norman J. Foucha, et al. *v.* F.T.C.			
(D.C. N.D. Ala. 1973)	Not reported	FTCA	759
Northwest Industries, Inc. *v.* F.T.C., et al.			
(D.C. Del. 1975)	396 F. Supp. 1125	FTCA	1293
OKC Corp. *v.* F.T.C.			
(C.A. 10 1972)	455 F. 2d 1159	CA7	215
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Oscar Mayer & Co., Inc. *v.* F.T.C., et al.			
(D.C. Del 1975)	396 F. Supp. 1125	FTCA	1293
Page, Richard M. and Arrow Food Distributors, Inc., et al.; F.T.C. *v.*			
(D.C. N.D. Ga. 1974)	378 F. Supp. 1052	FTCA	1053
Papercraft Corporation *v.* F.T.C.			
(C.A. 7 1973)	472 F. 2d 927	CA7	530
Papercraft Corporation; U.S. *v.*			
(D.C. W.D. Penn. 1975)	393 F. Supp. 408	CA7	1262
(D.C. W.D. Penn. 1975)	393 F. Supp. 415	CA7	1329
(D.C. W.D. Penn. 1975)	Not reported	CA7	1557
Patsy T. Mink, et al.; Environmental Protection Agency, et al. *v.*			
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PepsiCo, Inc. *v.* F.T.C. (D.C. S.D.N.Y. 1972)	343 F. Supp. 396	FTCA	295
PepsiCo, Inc.; F.T.C. *v.* (C.A. 2 1972)	472 F. 2d 179	FTCA	407
Certiorari denied (1973)	414 U.S. 876 94 S. Ct. 44		
(C.A. 2 1973)	477 F. 2d 24	CA7	614
Periodical Publishers' Service Bureau, Inc. *v.* F.T.C. (D.C. D.C. 1972)	Not reported	FTCA	443
Philip Morris Inc. *v.* Lewis A. Engman, et al. (D.C. S.D.N.Y. 1975)	Not reported	FTCA	1446
(D.C. S.D.N.Y. 1975)	Not reported	FTCA	1525
(C.A. 2 1975)	527 F. 2d 115	FTCA	1542
Purolator Products, Inc. *v.* F.T.C. (C.A. 7 1973)	Not reported	CA2	769
Ralph Botsford (Botsford Ready-Mix Company); F.T.C. *v.* (D.C. W.D. Mo. 1973)	Not reported	FTCA	572
Raymond Anderson; U.S. *v.* (D.C. S.D. Ohio 1975)	Not reported	FTCA	1557
Rejuvenation Center Ltd. (Robert E. Sheldon, Beverlee Sheldon, a/k/a Beverlee Choate, and Terry Lee Armas, III, d/b/a); F.T.C. *v.* (D.C. W.D. Texas 1973)	Not reported	FTCA	623
(D.C. W.D. Texas 1973)	Not reported	FTCA	804
Resort Car Rental Systems, Inc., et al. *v.* F.T.C. (C.A. 9 1975)	518 F. 2d 962	FTCA	1318
Retail Credit Company, Manager, Miami Branch Office; F.T.C. *v.* (D.C. D.C. 1973)	357 F. Supp. 347	FCRA	629
(C.A. D.C. 1975)	515 F. 2d 988	FCRA	1246
Richard Jackson, et al.; F.T.C. *v.* (D.C. W.D. Wash. 1974)	Not reported	FTCA	842
Richard M. Page and Arrow Food Distributors, Inc., et al.; F.T.C. *v.* (D.C. N.D. Ga. 1974)	378 F. Supp. 1052	FTCA	1053
Rifkin, Irving; U.S. *v.* (D.C. S.D.N.Y. 1974)	Not reported	WPLA	1556
R. J. Reynolds Tobacco Co. *v.* Lewis A. Engman, et al. (D.C. S.D.N.Y. 1975)	Not reported	FTCA	1446
(D.C. S.D.N.Y. 1975)	Not reported	FTCA	1525
(C.A. 2 1975)	527 F. 2d 115	FTCA	1542
Robert E. Sheldon, et al. (d/b/a Rejuvenation Center Ltd.); F.T.C. *v.* (D.C. W.D. Texas 1973)	Not reported	FTCA	623
(D.C. W.D. Texas 1973)	Not reported	FTCA	804
Rodgers, William H., Jr. *v.* F.T.C. (C.A. 9 1974)	492 F. 2d 228	FTCA	846
Royce George Hoffmann; U.S. *v.* (D.C. Kan. 1971)	Not reported	FTCA	1553
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Seven-Up Co. *v.* Andrew C. Goodhope			
(D.C. E.D. Mo. 1972)	349 F. Supp. 551	FTCA	366
Seven-Up Company *v.* F.T.C., et al.			
(C.A. 8 1973)	478 F. 2d 755	FTCA	670
Certiorari denied (1973)	414 U.S. 1013		
Sheldon, Beverlee (a/k/a Beverlee Choate), et al.; F.T.C. *v.*			
(D.C. W.D. Texas 1973)	Not reported	FTCA	623
(D.C. W.D. Texas 1973)	Not reported	FTCA	804
Sheldon, Robert E., et al.; F.T.C. *v.*			
(D.C. W.D. Texas 1973)	Not reported	FTCA	623
(D.C. W.D. Texas 1973)	Not reported	FTCA	804
Shell Oil Company; F.T.C. *v.*			
(D.C. D.C. 1974)	Not reported	FTCA	905
(C.A. D.C. 1975)	517 F. 2d 137	FTCA	1411
Shell Oil Co., and John Bodner, Jr. *v.* F.T.C., et al.			
(D.C. D.C. 1974)	Not reported	FTCA, FOIA	1122
(D.C. D.C. 1975)	Not reported	FTCA, FOIA	1161
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Simeon Management Corporation, et al.; F.T.C. *v.*			
(D.C. N.D. Calif. 1975)	391 F. Supp. 697	FTCA	1271
Skylark Originals, Inc., et al. *v.* F.T.C.			
(C.A. 3 1973)	474 F. 2d 1340	FTCA	572
Smarz, William; U.S. *v.*			
(D.C. S.D.N.Y. 1972)	Not reported	FTCA	1553
Smith Fencer Corp., et al.; U.S. *v.*			
(D.C. E.D. Mich. 1971)	Not reported	FTCA	1553
S.O.U.P., Inc. *v.* F.T.C.			
(D.C. D.C. 1971)	449 F. 2d 1142	FTCA	94
Spector, John *v.* F.T.C., et al.			
(D.C. S.D. Calif. 1973)	Not reported	FTCA	612
Sperry & Hutchinson Co.; F.T.C. *v.*			
(Sup. Ct. 1972)	92 S. Ct. 898 405 U.S. 233	FTCA	232
Spiegel, Inc. *v.* F.T.C.			
(C.A. 7 1974)	494 F. 2d 59	FTCA	891
Certiorari denied (1974)	419 U.S. 896		
Standard Educators, Inc., et al. *v.* F.T.C.			
(C.A. D.C. 1973)	475 F. 2d 401	FTCA	588
Certiorari denied (1973)	414 U.S. 828		
Standard Oil Company; F.T.C. *v.*			
(C.A. D.C. 1975)	517 F. 2d 137	FTCA	1411
Standard Oil Company *v.* F.T.C.			
(D.C. D.C. 1973)	Not reported	FTCA	540
Standard Oil Co. (Indiana); F.T.C. *v.*			
(D.C. D.C. 1974)	Not reported	FTCA	905
Standard Oil of California; F.T.C. *v.*			
(D.C. D.C. 1974)	Not reported	FTCA	905
(C.A. D.C. 1975)	517 F. 2d 137	FTCA	1411
Stanley Furs, Inc.; U.S. *v.*			

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(D.C. S.D. Colo. 1973)	Not reported	FPLA	1555
Stanley Works *v.* F.T.C.			
(C.A. 2 1972)	469 F. 2d 498	FTCA, CA7	367
Certiorari denied (1973)	412 U.S. 928		
Star Office Supply Co., et al. *v.* F.T.C.			
(C.A. 2, 1971)	Not reported	FTCA	443
Certiorari denied (1972)	406 U.S. 918		
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(D.C. N.D. Calif. 1975)	Not reported	FTCA	1373
Sterling Drug Inc. *v.* F.T.C.			
(C.A. D.C. 1971)	452 F. 2d 698	CA7	116
(D.C. S.D.N.Y. 1973)	Not reported	FTCA	816
Sunshine Art Studios, Inc., et al. *v.* F.T.C.			
(C.A. 1 1973)	481 F. 2d 1171	FTCA	760
Superior Oil Company, Inc.; F.T.C. *v.*			
(D.C. D.C. 1974)	Not reported	FTCA	908
(C.A. D.C. 1975)	517 F. 2d 137	FTCA	1411
Swingline, Inc.; U.S. *v.*			
(D.C. E.D.N.Y. 1973)	Not reported	FTCA, CA7	585
(D.C. E.D.N.Y. 1974)	371 F. Supp. 37	CA7	827
(D.C. E.D.N.Y. 1974)	Not reported	CA7	1556
Sydney N. Floersheim *v.* Lewis A. Engman, et al.			
(C.A. D.C. 1973)	494 F. 2d 949	FTCA	819
Symbra-Ette, (Ger-Ro-Mar, Inc. T/A et al. *v.* F.T.C.			
(C.A. 7 1975)	518 F. 2d 33	FTCA	1363
Techbestos, Inc.; U.S. *v.*			
(D.C. N.J. 1972)	Not reported	FTCA	1554
Ted Bates & Company, Inc. *v.* F.T.C.			
(C.A. D.C. 1975)	515 F. 2d 367	FTCA	1376
Terry Lee Armas, III, et al. (d/b/a Rejuvenation Center, Ltd.); F.T.C. *v.*			
(D.C. W.D. Texas 1973)	Not reported	FTCA	623
(D.C. W.D. Texas 1973)	Not reported	FTCA	804
Texaco, Inc.; F.T.C. *v.*			
(D.C. D.C. 1974)	Not reported	FTCA	905
(C.A. D.C. 1975)	517 F. 2d 137	FTCA	1411
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The Goodyear Tire & Rubber Company *v.* F.T.C., et al.			
(D.C. Del. 1975)	396 F. Supp. 1125	FTCA	1293
The Great Atlantic & Pacific Tea Company, Inc., et al. *v.* F.T.C.			
(D.C. S.D.N.Y. 1974)	Not reported	FTCA	1013
The Superior Oil Company, Inc.; F.T.C. *v.*			
(C.A. D.C. 1975)	517 F. 2d 137	FTCA	1411
Thomas J. Lipton, Inc. *v.* F.T.C., et al.			
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United Brands Company and Chiquita Brands, Inc. *v.* F.T.C. (C.A. 5 1974)	499 F. 2d 395	CA2,7	1090
United States Steel Corp. and Lukens Steel Co.; F.T.C. *v.* (D.C. D.C. 1975)	Not reported	FTCA	1317
United States Steel Corp. *v.* F.T.C. (C.A. 6 1971)	Not reported	CA7	68
U.S. *v.* Abraham Feder (D.C. S.D.N.Y. 1972)	Not reported	FPLA	1554
U.S. *v.* Aluminum Exterior Designers, Inc. (D.C. S.D. Ind. 1973)	Not reported	FTCA	1555
U.S. *v.* Alvin O. Langdon (D.C. E.D. Tenn. 1975)	Not reported	FTCA	1557
U.S. *v.* AMF Incorporated (D.C. Colo. 1972)	Not reported	FTCA	1554
U.S. *v.* Amstar Corporation (D.C. S.D.N.Y. 1975)	Not reported	FTCA	1558
U.S. *v.* Ancorp National Services, Inc. (D.C. S.D.N.Y. 1973)	367 F. Supp. 1221	FTCA	808
(C.A. 2 1975)	Not reported	FTCA	1312
U.S. *v.* Arlen Realty & Development Corp., et al. (D.C. Md. 1975)	Not reported	FTCA	1558
U.S. *v.* Atlantic School, Inc. (D.C. Kan. 1973)	Not reported	FTCA	1555
U.S. *v.* Automation Machine Training Center, Inc. (D.C. W.D. Mo. 1975)	Not reported	FTCA	1557
U.S. *v.* Beatrice Foods Co. (D.C. Minn. 1972)	344 F. Supp. 104	FTCA	437
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A. E. Staley Mfg. Co. et al. *v.* F.T.C. (C.A. 7 1943)	135 F. 2d 453	3 S. & D. 556.
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A. E. Staley Mfg. Co. et al.; F.T.C., *v.* (Sup. Ct. 1945)	324 U.S. 746	4 S. & D. 346.
Aetna Portland Cement Co. et al. (Cement Institute et al.) *v.* F.T.C. (C.A. 7 1946)	157 F. 2d 533	4 S. & D. 510.
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Affiliated Credit Exchange and Business Research (David Bernstein) *v.* F.T.C. (C.A. 9 1952)	200 F. 2d 404	5 S. & D. 472.
Aimcee Wholesale Corp.; U.S. *v.* (D.C.S.D. N.Y. 1966)	256 F. Supp. 318	8 S. & D. 338.
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Algoma Lumber Co. et al. *v.* F.T.C. (C.A. 9 1932)	56 F. 2d 774	2 S. & D. 158.
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Algoma Lumber Co. et al.; F.T.C. *v.* (Sup. Ct. 1934)	291 U.S. 67	2 S. & D. 247.

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Alhambra Motor Parts et al. *v.* F.T.C. (C.A. 9 1962)	309 F. 2d 213	7 S. & D. 550.
Allen B. Wrisley Co. et al. *v.* F.T.C. (C.A. 7 1940)	113 F. 2d 437	3 S. & D. 250.
Allen V. Tornek Co. (Allen V. Tornek t/a) *v.* F.T.C. (C.A.D.C. 1960)	276 F. 2d 513	6 S. & D. 726.
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Alle-Rhume Remedy Co., Inc., et al. *v.* F.T.C. (C.A. 3 1939)	Not reported	3 S. & D. 170.
Allied Paper Mills et al. *v.* F.T.C. (C.A. 7 1948)	168 F. 2d 600	4 S. & D. 751.
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Allied Pharmacal Co., Inc., etc.; F.T.C. *v.* (D.C.N.D. Ohio 1940)	Not reported	3 S. & D. 704.
Allied Tire & Battery Co. et al.; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
Allis-Chalmers Mfg. Co. (Grand Jury Proc.) (C.A. 3 1962)	309 F. 2d 440	7 S. & D. 567.
All-State Industries of North Carolina, Inc., et al. *v.* F.T.C. (C.A. 4 1970)	423 F. 2d 423	8 S. & D. 1114.
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Alvin D. Langdon; U.S. *v.* (D.C. E.D. Tenn. 1975)	Not reported	9 S. & D. 1557.
Amasia Importing Corp. *v.* F.T.C. (C.A. 2 1947)	Not reported	4 S. & D. 667.
Amber-Ita (Ward J. Miller t/a); F.T.C. *v.* (C.A. 6 1935)	Not reported	2 S. & D. 329.
A. McLean & Son et al.; F.T.C. *v.* (C.A. 7 1936)	84 F. 2d 910	2 S. & D. 347.
Certiorari denied (1936)	299 U.S. 590	
(C.A. 7 1938)	94 F. 2d 802	2 S. & D. 439.
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American Albums, Inc., et al.; U.S. *v.* (D.C.N.D. Ohio 1964)	Not reported	7 S. & D. 1446.
American Aluminum Corp. (Norman J. Foucha); F.T.C. *v.* (D.C.N.D. Ala. 1970)	Not reported	8 S. & D. 1092.
American Army and Navy Stores, Inc.; F.T.C. *v.* (C.A.D.C. 1936)	Not reported	2 S. & D. 358.
American Brands, Inc. *v.* F.T.C., et al. (D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1446.
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American Brands, Inc. *v.* Lewis A. Engman, et al. (C.A. 2 1975)	527 F. 2d 115	9 S. & D. 1542.
American Brake Shoe Co. *v.* Schrup et al. (D.C. Del. 1965)	Not reported	7 S. & D. 1357.
American Candle Co., Inc.; U.S. *v.* (D.C. E.D.N.Y. 1965)	Not reported	7 S. & D. 1449.
American Candy Co.; F.T.C. *v.* (C.A. 7 1938)	97 F. 2d 1001	2 S. & D. 467.
American Chain & Cable Co., Inc., et al. *v.* F.T.C. (C.A. 4 1944)	139 F. 2d 622	4 S. & D. 99.

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American College et al. *v.* F.T.C. (C.A. 7 1940)	Not reported	3 S. & D. 222.
American Crayon Co.; F.T.C. *v.* (C.A. 6 1955)	223 F. 2d 264	5 S. & D. 732.
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(Sup. Ct. 1956)	352 U.S. 806	6 S. & D. 59.
(C.A. 6 1957)	245 F. 2d 236	6 S. & D. 184.
American Cyanamid Co. *v.* F.T.C. (C.A. 6 1966)	363 F. 2d 757	8 S. & D. 248.
(C.A. 6 1968)	401 F. 2d 574	8 S. & D. 807.
Certiorari denied (1969)	394 U.S. 920	
American Discount Co. et al *v.* F.T.C. (C.A. 7 1940)	109 F. 2d 393	3 S. & D. 188.
Certiorari denied (1940)	310 U.S. 632	
American Drug Corp. *v.* F.T.C. (C.A. 8 1945)	149 F. 2d 608	4 S. & D. 371.
(C.A. 8 1947)	160 F. 2d 103	4 S. & D. 604.
American Extension Service et al. (Don H. Carnerie d/b/a); U.S. *v.* (D.C.W.D. Wash. 1955)	Not reported	5 S. & D. 811.
American Field Seed Co. et al. *v.* F.T.C. (C.A. 7 1940)	Not reported	3 S. & D. 200.
American General Insurance Company, et al. *v.* F.T.C.		
(D.C. S.D. Texas 1973)	359 F. Supp. 887	9 S. & D. 673.
(C.A. 5 1974)	496 F. 2d 197	9 S. & D. 1060.
American Greetings Corp.; U.S. *v.* (D.C. N.D. Ohio 1958)	168 F. Supp. 45	6 S. & D. 457.
(D.C.N.D. Ohio 1958)	Not reported	6 S. & D. 916.
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American Greetings Corp. *v.* U.S. (C.A. 6 1959)	272 F. 2d 945	6 S. & D. 714.
American Home Products Corp. *v.* F.T.C. (C.A. 2 1964)	Not reported	7 S. & D. 856.
American Home Products Corp. *v.* F.T.C. (C.A. 6 1968)	402 F. 2d 232	8 S. & D. 832.
(C.A. 6 1970)	421 F. 2d 845	8 S. & D. 1109.
American Hospital and Life Insurance Co., The, *v.* F.T.C. (C.A. 5 1957)	243 F. 2d 719	6 S. & D. 275.
American Hospital and Life Insurance Co., The; F.T.C. *v.* (Sup. Ct. 1958)	357 U.S. 560	6 S. & D. 432.
American Life & Accident Insurance Co. *v.* F.T.C. (C.A. 8 1958)	255 F. 2d 289	6 S. & D. 397.
Certiorari denied (1958)	358 U.S. 875	
American Medicinal Products, Inc., et al.; F.T.C. *v.* (D.C.S.D. Calif. C. Div. 1940)	Not reported	3 S. & D. 230.
American Medicinal Products, Inc., et al. *v.* F.T.C. (C.A. 9 1943)	136 F. 2d 426	3 S. & D. 591.
American Motor Specialties Co., Inc., et al. *v.* F.T.C. (C.A. 2 1960)	278 F. 2d 225	6 S. & D. 791.
Certiorari denied (1960)	364 U.S. 884	
American Motors Corp. et al. *v.* F.T.C. (C.A. 6 1967)	384 F. 2d 247	8 S. & D. 556.
Certiorari denied (1968)	390 U.S. 1012	
American News Co. et al. *v.* F.T.C. (C.A. 2 1962)	300 F. 2d 104	7 S. & D. 346.
Certiorari denied (1962)	371 U.S. 824	
American Oil Co., The; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
American Oil Co., The, *v.* F.T.C. (C.A. 7 1963)	325 F. 2d 101	7 S. & D. 813.
Certiori denied (1964)	377 U.S. 954	
American Rug & Carpet Co., Inc.; U.S. *v.*		

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(D.C.S.D.N.Y. 1967)	Not reported	8 S. & D. 1307.
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American Snuff Co.; F.T.C. *v.* (C.A. 3 1930)	38 F. 2d 547	2 S. & D. 68.
American Steel & Wire Co. of New Jersey, The, et al. *v.* F.T.C. (C.A. 7 1942)	Not reported	3 S. & D. 491.
(C.A. 3 1945)	Not reported	4 S. & D. 367.
American Steel & Wire Co. of New Jersey; U.S. *v.* (D.C.S.D.N.Y. 1947)	Not reported	4 S. & D. 822.
American Tack Co., Inc. et al. *v.* F.T.C. (C.A. 2 1954)	211 F. 2d 239	5 S. & D. 633.
American Television Institute, Inc.; U.S. *v.* (D.C.N.D. Ill. 1943)	Not reported	3 S. & D. 735.
American Tobacco Co.; F.T.C. *v.* (D.C.S.D. N.Y. 1922)	283 Fed. 999	1 S. & D. 239.
(Sup. Ct. 1924)	264 U.S. 298	1 S. & D. 341.
American Tobacco Co. *v.* F.T.C. (C.A. 2 1925)	9 F. 2d 570	1 S. & D. 433.
American Tobacco Co.; F.T.C. *v.* (Sup. Ct. 1927)	274 U.S. 543	1 S. & D. 615.
Americana Corp. *v.* F.T.C. (C.A. 2 1950)	Not reported	5 S. & D. 166.
Americana Corp.; U.S. *v.* (D.C.D. Md. 1960)	Not reported	6 S. & D. 919.
(D.C. Md. 1965)	Not reported	7 S. & D. 1449.
America's Medicine, etc. (Harry S. Benham t/a); F.T.C. *v.* (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 642.
AMF Incorporated; U.S. *v.* (D.C. D. Colo. 1972)	Not reported	9 S. & D. 1554.
Amstar Corporation; U.S. *v.* (D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1558.
Anaconda Copper Mining Co. et al. *v.* F.T.C. (C.A. 7 1955)	227 F. 2d 825	5 S. & D. 749.
(C.A. 7 1957)	244 F. 2d 312	6 S. & D. 328.
Anaconda Copper Mining Co. et al; F.T.C. *v.* (Sup. Ct. 1957)	352 U.S. 419	6 S. & D. 193.
Anchor Hocking Glass Corp. et al. (W. H. Peterson) *v.* F.T.C. (C.A. 6 1941)	124 F. 2d 187	3 S. & D. 426.
Anchor Serum Co. *v.* F.T.C. (C.A. 7 1954)	217 F. 2d 867	5 S. & D. 718.
Ancorp National Services, Inc.; U.S. *v.* (D.C. S.D.N.Y. 1973)	367 F. Supp. 1221	9 S. & D. 808.
(C.A. 2 1975)	Not reported	9 S. & D. 1312.
Anderson, R. D. (d/b/a Guaranteed Silverware Distributors, etc.) (D.C.W.D. Ky.)	Not reported	8 S. & D. 1305.
Anderson, Raymond; U.S. *v.* (D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1557.
Anheuser-Busch, Inc. *v.* F.T.C. (C.A. 7 1959)	265 F. 2d 677	6 S. & D. 547.
(Sup. Ct. 1960)	363 U.S. 536	6 S. & D. 817.
(C.A. 7 1961)	289 F. 2d 835	7 S. & D. 19.
Anheuser-Busch, Inc., et al. *v.* F.T.C. (D.C.E.D. Mo. 1965)	242 F. Supp. 122	7 S. & D. 1265.
(C.A. 8 1966)	359 F. 2d 487	8 S. & D. 1.
(Anheuser-Busch, Inc.) Paul C. Guignon and John H. Pahlman; F.T.C. *v.* (C.A. 8 1968)	390 F. 2d 323	8 S. & D. 640.
Annis-Stanton Co. et al.; U.S. *v.* (D.C.C.D. Calif. 1970)	Not reported	8 S. & D. 1309.
Antisepto Products Co., etc. (Edward L. Jenkins et al. t/a); F.T.C. *v.* (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 649.
A.O. Smith Corporation, et al. *v.* F.T.C., et al. (D.C. Del. 1975)	396 F. Supp. 1108	9 S. & D. 1205.
(D.C. Del. 1975)	396 F. Supp. 1125	9 S. & D. 1293.

Name of Case	Reference	Reported in—
(D.C. Del. 1975)	403 F. Supp. 1000	9 S. & D. 1474.
Appalachian Auto Parts Co., Inc., et al. *v.* F.T.C. (C.A. 7 1965).	346 F. 2d 311	7 S. & D. 1229.
Certiorari dismissed (1965)	382 U.S. 923	
Approved Photographers Assn. (Kenneth R. Ogle et al. t/a); U.S. *v.* (D.C.S.D. Ohio 1963)	Not reported	7 S. & D. 1443.
Approximately 500 Dozen Flammable Berets; F.T.C. *v.* (C.A. 3 1972)	458 F. 2d 1277	9 S. & D. 270.
Approximately 1499 Dozen Flammable Sheer Nylon Scarves; F.T.C. *v.* (D.C. S.D.N.Y. 1973)	Not reported	9 S. & D. 597.
A. P. W. Paper Co. Inc. *v.* F.T.C.		
(C.A. 2 1945)	149 F. 2d 424	4 S. & D. 361.
(C.A. 2 1947)	160 F. 2d 889	4 S. & D. 626.
(C.A. 2 1948)	Not reported	4 S. & D. 671.
A. P. W. Paper Co. Inc.; F.T.C. *v.* (Sup. Ct. 1946)	328 U.S. 193	4 S. & D. 483.
Ardelle, Inc., Helen, et al. *v.* F.T.C. (C.A. 9 1939)	101 F. 2d 718	3 S. & D. 59.
Arden, Inc., Elizabeth, et al. *v.* F.T.C. (C.A. 2 1946)	156 F. 2d 132	4 S. & D. 490.
Certiorari denied (1947)	331 U.S. 806	
Arkansas Wholesale Grocers' Assn. et al. *v.* F.T.C. (C.A. 8 1927)	18 F. 2d 866	1 S. & D. 593.
Certiorari denied (1927)	275 U.S. 533	
Arlen Realty & Development Corp., et al.; U.S. *v.* (D.C. Md. 1975)	Not reported	9 S. & D. 1558.
Armand Co., Inc. et al. *v.* F.T.C.		
(C.A. 2 1935)	78 F. 2d 707	2 S. & D. 310.
Certiorari denied (1935)	296 U.S. 650	
(C.A. 2 1936)	84 F. 2d 973	2 S. & D. 352.
Certiorari denied (1936)	299 U.S. 597	
Armas, Terry Lee, III, et al.; F.T.C. *v.*		
(D.C.W.D. Texas 1973)	Not reported	9 S. & D. 623.
(D.C.W.D. Texas 1973)	Not reported	9 S. & D. 804.
Armour & Co. *v.* F.T.C. (C.A. 7 1922)	Not reported	1 S. & D. 721.
Armstrong Cork Co. et al. *v.* F.T.C. (C.A. 4 1949)	176 F. 2d 974	5 S. & D. 150.
Army & Navy Trading Co.; F.T.C. *v.* (C.A. D.C. 1937)	88 F. 2d 776	2 S. & D. 374.
Arnold Constable Corp. *v.* F.T.C. (C.A. 2 1961)	Not reported	7 S. & D. 97.
Arnold Stone Co., Inc. *v.* F.T.C. (C.A. 5 1931)	49 F. 2d 1017	2 S. & D. 123.
A. Robbin & Co. *v.* F.T.C. (C.A. 7 1964)	337 F. 2d 441	7 S. & D. 1012.
Aronberg, Earl (t/a Positive Products Co., etc.); F.T.C. *v.* (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 647.
Aronberg, Earl (t/a Positive Products Co., etc.) *v.* F.T.C. (C.A. 7 1942)	132 F. 2d 165	3 S. & D. 528.
Aron, Morris, et al. (t/a Globe Printing Co.) *v.* F.T.C. (D.C.E.D. Pa. 1943)	50 F. Supp. 289	3 S. & D. 560.
Arrow Food Distributors, Inc. and Richard M. Page, et al.; F.T.C. *v.* (D.C. N.D. Ga. 1974)	378 F. Supp. 1052	9 S. & D. 1053.
Arrow-Hart & Hegeman Electric Co. *v.* F.T.C. (C.A. 2 1933)	63 F. 2d 108	2 S. & D. 211.
(C.A. 2 1933)	65 F. 2d 336	2 S. & D. 233.
(Sup. Ct. 1934)	291 U.S. 587	2 S. & D. 267.
Arrow Metal Products Corp. et al. *v.* F.T.C. (C.A. 3 1957)	249 F. 2d 83	6 S. & D. 371.
Arthur F. Burns, et al.; Continental Oil Co. *v.* (D.C. Del. 1970)	Not reported	8 S. & D. 1251.

Name of Case	Reference	Reported in—
Arthur Murray Studio of Washington, Inc.; F.T.C. *v.* (C.A. 5 1972)	458 F. 2d 622	9 S. & D. 254
Artloom Corp.; F.T.C. *v.* (C.A. 3 1934)	69 F. 2d 36	2 S. & D. 256.
Art National Manufacturers Distributing Co. et al. *v.* F.T.C. (C.A. 2 1962)	298 F. 2d 476	7 S. & D. 319.
Certiorari denied (1962)	370 U.S. 939	
Artnell Co.; U.S. *v.* (C.A. 7 1964)	Not reported	7 S. & D. 1016.
Artra Cosmetics, Inc. *v.* F.T.C. (C.A. 3 1949)	Not reported	5 S. & D. 161.
Ash Grove Cement Co. *v.* F.T.C., et al.		
(D.C. D.C. 1973)	Not reported	9 S. & D. 565.
(D.C. D.C. 1973)	Not reported	9 S. & D. 796.
(D.C. D.C. 1973)	Not reported	9 S. & D. 815.
(C.A. D.C. 1975)	511 F. 2d 815	9 S. & D. 1321.
(C.A. D.C. 1975)	519 F. 2d 934	9 S. & D. 1371.
(D.C. D.C. 1975)	Not reported	9 S. & D. 1533.
Asheville Textiles, Inc.; U.S. *v.* (D.C.S.D.N.Y. 1968)	Not reported	8 S. & D. 1308.
Asheville Tobacco Board of Trade, Inc. et al. *v.* F.T.C. (C.A. 4 1959)	263 F. 2d 502	6 S. & D. 507.
(C.A. 4 1961)	294 F. 2d 619	7 S. & D. 220.
Associated Laboratories, Inc. *v.* F.T.C. (C.A. 2 1945)	150 F. 2d 629	4 S. & D. 395.
Assoicated Laboratories (Milton Irwin et al. t/a) *v.* F.T.C. (C.A. 8 1944)	143 F. 2d 316	4 S. & D. 198.
Associated Merchandising Corp. et al.; U.S. *v.* (D.C.S.D.N.Y. 1966)	256 F. Supp. 318	8 S. & D. 338.
(D.C.S.D.N.Y. 1966)	261 F. Supp. 553	8 S. & D. 382.
Associated Merchandising Corp. et al. *v.* William K. Jackson (D.C. Md. 1969)	Not reported	8 S. & D. 888.
Associated News Photographic Service, Inc., et al. *v.* F.T.C. (C.A. 2 1942)	Not reported	3 S. & D. 527.
Associated Trade Press Inc., et al.; U.S. *v.* (D.C.N.D. Ill. 1969)	Not reported	8 S. & D. 1308.
Astor Industries, Inc., et al. *v.* F.T.C. (C.A. 2 1954)	Not reported	5 S. & D. 693.
Atlanta Trading Corp. *v.* F.T.C. (C.A. 2 1958)	258 F. 2d 365	6 S. & D. 439.
Atlantic & Pacific Tea Co., The Great, *v.* F.T.C. (C.A. 3 1939)	106 F. 2d 667	3 S. & D. 146.
Certorari denied (1940)	308 U.S. 625	
Atlantic Coast Oil Co. of New York, Inc.; U.S. *v.* (D.C.E.D.N.Y. 1950)	Not reported	5 S. & D. 798.
Atlantic Refining Co., The, *v.* F.T.C. (C.A. 7 1964)	331 F. 2d 394	7 S. & D. 900.
(Sup. Ct. 1965)	381 U.S. 357	7 S. & D. 1238.
Atlantic Refining Co., The, *v.* F.T.C. (C.A. 6 1965)	344 F. 2d 599	7 S. & D. 1172.
Certiorari denied (1965)	382 U.S. 939	
Atlantic Richfield Company *v.* F.T.C., et al. (D.C. S.D. Texas 1975)	398 F. Supp. 1	9 S. & D. 1385.
(D.C. S.D. Texas 1975)	Not reported	9 S. & D. 1407.
Atlantic School, Inc.; U.S. *v.* (D.C. Kan. 1973)	Not reported	9 S. & D. 1555.
Atlas Health Appliance Co. (Jacob L. Goldman et al. t/a); F.T.C. *v.* (D.C.S.D. Calif 1940)	Not reported	3 S. & D. 696.
Atlas Mfg. & Sales Corp., The, et al. (Roland S. Jenkins); U.S. *v.* (D.C.N.D. Ohio 1966)	Not reported	8 S. & D. 1306.
Audivox, Inc., et al. *v.* F.T.C. (C.A. 1 1960)	275 F. 2d 685	6 S. & D. 751.
Auerbach, Shay (t/a Belvedere Wool Co.); U.S. *v.* (D.C.E.D.N.Y. 1961)	Not reported	7 S. & D. 1439.

Name of Case	Reference	Reported in—
Augen, Harry (d/b/a Graphited Lubricants Co.) *v.* F.T.C. (C.A. 2 1954)	Not reported	5 S. & D. 599.
Automatic Canteen Co. of America *v.* F.T.C. (C.A. 7 1952)	194 F. 2d 433	5 S. & D. 349.
(Sup. Ct. 1953)	346 U.S. 61	5 S. & D. 531.
Automation Machine Training Center, Inc.; U.S. *v.* (D.C. W.D. Mo. 1975)	Not reported	9 S. & D. 1557.
Automobile Owners Safety Insurance Co. *v.* F.T.C. (C.A. 8 1958)	255 F. 2d 295	6 S. & D. 405.
Certiorari denied (1958)	358 U.S. 875	
Avery Salt Co. *v.* F.T.C. (C.A. 4 1940)	Not reported	3 S. & D. 216.
Aviation Institute of U.S.A., Inc; F.T.C. *v.* (C.A.D.C. 1935)	Not reported	2 S. & D. 326.
Avnet, Inc. *v.* F.T.C. (C.A. 7 1975)	511 F. 2d 70	9 S. & D. 1235.
Awnair Corp. of America et al. *v.* F.T.C. (C.A. 3 1957)	249 F. 2d 83	6 S. & D. 371.
Axel, Edwin G. (National Clearance Bureau et al.), *In re* (C.A. 3 1960)	Not reported	6 S. & D. 816.
Ayer, Harriet Hubbard, Inc. *v.* F.T.C. (C.A. 2 1926)	15 F. 2d 274	1 S. & D. 569.
Certiorari denied (1927)	273 U.S. 759	
Bakers Franchise Corp. et al. *v.* F.T.C. (C.A. 3 1962)	302 F. 2d 258	7 S. & D. 464.
Balditt, Rene P. (t/a Clito Co.); F.T.C. *v.* (D.C.W.D. Tex. 1940)	Not reported	3 S. & D. 694.
Baldwin Bracelet Corp. et al. *v.* F.T.C. (C.A.D.C. 1963)	325 F. 2d 1012	7 S. & D. 832.
Certiorari denied (1964)	377 U.S. 923	
Balfour Co., L. G., et al. *v.* F.T.C. (D.C.E.D. Va. 1964)	Not reported	7 S. & D. 889.
Balfour, L. G., Co. *v.* F.T.C. (C.A. 7 1971)	442 F. 2d 1	9 S. & D. 26.
Balme, Paul; F.T.C. *v.* (C.A. 2 1928)	23 F. 2d 615	1 S. & D. 666.
Certiorari denied (1928)	277 U.S. 598	
Baltimore Grain Co. et al.; F.T.C. *v.* (D.C. Md 1922)	284 Fed. 886	1 S. & D. 254.
(Sup. Ct. 1925)	267 U.S. 586	1 S. & D. 408.
Baltimore Luggage Co. et al. *v.* F.T.C. (C.A. 4 1961)	296 F. 2d 608	7 S. & D. 251.
Certiori denied (1962)	369 U.S. 860	
Baltimore Paint & Color Works Inc.; F.T.C. *v.* (C.A. 4 1930)	41 F. 2d 474	2 S. & D. 75.
Bankers Securities Corp. *v.* F.T.C. (C.A. 3 1961)	297 F. 2d 403	7 S. & D. 300.
Bantam Books, Inc. *v.* F.T.C. (C.A. 2 1960)	275 F. 2d 680	6 S. & D. 744.
Certiorari denied (1960)	364 U.S. 819	
Barager-Webster Co.; F.T.C. *v.* (C.A. 7 1937)	95 F. 2d 1000	2 S. & D. 434.
Barber, Hiram E. (t/a Motor Equipment Specialty Co.); U.S. *v.* (D.C. Nebr. 1943)	Not reported	3 S. & D. 734.
Barclay Home Products, Inc., et al. *v.* F.T.C. (C.A.D.C. 1957)	241 F. 2d 451	6 S. & D. 173.
Certiorari denied (1957)	354 U.S. 942	
Barnard Hosiery Co., Inc., et al.; F.T.C. *v.* (D.C.S.D.N.Y. 1959)	Not reported	6 S. & D. 572.
Barnes Motor & Parts Co. et al. *v.* F.T.C. (C.A. 7 1965)	346 F. 2d 311	7 S. & D. 1229.
Certiorari dismissed (1965)	382 U.S. 923	
Barton, Duer & Koch Paper Co. *v.* F.T.C. (C.A. 2 1955)	Not reported	5 S. & D. 733.
Bart Schwartz International Textiles, Ltd. *v.* F.T.C. (C.C.P.A. 1961)	289 F. 2d 665	7 S. & D. 86.

Name of Case	Reference	Reported in—
Bascom Doyle *v.* F.T.C. (C.A. 5 1966)	356 F. 2d 381	8 S. & D. 40.
Basic Books, Inc., et al. *v.* F.T.C. (C.A. 7 1960)	276 F. 2d 718	6 S. & D. 781.
Basic Products Co.; U.S. *v.* (D.C.W.D. Pa. 1919)	260 Fed. 472	1 S. & D. 876.
Baskin, Ned R.; U.S. *v.* (D.C.N.D. Ill. E.D. 1957)	Not reported	6 S. & D. 913.
Bates & Co., Inc., Ted, *v.* F.T.C. (C.A. 1 1962)	310 F. 2d 89	7 S. & D. 574.
(C.A. 1 1963)	326 F. 2d 517	7 S. & D. 824.
Bates & Co., Inc., Ted; F.T.C. *v.* (Sup Ct. 1965)	380 U.S. 374	7 S. & D. 1152.
Battle Creek Appliance Co., Ltd. *v.* F.T.C. (C.A. 6 1935)	Not reported	2 S. & D. 327.
Bauer Cannery, Inc., et al. *v.* F.T.C. (C.A. 7 1957)	246 F. 2d 458	6 S. & D. 355.
Bayuk Cigars, Inc. *v.* F.T.C. (C.A. 3 1930)	Not reported	2 S. & D. 106.
(C.A. 3 1939)	Not reported	3 S. & D. 110.
(C.A. 3 1939)	Not reported	3 S. & D. 131.
Bazelon, Mitchell A., et al. (t/a Evans Novelty Co., etc.) *v.* F.T.C. (C.A. 7 1942)	Not reported	3 S. & D. 441.
Bear Mill Mfg. Co., Inc. *v.* F.T.C. (C.A. 2 1938)	98 F. 2d 67	2 S. & D. 468.
Bear Sales Co. et al. *v.* F.T.C. (C.A. 7 1966)	362 F. 2d 96	8 S. & D. 170.
Certiorari denied (1966)	385 U.S. 933	
Beatrice Foods Co. and the Kroger Co. *v.* F.T.C.		
(D.C.D.C. 1966)	Not reported	8 S. & D. 139.
(C.A.D.C. 1966)	Not reported	8 2. & D. 142.
Beatrice Foods Co. *v.* F.T.C. (C.A. 9 1967)	Not reported	8 S. & D. 495.
Beatrice Foods Co. (Walter L. Dilger); F.T.C. *v.* (D.C.N.D. Ill. 1959)	Not reported	6 S. & D. 662.
(C.A. 7 1960)	276 F. 2d 739	6 S. & D. 773.
Certiorari denied (1960)	364 U.S. 882	
Beatrice Foods Co.; U.S. *v.*		
(D.C. Minn. 1971)	322 F. Supp. 139	9 S. & D. 2.
(D.C. Minn. 1971)	Not reported	9 S. & D. 19.
(D.C. Minn. 1971)	Not reported	9 S. & D. 75.
(D.C. Minn. 1972)	344 F. Supp. 104	9 S. & D. 320.
(D.C. Minn. 1972)	351 F. Supp. 969	9 S. & D. 437.
(C.A. 8 1974)	493 F. 2d 1259	9 S. & D. 867.
Beautiderm Co. (Louis Zinberg t/a); F.T.C. *v.* (D.C.S.D.N.Y. 1940)	Not reported	3 S. & D. 681.
Beech-Nut Packing Co. *v.* F.T.C. (C.A. 2 1920)	264 Fed. 885	1 S. & D. 54.
Beech-Nut Packing Co.; F.T.C. *v.* (Sup. Ct. 1922)	257 U.S. 441	1 S. & D. 170.
Beech-Nut Packing Co. *v.* F.T.C. (C.A. 2 1922)	Not reported	1 S. & D. 189.
Bee Jay Products, Inc., et al. *v.* F.T.C. (C.A. 10 1953)	204 F. 2d 272	5 S. & D. 527.
Certiorari denied (1953)	346 U.S. 856	
Bee Jay Products, Inc. (Reubin Berkowitz) et al. *v.* F.T.C. (D.C.D.C. 1954)	Not reported	5 S. & D. 677.
Belmont Laboratories, Inc. *v.* F.T.C. (C.A. 3 1939)	103 F. 2d 538	3 S. & D. 97.
Beltone Electronics Corporation, et al. *v.* F.T.C., et al. (D.C. N.D. Ill. 1975)	402 F. Supp. 590	9 S. & D. 1459.
Belvedere Wool Co. (Shay Auerbach t/a); U.S. *v.* (D.C.E.D.N.Y. 1961)	Not reported	7 S. & D. 1439.
Bendix Corp., The, *v.* F.T.C. (C.A. 6 1971)	450 F. 2d 534	9 S. & D. 138.

Name of Case	Reference	Reported in—
Bene & Sons, Inc., John *v.* F.T.C. (C.A. 2 1924)	299 Fed. 468	1 S. & D. 354.
Benham, Harry S. (t/a America's Medicines, etc.); F.T.C. *v.* (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 642.
Benham, Leland F. (t/a The Zelle Co.); F.T.C. *v.* (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 644.
Benjamin D. Kalin; U.S. *v.* (D.C. N.D. W.D. Ia. 1971)	Not reported	9 S. & D. 1553.
Benmar Sales Co. (Marshall Maltz t/a) *v.* F.T.C. (C.A. 7 1955)	Not reported	5 S. & D. 740.
Bennett, Robert O. (d/b/a National Service Bureau et al.) *v.* F.T.C. (C.A.D.C. 1952)	200 F. 2d 362	5 S. & D. 447.
Bennett, William P., and Charles C.; U.S. *v.* (D.C.N.D. Tex. 1965)	Not reported	7 S. & D. 1449.
Benrus Watch Co., Inc.; F.T.C *v.* (C.A. 2 1972)	Not reported	7 S. & D. 521.
Benrus Watch Co., Inc., et al. and Clifford Seigmeister *v.* F.T.C. (C.A. 8 1965)	352 F. 2d 313	7 S. & D. 1386.
Certiorari denied (1966)	384 U.S. 939	
Benson, John T. (Renor Co., Inc., et al.); U.S. *v.* (D.C.N.D. Ill. 1960)	Not reported	6 S. & D. 918.
Benton Announcements, Inc. *v.* F.T.C. (C.A. 2 1942)	130 F. 2d 254	3 S. & D. 495.
Berdy, Martin; F.T.C. *v.* (D.C.S.D.N.Y. 1957)	Not reported	6 S. & D. 905.
Berkey & Gay Furniture Co. et al. *v.* F.T.C. (C.A. 6 1930)	42 F. 2d 427	2 S. & D. 91.
Berkley, Philip T.; U.S. *v.* (D.C.S.D. Calif. 1972)	Not reported	9 S. & D. 1554.
Berkowitz, Reubin (Bee Jay Products, Inc.) *v.* F.T.C. (D.C.D.C. 1954)	Not reported	5 S. & D. 677.
Bern Products Co. (Bernard Rosten t/a) *v.* F.T.C. (C.A. 2 1959)	263 F. 2d 620	6 S. & D. 530.
Bernstein, David (Affiliated Credit Exchange and Business Research) *v.* F.T.C. (C.A. 9 1952)	200 F. 2d 404	5 S. & D. 472.
Berry Seed Co. et al. *v.* F.T.C. (C.A. 8 1940)	109 F. 2d 1012	3 S. & D. 201.
Better Living, Inc., et al. *v.* F.T.C. (C.A. 3 1958)	259 F. 2d 271	6 S. & D. 453.
Better Rhinestone Jewelry Corp. et al.; U.S. *v.* (D.C.S.D.N.Y. 1970)	Not reported	8 S. & D. 1309.
Beverlee Sheldon, a/k/a Beverlee Choate, et al., (d/b/a Rejuvenation Center Ltd.); F.T.C. *v.*		
(D.C. W.D. Texas 1973)	Not reported	9 S. & D. 623.
(D.C. W.D. Texas 1973)	Not reported	9 S. & D. 804.
B. F. Goodrich Co., The, et al. *v.* F.T.C. (C.A.D.C. 1953)	208 F. 2d 829	5 S. & D. 572.
(D.C.D.C. 1955)	134 F. Supp. 39	5 S. & D. 734.
B. F. Goodrich Co., The et al.; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
B. F. Goodrich Co., The; U.S. *v.* (D.C.N.D. Ohio 1957)	Not reported	6 S. & D. 914.
B. F. Goodrich Co., The, and Texaco, Inc. *v.* F.T.C. (D.C.D.C. 1962)	Not reported	7 S. & D. 488.
(D.C.D.C. 1962)	Not reported	7 S. & D. 492.
(C.A.D.C. 1962)	Not reported	7 S. & D. 494.
(D.C.D.C. 1962)	Not reported	7 S. & D. 524.
(C.A.D.C. 1964)	336 F. 2d 754	7 S. & D. 956.
(C.A.D.C. 1967)	383 F. 2d 942	8 S. & D. 543.
B. F. Goodrich Co., The, and Texaco, Inc.; F.T.C. *v.* (Sup. Ct. 1965)	381 U.S. 739	7 S. & D. 1263.

Name of Case	Reference	Reported in—
Biddle Purchasing Co. et al. *v.* F.T.C. (C.A. 2 1938)	96 F. 2d 687	2 S. & D. 447.
Certiorari denied (1938)	305 U.S. 634	
Biddle Purchasing Co. et al.; F.T.C. *v.* (C.A. 2 1941)	117 F. 2d 29	3 S. & D. 331.
(C.A. 2 1941)	Not reported	3 S. & D. 354.
(C.A. 2 1941)	Not reported	3 S. & D. 391.
Bigelow-Sanford Carpet Co., Inc. *v.* F.T.C. (D.C.D.C. 1960)	182 F. Supp. 212	6 S. & D. 742.
(D.C.D.C. 1960)	Not reported	6 S. & D. 829.
(C.A.D.C. 1961)	294 F. 2d 718	7 S. & D. 80.
Bill The Distributer, Inc., of Mississippi, et al.; F.T.C. *v.* (D.C.S.D. Miss. 1963)	Not reported	7 S. & D. 680.
Binney & Smith Inc.; F.T.C. *v.* (C.A. 2 1954)	Not reported	5 S. & D. 676.
Blackstone Studios, Inc., et al. *v.* F.T.C. (C.A. 2 1942)	Not reported	3 S. & D. 527.
Blaine, Sol; F.T.C. *v.* (D.C.N.D. Ga. 1970)	308 F. Supp. 932	8 S. & D. 1100.
Blank, Jerome; F.T.C. *v.* (D.C. S.D. Fla. 1973)	Not reported	9 S. & D. 814.
Blanton Co., The, *v.* F.T.C. (C.A. 8 1957)	244 F. 2d 720	6 S. & D. 332.
Block, Sol, et al. (t/a Rittenhouse Candy Co.); F.T.C. *v.* (C.A. 3 1938)	Not reported	2 S. & D. 436.
Blumenthal, Sidney, et al. (t/a Rittenhouse Candy Co.); F.T.C. *v.* (C.A. 3 1938)	Not reported	2 S. & D. 436.
Board of Governors of the Federal Reserve System, et al.; Garnder and North Roofing and Siding Corporation *v.* (C.A. D.C. 1972)	464 F. 2d 838	9 S. & D. 314.
Board of Governors of the Federal Reserve System, et al.; N.C. Freed, Inc., et al. *v.* (C.A. 2 1973)	473 F. 2d 1210	9 S. & D. 451.
Certiorari denied (1973)	414 U.S. 827	
Bob Hofeller Candy Co. (Robert Hofeller t/a) *v.* F.T.C. (C.A. 7 1936)	82 F. 2d 647	2 S. & D. 338.
Certiorari denied (1936)	299 U.S. 557	
(C.A. 7 1942)	Not reported	3 S. & D. 473.
Bockenstette, J.A., et al. *v.* F.T.C. (C.A. 10 1943)	134 F. 2d 369	3 S. & D. 539.
(C.A. 10 1945)	Not reported	4 S. & D. 423.
Bodner, John Jr., and Shell Oil Co. *v.* F.T.C., et al. (D.C. D.C. 1974)	Not reported	9 S. & D. 1122.
(D.C. D.C. 1975)	Not reported	9 S. & D. 1161.
(D.C. D.C. 1975)	Not reported	9 S. & D. 1227.
Bogolub, William (doing business as Fabricon Co.); U.S. *v.* (D.C.N.D. Ill. 1967)	Not reported	8 S. & D. 1308.
Bond Crown & Cork Co. *v.* F.T.C. (C.A. 4 1949)	176 F. 2d 974	5 S. & D. 150.
Bonita Co., The, et al.; F.T.C. *v.* (C.A. 7 1936)	84 F. 2d 910	2 S. & D. 347.
Certiorari denied (1936)	299 U.S. 590	
(C.A. 7 1940)	Not reported	3 S. & D. 267.
Book-of-the-Month Club, et al. *v.* F.T.C. (C.A. 2 1953)	202 F. 2d 486	5 S. & D. 508.
Borden Co., The (Douglas T. Orton); F.T.C. *v.* (D.C.S.D.N.Y. 1959)	175 F. Supp. 77	6 S. & D. 658.
(D.C.S.D.N.Y. 1959)	177 F. Supp. 241	6 S. & D. 661.
Borden Co., The; F.T.C. *v.* (Sup. Ct. 1966)	383 U.S. 637	8 S. & D. 123.
Borden Co., The, *v.* F.T.C. (C.A. 5 1964)	339 F. 2d 133	7 S. & D. 1039.
(C.A. 5 1967)	381 F. 2d 175	8 S. & D. 515.
(C.A. 7 1964)	339 F. 2d 953	7 S. & D. 1070.

Name of Case	Reference	Reported in—
(D.C. N.D. Ill. 1973)	Not reported	9 S. & D. 688.
(D.C. N.D. Ill. 1973)	Not reported	9 S. & D. 802.
(D.C. N.D. Ill. 1974)	495 F. 2d 785	9 S. & D. 931.
Bork Mfg. Co., Inc., et al. *v.* F.T.C. (C.A. 9 1952)	194 F. 2d 611	5 S. & D. 373.
Bostic, William N.; U.S. *v.*		
(D.C. D. So. Car. 1972)	336 F. 2d 1312	9 S. & D. 185.
Certiorari denied (1973)	411 U.S. 966	
Bostwick Laboratores, Inc. *v.* F.T.C. (C.A. 2 1953)	Not reported	5 S. & D. 591.
Bostwick Laboratories, Inc.; U.S. *v.* (D.C. Conn. 1957)	Not reported	6 S. & D. 913.
Botsford, Ralph; F.T.C. *v.*		
(D.C. W.D. Mo. 1972)	Not reported	9 S. & D. 250.
(D.C. W.D. Mo. 1973)	Not reported	9 S. & D. 572.
Boulevard Candy Co. *v.* F.T.C. (C.A. 7 1942)	Not reported	3 S. & D. 507.
Bourjois, Inc., et al. *v.* F.T.C. (C.A. 2 1938)	Not reported	2 S & D. 475.
Bowman Dairy Co., and Dean Foods Co.; F.T.C. *v.* (C.A. 7 1966)	356 F. 2d 481	8 S. & D. 21.
(Sup. Ct. 1966)	Not reported	8 S. & D. 39.
(C.A. 7 1967)	Not reported	8 S. & D. 474.
Bowman, Fred J.; F.T.C. *v.* (D.C.N.D. Ill. 1957)	149 F. Supp. 624	6 S. & D. 174.
(C.A. 7 1957)	248 F. 2d 456	6 S. & D. 368.
Boyer's Candy, Lee, *v.* F.T.C. (C.A. 9 1942)	128 F. 2d 261	3 S & D. 487.
Brach & Sons, E.J. *v.* F.T.C. (C.A. 7 1939)	Not reported	3 S. & D. 133.
Bradley, James J., *v.* F.T.C. (C.A. 2 1929)	31 F. 2d 569	1 S. & D. 700.
Brady & Co., W. H., et al. *v.* F.T.C. (C.A. D.C. 1952)	Not reported	5 S. & D. 387.
Bramman, Jr., William J.; F.T.C. *v.*		
(D.C. W.D. Mo. 1972)	Not reported	9 S. & D. 250.
(D.C. W.D. Mo. 1973)	Not reported	9 S. & D. 572.
Branch, Joseph G., *v.* F.T.C. (C.A. 7 1944)	141 F. 2d 31	4 S. & D. 137.
Brandenfels, Carl, *v.* J. Edward Day et al. (C.A.D.C. 1963)	316 F. 2d 375	7 S. & D. 648.
Certiorari denied (1963)	375 U.S. 824	
Brecht Candy Co.; F.T.C. *v.* (C.A. 10 1937)	92 F. 2d 1002	2 S. & D. 418.
Brewer & Sons, Chas. A., *v.* F.T.C. (C.A. 6 1946)	158 F. 2d 74	4 S. & D. 588.
Briggs Mfg. Co. *v.* Crane Co. (D.C.E.D. Mich. 1960)	185 F. Supp. 177	6 S. & D. 797.
(C.A. 6 1960)	280 F. 2d 747	6 S. & D. 797n.
Bristol-Myers Co. et al. *v.* F.T.C.		
(C.A. 4 1950)	185 F. 2d 58	5 S. & D. 204.
(C.A. 6 1966)	363 F. 2d 757	8 S. & D. 248.
(D.C.D.C. 1968)	284 F. Supp. 745	8 S. & D. 767.
(C.A.D.C. 1970)	424 F. 2d 935	8 S. & D. 1132.
Certiorari denied (1970)	400 U.S. 824	
Bristol-Myers Co.; F.T.C. *v.*		
(C.A. 2 1972)	469 F. 2d 1116	9 S. & D. 401.
Brite Mfg. Co. et al. *v.* F.T.C. (C.A.D.C. 1965)	347 F. 2d 477	7 S. & D. 1201.
British Oxygen Co., Ltd., et al.; F.T.C. *v.*		
(D.C. Del. 1974)	Not reported	9 S. & D. 887.
(D.C. Del. 1974)	Not reported	9 S. & D. 910.
Broadmore Fashions, Inc., et al.; U.S. *v.* (D.C.S.D.N.Y. 1955)	Not reported	5 S. & D. 809.
Broadway Gift Co. (Carl Drath t/a) *v.* F.T.C. (C.A.D.C. 1956)	239 F. 2d 452	6 S. & D. 105.
Certiorari denied (1957)	353 U.S. 917	
Broch & Co., Henry, *v.* F.T.C. (C.A. 7 1958)	261 F. 2d 725	6 S. & D. 464.

Name of Case	Reference	Reported in—
Broch & Co., Henry; F.T.C. *v.* (Sup. Ct. 1960)	363 U.S. 166	6 S. & D. 800.
Broch & Co., Henry, *v.* F.T.C. (C.A. 7 1960)	285 F. 2d 764	6 S. & D. 843.
Broch & Co., Henry; F.T.C. *v.* (Sup. Ct. 1962)	368 U.S. 360	7 S. & D. 305.
Broussard, Joseph J., *v.* Socony Mobil Oil Co., Inc., et al. (C.A. 5 1965)	350 F. 2d 346	7 S. & D. 1294.
Brown & Haley et al. *v.* F.T.C. (C.A. 9 1939)	101 F. 2d 718	3 S. & D. 59.
Brown & Williamson Tobacco Corp. *v.* Lewis A. Engman, et al.		
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1446.
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1525.
(C.A. 2 1975)	527 F. 2d 115	9 S. & D. 1542.
Brown Auto Stabilizer Co. *v.* F.T.C. (C.A. 5 1973)	Not reported	9 S. & D. 792.
Brown Fence & Wire Co. *v.* F.T.C. (C.A. 6 1933)	64 F. 2d 934	2 S. & D. 230.
Browning, Ralph L.; F.T.C. *v.* (D.C.D.C. 1969)	Not reported	8 S. & D. 918.
Browning, Ralph L. (Lehigh Portland Cement Co.); F.T.C. *v.* (C.A.D.C. 1970)	435 F. 2d 96	8 S. & D. 1273.
Brown Shoe Co., Inc. *v.* F.T.C. (C.A. 8 1964)	339 F. 2d 45	7 S. & D. 1047.
Certiorari granted (1965)	382 U.S. 808	
Brown Shoe Co., Inc.; F.T.C. *v.* (Sup. Ct. 1966)	384 U.S. 316	8 S. & D. 171.
Bruning Co., Inc., Charles, et al. *v.* F.T.C. (C.A. 7 1942)	Not reported	3 S. & D. 494.
(C.A. 7 1944)	142 F. 2d 321	4 S. & D. 117.
Certiorari denied (1944)	323 U.S. 730	
Buchan Baking Co. et al. *v.* F.T.C. (C.A. 9 1966)	366 F. 2d 795	8 S. & D. 351.
Certiorari denied (1967)	386 U.S. 932	
Buchman Co., Inc., The L., et al. *v.* F.T.C. (C.A. 2 1956)	235 F. 2d 344	6 S. & D. 30.
Buchsbaum & Co., S., *v.* F.T.C. (C.A. 7 1946)	153 F. 2d 85	4 S. & D. 449.
Buchsbaum & Co., S.; F.T.C. *v.* (Sup Ct. 1946)	328 U.S. 818	4 S. & D. 482.
Buchsbaum & Co., S., *v.* F.T.C. (C.A. 7 1947)	160 F. 2d 121	4 S. & D. 621.
Buchwalter, Louis, et al. (t/a National Feather & Down Co.) *v.* F.T.C. (C.A. 2 1956)	235 F. 2d 344	6 S. & D. 30.
Bundy, Robert C. (t/a The Jackson Sales Co.) *v.* F.T.C. (C.A. 5 1941)	Not reported	3 S. & D. 417.
Bunte Brothers, Inc. *v.* F.T.C. (C.A. 7 1939)	104 F. 2d 996	3 S. & D. 111.
(C.A. 7 1940)	110 F. 2d 412	3 S. & D. 202.
Bunte Brothers, Inc.; F.T.C. *v.* (Sup. Ct. 1941)	312 U.S. 349	3 S. & D. 337.
Burch, Harry A. (t/a Washington Institute of Practical Nursing, etc.); U.S. *v.* (D.C.W.D. Wash. 1959)	Not reported	6 S. & D. 916.
Burns, Arthur F., et al.; Continental Oil Co. *v.* (D.C. Del. 1970)	Not reported	8 S. & D. 1251.
Burns Cuboid Co. (James H. Sewell d/b/a) *v.* F.T.C. (C.A. 9 1956)	240 F. 2d 228	6 S. & D. 60.
Burns Cuboid Co. (James H. Sewell d/b/a); F.T.C. *v.* (Sup. Ct. 1957)	353 U.S. 969	6 S. & D. 60n.
Burton-Dixie Corp. et al. *v.* F.T.C. (C.A. 7 1957)	240 F. 2d 166	6 S. & D. 153.
Busse, Robert G.; U.S. *v.* (D.C.S.D. Ill. 1964)	Not reported	7 S. & D. 1446.
Buttenfield, Charles C.; U.S. *v.* (D.C.W.D. Pa. 1925)	Not reported	1 S. & D. 1064.
Butterick Co. et al. *v.* F.T.C. (C.A. 2 1925)	4 F. 2d 910	1 S. & D. 378.
Butterick Publishing Co. et al. *v.* F.T.C. (C.A.2 1936)	85 F. 2d 522	2 S. & D. 359.
B-X Laboratories, etc. (John Petrie t/a); U.S.		

Name of Case	Reference	Reported in—
v. (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 723.
Cabin Crafts, Inc. *v.* F.T.C. (C.A. 5 1966)	362 F. 2d 435	8 S. & D. 195.
Caldwell, Inc., Dr. W. B., *v.* F.T.C. (C.A. 7 1940)	111 F. 2d 889	3 S. & D. 218.
California Lumbermen's Council et al. *v.* F.T.C. (C.A. 9 1939)	103 F. 2d 304	3 S. & D. 106.
(C.A. 9 1939)	104 F. 2d 855	3 S. & D. 125.
(C.A. 9 1940)	115 F. 2d 178	3 S. & D. 298.
Certiorari denied (1941)	312 U.S. 709	
California Rice Industry, et al. *v.* F.T.C. (C.A. 9 1939)	102 F. 2d 716	3 S. & D. 74.
(C.A. 9 1941)	Not reported	3 S. & D. 376.
California, State of, ex rel. C.B. Christensen, Director of Food and Agriculture *v.* F.T.C., et al.		
(D.C. N.D. Calif. 1974)	Not reported	9 S. & D. 1118.
(D.C. N.D. Calif. 1975)	Not reported	9 S. & D. 1373.
Callaghan & Co. et al. *v.* F.T.C. (C.A. 2 1947)	163 F. 2d 359	4 S. & D. 644.
Callaway Mills Co. et al. *v.* F.T.C. (C.A. 5 1966)	362 F. 2d 435	8 S. & D. 195.
Campbell Co., Joseph, et al. *v.* F.T.C. (C.A. 7 1957)	246 F. 2d 458	6 S. & D. 355.
Campbell Soup Co., et al. *v.* F.T.C. (C.A. 7 1957)	246 F. 2d 458	6 S. & D. 355.
Canadian Ace Brewing Co.; U.S. *v.* (D.C.N.D. Ill. 1949)	Not reported	5 S. & D. 797.
Candymasters, Inc. *v.* F.T.C. (C.A. 8 1942)	Not reported	3 S. & D. 443.
Canfield Oil Co. *v.* F.T.C. (C.A. 6 1921)	274 Fed. 571	1 S. & D. 136.
Cannan *v.* U.S. (C.A. 5 1927)	19 F. 2d 823	1 S. & D. 1106.
Cannon, Samuel A., et al. (d/b/a National Employment Information Service) *v.* F.T.C. (C.A.D.C. 1961)	295 F. 2d 546	7 S. & D. 238.
Canterbury Candy Makers, Inc. et al. *v.* F.T.C. (C.A. 9 1939)	101 F. 2d 718	3 S. & D. 59.
Canute Co. *v.* F.T.C. (C.A. 7 1948)	Not reported	5 S. & D. 100.
Capital Drug Co. (Max Caplan t/a); F.T.C. *v.* (D.C.W.D. Va. 1940)	Not reported	3 S. & D. 699.
Capitol Service, Inc., The, et al.; U.S. *v.* (D.C.E.D. Mich. 1957)	Not reported	6 S. & D. 913.
Capon Water Co. et al. *v.* F.T.C. (C.A. 3 1939)	107 F. 2d 516	3 S. & D. 162.
Cardinal Co., The, etc. (Charles L. Klapp t/a); F.T.C. *v.* (D.C.E.D. Mo. 1939)	Not reported	3 S. & D. 651.
Carey Mfg. Co., Philip, et al. *v.* F.T.C. (C.A. 6 1928)	29 F. 2d 49	1 S. & D. 687.
Carlay Co. et al. *v.* F.T.C. (C.A. 7 1946)	153 F. 2d 493	4 S. & D. 470.
Carlisle Corp.; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
Carnerie, Don N. (d/b/a Civil Preparation Service, etc.); U.S. *v.* (D.C.W.D. Wash. 1955)	Not reported	5 S. & D. 811.
Carnerie, Don N.; U.S. *v.* (D.C. Colo. 1969)	Not reported	8 S. & D. 1308.
Carpentier, Dr. Emilie; U.S. *v.* (D.C.N.J. 1944)	Not reported	4 S. & D. 816.
Carr, Harry, *v.* F.T.C. (C.A. 1 1962)	302 F. 2d 688	7 S. & D. 322.
Carter Carburetor Corp. *v.* F.T.C. (C.A. 8 1940)	112 F. 2d 722	3 S. & D. 232.
Carter Paint Co., Mary, et al. *v.* F.T.C. (C.A. 5 1964)	333 F. 2d 654	7 S. & D. 929.
Carter Paint Co., Mary, et al.; F.T.C. *v.* (Sup. Ct. 1965)	382 U.S. 46	7 S. & D. 1403.
Carter Products, Inc. *v.* F.T.C. (C.A. 9 1953)	201 F. 2d 446	5 S. & D. 478.
Carter Products, Inc.; F.T.C. *v.* (Sup Ct.		

Name of Case	Reference	Reported in—
1953)	346 U.S. 327	5 S. & D. 581.
Carter Products, Inc. *v.* F.T.C. (C.A. 9 1959)	268 F. 2d 461	6 S. & D. 598.
Certiorari denied (1959)	361 U.S. 884	
Carter Products, Inc., et al. *v.* F.T.C. (C.A. 7 1951)	186 F. 2d 821	5 S. & D. 244.
Carter Products, Inc., et al. *v.* F.T.C. (C.A. 5 1963)	323 F. 2d 523	7 S. & D. 794.
Casey Concession Co. (Louis Keller et al. d/b/a) *v.* F.T.C. (C.A. 7 1942)	132 F. 2d 59	3 S. & D. 520.
Cassoff, L.F.; F.T.C. *v.* (C.A. 2 1930)	38 F. 2d 790	2 S. & D. 72.
Caulk Co., L.D., The, and the Dentists' Supply Co. of New York; U.S. *v.* (D.C.E.D. Pa. 1964)	Not reported	7 S. & D. 1446.
Cement Institute et al. *v.* F.T.C. (C.A. 7 1946)	157 F. 2d 533	4 S. & D. 510.
Cement Institute et al.; F.T.C. *v.* (Sup. Ct. 1948)	333 U.S. 683	4 S. & D. 676.
Rehearing denied (1948)	334 U.S. 839	
Cement Institue, et al. *v.* F.T.C. (C.A. 7 1948)	Not reported	4 S. & D. 765.
C. E. Niehoff & Co. *v.* F.T.C. (C.A. 7 1957)	241 F. 2d 37	6 S. & D. 144.
C. E. Niehoff & Co.; F.T.C. *v.* (Sup. Ct. 1958)	355 U.S. 411	6 S. & D. 382.
Rehearing denied (1958)	356 U.S. 905	
Central Retailer-Owned Grocers, Inc. *v.* F.T.C. (C.A. 7 1963)	319 F. 2d 410	7 S. & D. 724.
Century Metalcraft Corp. *v.* F.T.C. (C.A. 7 1940)	112 F. 2d 443	3 S. & D. 224.
Century Metalcraft Corp.; U.S. *v.* (D.C.S.D. Calif. 1955)	Not reported	5 S. & D. 812.
Certane Co. et al.; U.S. *v.* (D.C.S.D. Calif. 1943)	Not reported	3 S. & D. 737.
C. F. Pease Co. et al. *v.* F.T.C. (C.A. 7 1944)	142 F. 2d 321	4 S. & D. 117.
Certiorari denied (1944)	323 U.S. 730	
Chain Institute, Inc., et al. *v.* F.T.C. (C.A. 8 1957)	246 F. 2d 231	6 S. & D. 343.
Certiorari denied (1957)	355 U.S. 895	
Chamber of Commerce of Minneapolis et al. *v.* F.T.C. (C.A. 8 1922)	280 Fed. 45	1 S. & D. 193.
(C.A. 8 1926)	13 F. 2d 673	1 S. & D. 502.
Chanel, Inc. *v.* F.T.C. (C.A. 2 1941)	Not reported	3 S. & D. 353.
Chapman Health Products Co., The, et al.; F.T.C. *v.* (D.C.N.D. Ohio 1939)	Not reported	3 S. & D. 654.
Chas. A. Brewer & Sons *v.* F.T.C. (C.A. 6 1946)	158 F. 2d 74	4 S. & D. 588.
Charles Bruning Co., Inc. et al. *v.* F.T.C. (C.A. 7 1942)	Not reported	3 S. & D. 494.
(C.A. 7 1944)	142 F. 2d 321	4 S. & D. 117.
Certiorari denied (1944)	323 U.S. 730	
Charles C., and William P. Bennett; U.S. *v.* (D.C.N.D. Tex. 1965)	Not reported	7 S. & D. 1449.
Charles N. Miller Co.; F.T.C. *v.* (C.A. 1 1938)	97 F. 2d 563	2 S. & D. 464.
Charles of the Ritz Dist. Corp. *v.* F.T.C. (C.A. 2 1944)	143 F. 2d 676	4 S. & D. 226.
Chas. Pfizer & Co., Inc. *v.* F.T.C. (C.A. 6 1966)	363 F. 2d 757	8 S. & D. 248.
Charles Pfizer & Co., Inc. *v.* F.T.C. (C.A. 6 1968)	401 F. 2d 574	8 S. & D. 807.
Certiorari denied (1969)	394 U.S. 920	
Charles R. Johnson; U.S. *v.* (D.C. E.D. Mo. 1975)	Not reported	9 S. & D. 1558.
Charlotte Novelty Co. (Jack Salup); U.S. *v.* (D.C. Md. 1958)	Not reported	6 S. & D. 915.
Charnita, Inc. *v.* F.T.C.		

Name of Case	Reference	Reported in—
(C.A. 3 1973)	479 F. 2d 684	9 S. & D. 701.
Chase & Sanborn (John Moir, et al. d/b/a) *v.* F.T.C. (C.A. 1 1926)	12 F. 2d 22	1 S. & D. 489.
Chase Candy Co.; F.T.C. *v.* (C.A. 8 1938)	97 F. 2d 1002	2 S. & D. 437.
Chase Manhattan Bank, The, et al. *v.* F.T.C., et al. (D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1551.
Checker Taxi Company, Inc. and Jerry L. Feldman *v.* F.T.C. (D.C. N.D. Ill. 1975)	Not reported	9 S. & D. 1326.
Cheff, Paul Theodore (Holland Furnace) *v.* Elmer J. Schnackenberg et al. (Sup. Ct. 1966)	384 U.S. 373	8 S. & D. 176.
Chemical New York Corporation, et al. *v.* F.T.C., et al. (D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1551.
Chemway Corp. *v.* F.T.C. (C.A. 2 1962)	Not reported	7 S. & D. 500.
Cherry, Albert T., *v.* F.T.C. (C.A. 6 1941)	121 F. 2d 451	3 S. & D. 377.
Chesapeake Distilling & Distributing Co.; U.S. *v.* (D.C. Md. 1941)	Not reported	3 S. & D. 727.
Chicago Board Co. (R.B. James et al. d/b/a) *v.* F.T.C. (C.A. 7 1958)	253 F. 2d 78	6 S. & D. 385.
Certiorari denied (1958)	358 U.S. 821	
Chicago Portrait Co. *v.* F.T.C. (C.A. 7 1925)	4 F. 2d 759	1 S. & D. 373.
Chicago Silk Co. *v.* F.T.C. (C.A. 7 1937)	90 F. 2d 689	2 S. & D. 410.
Certiorari denied (1937)	302 U.S. 753	
Chicago Technical College; U.S. *v.* (D.C. N.D. Ill. 1972)	Not reported	9 S. & D. 1554.
Chief Statistician, etc. (Michel Lipman, et al. t/a) *v.* F.T.C. (C.A. 9 1945)	148 F. 2d 823	4 S. & D. 322.
Chipman Knitting Mills, etc. *v.* F.T.C. (C.A. 3 1930)	Not reported	2 S. & D. 74.
Chiquita Brands, Inc. and United Brands Company *v.* F.T.C. (C.A. 5 1974)	499 F. 2d 395	9 S. & D. 1090.
C. Howard Hunt Pen Co. *v.* F.T.C. (C.A. 3 1952)	197 F. 2d 273	5 S. & D. 405.
Christie, James H. (d/b/a United Surveys); U.S. *v.* (D.C.E.D. Wash. 1955)	Not reported	5 S. & D. 813.
Chun King Sales, Inc.; U.S. *v.* (D.C.S.D. Calif. 1965)	Not reported	7 S. & D. 1449.
Chusid, Frederick; F.T.C. *v.* (D.C. N.D. Ill. 1974)	Not reported	9 S. & D. 912.
C. H. Wheeler Mfg. Co. (Grand Jury Proc.) (C.A. 3 1962)	309 F. 2d 440	7 S. & D. 567.
Cinader, Mitchell, *v.* F.T.C. (C.A. 2 1944)	141 F. 2d 1022	4 S. & D. 177.
Cinderella Career and Finishing Schools, Inc., et al. *v.* F.T.C. (D.C.D.C. 1967)	Not reported	8 S. & D. 470.
(C.A.D.C. 1970)	425 F. 2d 583	8 S. & D. 1118.
Cinderella Career and Finishing Schools, Inc., et al.; F.T.C. *v.* (C.A.D.C. 1968)	404 F. 2d 1308	8 S. & D. 660.
C.I.T. Financial Corporation and Glen E. Jorgensen; F.T.C. *v.* (D.C. D.C. 1975)	Not reported	9 S. & D. 1352.
Civil Preparation Service et al. (Don N. Carnerie d/b/a); U.S. *v.* (D.C.W.D. Wash. 1955)	Not reported	5 S. & D. 811.
Civil Service Training Bureau, Inc.; F.T.C. *v.* (C.A. 6 1935)	79 F. 2d 113	2 S. & D. 306.
Claire Furnace Co. et al. *v.* F.T.C. (D.C.S.C. 1922)	Not reported	1 S. & D. 190.
Claire Furnace Co. et al.; F.T.C. *v.* (C.A.D.C.		

Name of Case	Reference	Reported in—
1923)	285 Fed. 936	1 S. & D. 259.
(Sup. Ct. 1927)	274 U.S. 160	1 S. & D. 602.
Clairol Inc. *v.* F.T.C. (C.A. 9 1969)	410 F. 2d 647	8 S. & D. 910.
Clara Stanton, Druggist to Women *v.* F.T.C. (C.A. 10 1942)	131 F. 2d 105	3 S. & D. 508.
Clark, William R.; U.S. *v.* (D.C. Md. 1975)	Not reported	9 S. & D. 1557.
Clarke, Frederick A.; F.T.C. *v.* (D.C.S.D. Calif. 1941)	Not reported	3 S. & D. 406.
Clarke, Frederick A. *v.* F.T.C. (C.A. 9 1942)	128 F. 2d 542	3 S. & D. 488.
Claude Thiret, et al. *v.* F.T.C. (C.A. 10 1975)	512 F. 2d 176	9 S. & D. 1285.
Clayton Mark & Co. et al. (Triangle Conduit & Cable Co.) *v.* F.T.C. (C.A. 7 1948)	168 F. 2d 175	4 S. & D. 741.
(Sup. Ct. 1949)	336 U.S. 956	5 S. & D. 102.
Clean-Rite Vacuum Stores, Inc., et al. *v.* F.T.C. (C.A.D.C. 1955)	Not reported	5 S. & D. 734.
Clein, Max L., et al. *v.* F.T.C. (C.A. 5 1941)	Not reported	3 S. & D. 355.
Clifford Seigmeister and Benrus Watch Co., Inc., et al. *v.* F.T.C. (C.A. 8 1965)	352 F. 2d 313	7 S. & D. 1386.
Certiorari denied (1966)	384 U.S. 939	
Clinton Watch Co. et al. *v.* F.T.C. (C.A. 7 1961)	291 F. 2d 838	7 S. & D. 184.
Certiorari denied (1962)	368 U.S. 952	
Clito Co. (Rene P. Balditt t/a); F.T.C. *v.* (D.C.W.D. Tex. 1940)	Not reported	3 S. & D. 694.
Coca-Cola Company, et al. *v.* F.T.C. (D.C. N.D. Ga. 1972)	342 F. Supp. 760	9 S. & D. 276.
(D.C. N.D. Ga. 1972)	Not reported	9 S. & D. 446.
(C.A. 5 1973)	475 F. 2d 299	9 S. & D. 557.
Certiorari denied (1973)	414 U.S. 877	
Cohen, Al, et al.; Gibson, H.R., Sr., et al. *v.* (D.C.S.D. Texas 1975)	Not reported	9 S. & D. 1510.
Coldwater Seafood Corporation; F.T.C. *v.* (D.C. S.D.N.Y. 1972)	Not reported	9 S. & D. 456.
Cole, Ben (Hallmark, Inc.); F.T.C. *v.* (D.C.N.D. Ill. 1958)9	170 F. Supp. 24	6 S. & D. 452.
(C.A. 7 1959)	265 F. 2d 433	6 S. & D. 539.
Colgate-Palmolive Co. et al. *v.* F.T.C. (C.A. 1 1962)	310 F. 2d 89	7 S. & D. 574.
(C.A. 1 1963)	326 F. 2d 517	7 S. & D. 824.
Colgate-Palmolive Co. et al.; F.T.C. *v.* (Sup. Ct. 1965)	380 U.S. 374	7 S. & D. 1152.
Collier, P.F., & Son Corp. et al. *v.* F.T.C. (C.A. 6 1970)	427 F. 2d 261	8 S. & D. 1188.
Certiorari denied (1970)	400 U.S. 926	
Colon, Jacob, et al. (d/b/a E. & J. Distributing Co.) *v.* F.T.C. (C.A. 2 1952)	193 F. 2d 179	5 S. & D. 349.
Certiorari denied (1952)	344 U.S. 823	
Colonial Bead Co., Inc. *v.* F.T.C. (C.A. 7 1951)	191 F. 2d 954	5 S. & D. 327.
Colonial Stores, Inc. *v.* F.T.C. (C.A. 5 1971)	450 F. 2d 733	9 S. & D. 149.
Columbia Broadcasting System, Inc., et al. *v.* F.T.C. (C.A. 7 1969)	414 F. 2d 974	8 S. & D. 981.
Certiorari denied (1970)	397 U.S. 907	
Comforte, Inc., et al.; F.T.C. *v.* (D.C.N.D. Ill. 1955)	Not reported	5 S. & D. 792.
Commercial Distributors of America et al. (Gene J. Davidson); U.S. *v.* (D.C.E.D. Pa. 1964)	Not reported	7 S. & D. 1448.

Name of Case	Reference	Reported in—
Community Blood Bank of the Kansas City Area, Inc., et al. *v.* F.T.C. (C.A. 8 1969)	405 F. 2d 1011	8 S. & D. 865.
Concrete Materials Corp. *v.* F.T.C. (C.A. 7 1951)	189 F. 2d 359	5 S. & D. 282.
Consolidated Book Publishers, Inc. *v.* F.T.C. (C.A. 7 1931)	53 F. 2d 942	2 S. & D. 152.
Certiorari denied (1932)	286 U.S. 553	
Consolidated Foods Corp. *v.* F.T.C. (C.A. 7 1964)	329 F. 2d 623	7 S. & D. 881.
Consolidated Foods Corp.; F.T.C. *v.*		
(Sup. Ct. 1965)	380 U.S. 592	7 S. & D. 1189.
(D.C. S.D.N.Y. 1974)	Not reported	9 S. & D. 1147.
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1163.
(D.C. S.D.N.Y. 1975)	396 F. Supp. 1353	9 S & D. 1355.
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1557.
Consolidated Mfg. Co. et al. *v.* F.T.C. (C.A. 4, 1952)	199 F. 2d 417	5 S. & D. 426.
(D.C.D.C. 1954)	Not reported	5 S. & D. 677.
Consolidated Royal Chemical Corp. *v.* F.T.C. (C.A. 7 1951)	191 F. 2d 896	5 S. & D. 320.
Constable Corp., Arnold *v.* F.T.C. (C.A. 2 1961)	Not reported	7 S. & D. 97.
Consumer Federation of America, et al. *v.* F.T.C. (C.A. D.C. 1975)	515 F. 2d 367	9 S. & D. 1376.
Consumer Sales Corp. et al. *v.* F.T.C. (C.A. 2 1952)	198 F. 2d 404	5 S. & D. 419.
Certiorari denied (1953)	344 U.S. 912	
Consumers Home Equipment Co. et al. *v.* F.T.C. (C.A. 6 1947)	164 F. 2d 972	4 S. & D. 669.
Certiorari denied (1947)	331 U.S. 860	
Consumers Products of America, Inc., et al. *v.* F.T.C. (C.A. 3 1968)	400 F. 2d 930	8 S. & D. 801.
Certiorari denied (1969)	393 U.S. 1088	
Container Mfg. Co. et al. *v.* F.T.C. (C.A. 4 1952)	199 F. 2d 417	5 S. & D. 426.
(D.C.D.C. 1954)	Not reported	5 S. & D. 677.
Continental Baking Co. *v.* Caspar W. Weinberger et al. (D.C. Del. 1970)	Not reported	8 S. & D. 1140.
Continental Baking Co. *v.* F.T.C. (C.A. 9 1966)	366 F. 2d 795	8 S. & D. 351.
Certiorari denied (1967)	386 U.S. 932	
Continental Baking Co. *v.* Paul Rand Dixon et al. (D.C. Del. 1968)	283 F. Supp. 285	8 S. & D. 679.
Continental Can Co., Inc.; F.T.C. *v.* (D.C.S.D.N.Y. 1967)	267 F. Supp. 713	8 S. & D. 491.
Continental Oil Co.; F.T.C. *v.* (D.C. D.C. 1974)	Not reported	9 S. & D. 890.
Continental Oil Co. *v.* Arthur F. Burns, et al. (D.C. Del. 1970)	Not reported	8 S. & D. 1251.
Continental Wax Corp. et al. *v.* F.T.C. (C.A. 2 1964)	330 F. 2d 475	7 S. & D. 891.
Control Data Corporation, et al. *v.* F.T.C., et al.		
(D.C. Minn. 1974)	Not reported	9 S. & D. 852.
(D.C. Minn. 1974)	Not reported	9 S. & D. 1002.
(D.C. Minn. 1974)	Not reported	9 S. & D. 1107.
(D.C. Minn. 1975)	Not reported	9 S. & D. 1449.
(D.C. Minn. 1975)	Not reported	9 S. & D. 1500.
Cooper, George A. (Valve Manufacturers Assn.); F.T.C. *v.* (D.C.S.D.N.Y. 1962)	Not reported	7 S. & D. 477.
Coradio, Inc.; U.S. *v.* (D.C.D.N.J. 1956)	Not reported	6 S. & D. 911.

Name of Case	Reference	Reported in—
Cordes, J. V., et al. (d/b/a Martha Beasley Associates); F.T.C. *v.* (D.C.E.D. Mich. 1939)	Not reported	3 S. & D. 635.
Corn Products Refining Co. *v.* F.T.C. (C.A. 7 1944)	144 F. 2d 212	4 S. & D. 234.
(Sup. Ct. 1945)	324 U.S. 726	4 S. & D. 331.
Corning Glass Works *v.* F.T.C. (C.A. 7 1975)	509 F. 2d 293	9 S. & D. 1164.
Coro, Inc. *v.* F.T.C. (C.A. 7 1951)	191 F. 2d 954	5 S. & D. 327.
Coro, Inc. et al. *v.* F.T.C. (C.A. 1 1964)	338 F. 2d 149	7 S. & D. 1022.
Certiorari denied (1965)	380 U.S. 954	
Corrigan-Republic, Inc. (Zale Corporation) *v.* F.T.C. (C.A. 5 1973)	473 F. 2d 1317	9 S. & D. 550.
Cosner Candy Co.; F.T.C. *v.* (C.A. 10 1937)	92 F. 2d 1002	2 S. & D. 419.
Cotherman, Lester S., et al. *v.* F.T.C. (C.A. 5 1969)	417 F. 2d 587	8 S. & D. 1008.
Cotton States, Inc., et al. *v.* F.T.C. (C.A. 5 1961)	287 F. 2d 512	7 S. & D. 41.
Certiorari denied (1961)	368 U.S. 838	
Coty, Inc., et al. *v.* F.T.C. (C.A. 3 1942)	Not reported	3 S. & D. 464.
(C.A. 3 1963)	Not reported	7 S. & D. 647.
Coty, Inc., et al.; U.S. *v.* (D.C.D. Del. 1963)	Not reported	7 S. & D. 1444.
Country Tweeds, Inc., et al. *v.* F.T.C. (C.A. 2 1964)	326 F. 2d 144	7 S. & D. 835.
Courtaulds (Alabama) Inc. *v.* Earl W. Kintner et al. (D.C.D.C. 1960)	182 F. Supp. 207	6 S. & D. 736.
(D.C.D.C. 1960)	Not reported	6 S. & D. 842.
Courtaulds (Alabama) Inc. *v.* Paul R. Dixon et al. (C.A.D.C. 1961)	294 F. 2d 899	7 S. & D. 97.
Cox & Cox; F.T.C. *v.* (C.A. 5 1923)	Not reported	1 S. & D. 329.
Crafts, James F., *v.* F.T.C. (C.A. 9 1957)	244 F. 2d 882	6 S. & D. 204.
Crafts, James F.; F.T.C. *v.* (Sup. Ct. 1957)	355 U.S. 9	6 S. & D. 204n.
Rehearing denied (1957)	355 U.S. 885	
Crancer, L.A., et al.; F.T.C. *v.* (C.A. 8 1935)	76 F. 2d 1008	2 S. & D. 291.
Crane Co.; Briggs Mfg. Co. *v.* (D.C.E.D. Mich. 1960)	185 F. Supp. 177	6 S. & D. 797.
(C.A. 6 1960)	280 F. 2d 747	6 S. & D. 797n.
Cream of Wheat Co. *v.* F.T.C. (C.A. 8 1926)	14 F. 2d 40	1 S. & D. 539.
Credit Card Service Corporation, et al. *v.* F.T.C. (C.A. D.C. 1974)	495 F. 2d 1004	9 S. & D. 914.
Crosse & Blackwell Co. (John T. Menzies, et al.); F.T.C. *v.* (D.C.D. Md. 1956)	145 F. Supp. 164	6 S. & D. 42.
Crosse & Blackwell Co. (John T. Menzies, et al.) *v.* F.T.C. (C.A. 4 1957)	242 F. 2d 81	6 S. & D. 225.
Certiorari denied (1957)	353 U.S. 957	
Crosse & Blackwell Co. *v.* F.T.C. (C.A. 4 1959)	262 F. 2d 600	6 S. & D. 483.
Crown Mfrs. Ass'n. of America et al. *v.* F.T.C. (C.A. 4 1949)	176 F. 2d 974	5 S. & D. 150.
Crown Manufacturing Co., Inc., et al.; U.S. *v.* (D.C.E.D. Pa. 1960)	Not reported	6 S. & D. 919.
Crown Zellerbach Corp. et al. *v.* F.T.C. (C.A. 9 1946)	156 F. 2d 927	4 S. & D. 507.
Crown Zellerbach Corp. *v.* F.T.C. (C.A. 9 1961)	296 F. 2d 800	7 S. & D. 126.
Certiorari denied (1962)	370 U.S. 937	
Crowther, Walter E., et al.; F.T.C. *v.* (D.C.D.C. 1969)	Not reported	8 S. & D. 1070.
Crowther, Walter E.; F.T.C. *v.* (C.A.D.C. 1970)	430 F. 2d 510	8 S. & D. 1212.

Name of Case	Reference	Reported in--
Cubberley, U.S. ex rel. *v.* F.T.C. (D.C.D.C. 1933)	Not reported	2 S. & D. 240.
Curtis Brothers, Inc.; U.S. *v.* (D.C. D.C. 1973)	Not reported	9 S. & D. 1556.
Curtis Publishing Co. *v.* F.T.C. (C.A. 3 1921)	270 Fed. 881	1 S. & D. 93.
Curtis Publishing Co.; F.T.C. *v.* (Sup. Ct. 1923)	260 U.S. 568	1 S. & D. 271.
Curtiss-Wright Corp. and Martin A. Sherry; F.T.C. *v.* (D.C.D.C. 1969)	Not reported	8 S. & D. 935.
CWF Corporation; U.S. *v.* (D.C. Md. 1973)	Not reported	9 S. & D. 1556.
Dalton et al., Mick; U.S. *v.* (D.C. Nebr. 1965)	Not reported	7 S. & D. 1449.
Damar Products, Inc., et al. *v.* F.T.C. (C.A. 3 1962)	309 F. 2d 323	7 S. & D. 566.
Dandy Products, Inc., et al. *v.* F.T.C. (C.A. 7 1964)	332 F. 2d 985	7 S. & D. 920.
Certiorari denied (1965)	379 U.S. 961	
Daniel Brokerage Co. *v.* F.T.C. (C.A. 5 1940)	109 F. 2d 268	3 S. & D. 184.
Daresh Garment Co., Inc. *v.* F.T.C. (C.A. 2 1952)	194 F. 2d 504	5 S. & D. 374.
Dartmouth Finishing Corp.; U.S. *v.* (D.C.D. Mass. 1965)	Not reported	7 S. & D. 1276.
David R. Markin, et al.; F.T.C. *v.* (D.C. W.D. Mich. 1974)	391 F. Supp. 865	9 S. & D. 1138.
David Rettinger *v.* F.T.C. (C.A. 2 1968)	392 F. 2d 454	8 S. & D. 743.
David W. Erickson (d/b/a Erickson Hair and Scalp Specialists) *v.* F.T.C. (C.A. 7 1959)	272 F. 2d 318	6 S. & D. 697.
Certiorari denied (1960)	362 U.S. 940	
David W. Margulies *v.* F.T.C. (C.A. 3 1964)	339 F. 2d 603	7 S. & D. 1076.
Davidson, Gene J. (Commercial Distributors of America Inc.); U.S. *v.* (D.C.E.D. Pa. 1964)	Not reported	7 S. & D. 1448.
Davis, G. Fred; U.S. *v.* (D.C. N.D. Texas 1972)	Not reported	9 S. & D. 1554.
Davis, John H., et al (t/a Normandie Et Cie) *v.* F.T.C. (C.A. 1 1942)	Not reported	3 S. & D. 465.
Dayco Corp. *v.* F.T.C. (C.A. 6 1966)	362 F. 2d 180	8 S. & D. 327.
Day, J. Edward, et al.; Carl Brandenfels *v.* (C.A.D.C. 1963)	316 F. 2d 375	7 S. & D. 648.
Certiorari denied (1963)	375 U.S. 824	
Dayton Rubber Co., The; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
D. D. D. Corp. *v.* F.T.C. (C.A. 7 1942)	125 F. 2d 679	3 S. & D. 455.
Dean Foods Co. and Bowman Dairy Co.; F.T.C. *v.* (C.A. 7 1966)	356 F. 2d 481	8 S. & D. 21.
(Sup. Ct. 1966)	Not reported	8 S. & D. 39.
(C.A. 7 1967)	Not reported	8 S. & D. 474.
Dean Foods Co. et al.; F.T.C. *v.* (Sup. Ct. 1966)	384 U.S. 597	8 S. & D. 208.
Dean Milk Co. et al. *v.* F.T.C. (C.A. 7 1968)	395 F. 2d 696	8 S. & D. 699.
Dearborn Supply Co. *v.* F.T.C. (C.A. 7 1944)	146 F. 2d 5	4 S. & D. 303.
Deckelbaum, Howard (Sun Cut Rate Drug Store); F.T.C. *v.* (D.C.S.D. W. Va. 1940)	Not reported	3 S. & D. 689.
Decker, Amiel F., et al. (t/a Decker Products Co.) *v.* F.T.C. (C.A.D.C. 1944)	Not reported	4 S. & D. 212.
Certiorari denied (1944)	323 U.S. 786	
(C.A.D.C. 1949)	176 F. 2d 461	5 S. & D. 137.
Certiorari denied (1949)	338 U.S. 878	
Deer et al. *v.* F.T.C. (C.A. 2 1945)	152 F. 2d 65	4 S. & D. 437.
Deeter, Larry M. (Educational Surveys); U.S. *v.* (D.C.E.D. Wash. 1959)	Not reported	6 S. & D. 916.
De Forest's Training, Inc. *v.* F.T.C. (C.A. 7		

Name of Case	Reference	Reported in—
1943)	134 F. 2d 819	3 S. & D. 552.
De Gorter, Jacques, et al. (t/a Pelta Furs) *v.* F.T.C. (C.A. 1957)	244 F. 2d 270	6 S. & D. 310.
Dejay Stores, Inc. *v.* F.T.C. (C.A. 2 1952)	200 F. 2d 865	5 S. & D. 475.
Del L. Young; U.S. *v.* (D.C. N.D. Ill. 1975)	Not reported	9 S. & D. 1558.
DeLaval Steam Turbine Co. (Grand Jury Proc.) (C.A. 3 1962)	309 F. 2d 440	7 S. & D. 567.
Delaware Watch Co., Inc., et al. *v.* F.T.C. (C.A. 2 1964)	332 F. 2d 745	7 S. & D. 915.
Delco Novelty Co. and DeLuxe Products Co. (Alvin B. Wolf t/a) *v.* F.T.C. (C.A. 7 1943)	135 F. 2d 564	3 S. & D. 564.
Delco Novelty Co. and DeLuxe Products Co. (Alvin B. Wolf t/a); U.S. *v.* (D.C.N.D. Ill. 1948)	Not reported	4 S. & D. 824.
Denman Rubber Manufacturing Co.; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
Dentists' Supply Co. of New York, The, and The L. D. Caulk Co.; U.S. *v.* (D.C.E.D. Pa. 1964)	Not reported	7 S. & D. 1446.
Deran Confectionery Co.; U.S. *v.* (D.C.D. Mass. 1940)	Not reported	3 S. & D. 724.
Dictograph Products, Inc. *v.* F.T.C. (C.A. 2 1954)	217 F. 2d 821	5 S. & D. 707.
Certiorari denied (1955)	349 U.S. 940	
Diener's, Inc., et al. *v.* F.T.C. (C.A. D.C. 1974)	494 F. 2d 1132	9 S. & D. 901.
Dietzgen Co., Eugene, et al. *v.* F.T.C. (C.A. 7 1944)	142 F. 2d 321	4 S. & D. 117.
Certiorari denied (1944)	323 U.S. 730	
Dietz Gum Co. et al. *v.* F.T.C. (C.A. 7 1939)	104 F. 2d 999	3 S. & D. 116.
Certiorari denied (1939)	308 U.S. 610	
Dilger, Walter L. (Beatrice Foods Co.); F.T.C. *v.* (D.C.N.D. Ill. 1959)	Not reported	6 S. & D. 662.
(C.A. 7 1960)	276 F. 2d 739	6 S. & D. 773.
Certiorari denied (1960)	364 U.S. 882	
Directory Publishing Corp. et al. *v.* F.T.C. (C.A. 2 1953)	208 F. 2d 632	5 S. & D. 593.
Distinctive Emblem & Uniform Corp. et al. (Seymour S. Hindman); U.S. *v.* (D.C.D. N.J. 1960)	179 F. Supp. 926	6 S. & D. 715.
(D.C.D.N.J. 1960)	Not reported	6 S. & D. 918.
Dixon, Paul Rand, et al.; Continental Baking Co. *v.* (D.C. Del. 1968)	283 F. Supp. 285	8 S. & D. 679.
Dixon, Paul Rand, et al.; Knoll Associates, Inc. *v.* (D.C.S.D.N.Y. 1964)	232 F. Supp. 283	7 S. & D. 937.
Dixon, Paul Rand, et al.; The Elmo Division of Drive-X Co., Inc., et al. *v.* (C.A.D.C. 1965)	348 F. 2d 342	7 S. & D. 1124.
D. J. Mahler Co., Inc.; F.T.C. *v.* (D.C.D.R.I. 1940)	Not reported	3 S. & D. 691.
Dlutz, Walter *v.* F.T.C. (C.A. 3 1969)	406 F. 2d 227	8 S. & D. 880.
Certiorari denied (1969)	395 U.S. 936	
Rehearing denied (1969)	396 U.S. 869	
Dodson, J. G. et al. (t/a Ironized Yeast Co.) *v.* F.T.C. (C.A. 6 1935)	Not reported	2 S. & D. 303.
Certiorari denied (1935)	296 U.S. 623	
Doherty, Clifford, Steers & Shenfield, Inc. *v.* F.T.C. (C.A. 6 1968)	392 F. 2d 921	8 S. & D. 725.
Dolcin Corp. et al. *v.* F.T.C. (C.A.D.C. 1954)	219 F. 2d 742	5 S. & D. 646.
Certiorari denied (1955)	348 U.S. 981	
Dolcin Corp. et al., *In re* (C.A.D.C. 1956)	247 F. 2d 524	6 S. & D. 123.

Name of Case	Reference	Reported in—
Certiorari denied (1957)	353 U.S. 988	
Dollar Co., Robert; F.T.C. *v.* (C.A. 9 1929)	Not reported	1 S. & D. 682.
Domestic Diathermy Co.; U.S. *v.* (D.C.S.D. N.Y. 1952)	Not reported	5 S. & D. 803.
Dooley, Inc., Paul R., et al.; U.S. *v.* (D.C.S.D. Calif. 1958)	Not reported	6 S. & D. 915.
Dorfman et al. (Stetson Felt Mills) *v.* F.T.C. (C.A. 8 1944)	144 F. 2d 737	4 S. & D. 278.
Double Eagle Lubricants, Inc. *v.* The State of Texas (D.C.N.D. Tex. 1965)	248 F. Supp. 515	7 S. & D. 1416.
Appeal dismissed (1966)	384 U.S. 434	
Double Eagle Lubricants, Inc., et al. *v.* F.T.C. (C.A. 10 1965)	360 F. 2d 268	7 S. & D. 1413.
Double Eagle Refining Co. (Frank A. Kerran et al. d/b/a) *v.* F.T.C. (C.A. 10 1959)	265 F. 2d 246	6 S. & D. 533.
Certiorari denied (1959)	361 U.S. 818	
Douglas Candy Co. *v.* F.T.C. (C.A. 8 1942)	125 F. 2d 665	3 S. & D. 449.
Douglas Fir Exploitation & Export Co. *v.* F.T.C. (D.C.S.C. 1922)	Not reported	1 S. & D. 197.
Douglass Candy Co. *v.* F.T.C. (C.A. 3 1939)	102 F. 2d 69	3 S. & D. 51.
Doyle, Bascom *v.* F.T.C. (C.A. 5 1966)	356 F. 2d 381	8 S. & D. 40.
Dr. A. Posner Shoes, Inc. *v.* F.T.C. (D.C.D.C. 1953)	Not reported	5 S. & D. 789.
(C.A.D.C. 1953)	Not reported	5 S. & D. 789.
Drath, Carl (t/a Broadway Gift Co.) *v.* F.T.C. (C.A.D.C. 1956)	239 F. 2d 452	6 S. & D. 105.
Certiorari denied (1957)	353 U.S. 917	
Drew & Co., Inc., E.F. *v.* F.T.C. (C.A. 2 1956)	235 F. 2d 735	6 S. & D. 34.
Certiorari denied (1957)	352 U.S. 969	
Drew Corp., The Irving; U.S. *v.* (D.C.S.D. Ohio 1956)	Not reported	6 S. & D. 911.
Dr. F. A. Newcomb *v.* F.T.C. (C.A. 10 1950)	Not reported	5 S. & D. 199.
Dr. Hiss Shoes, Inc.; U.S. *v.* (D.C.S.D. Ohio 1956)	Not reported	6 S. & D. 912.
Dr. W. B. Caldwell, Inc. *v.* F.T.C. (C.A. 7 1940)	111 F. 2d 889	3 S. & D. 218.
Dubinoff, Louis (t/a Famous Pure Silk Hosiery Co.); F.T.C. *v.* (C.A. 3 1938)	Not reported	2 S. & D. 459.
Dunlop Tire and Rubber Corp.; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
Duon, Inc., et al.; U.S. *v.* (D.C.S.D. Fla. 1959, 1960)	Not reported	6 S. & D. 917.
Durkee-Atwood Co.; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
Durlacher and Co., Inc.; U.S. *v.* (D.C. S.D.N.Y. 1973)	Not reported	9 S. & D. 1555.
Dyche, William A. *v.* Wayne E. Kaplan et al. (D.C.D.C. 1962)	Not reported	7 S. & D. 599.
Eagle-Picher Co., The, et al. *v.* F.T.C. (C.A. 7 1955)	227 F. 2d 825	5 S. & D. 749.
Certiorari denied (1956)	351 U.S. 964	
(C.A. 7 1957)	244 F. 2d 312	6 S. & D. 328.
Eagle-Picher Co., The, et al.; F.T.C. *v.* (Sup. Ct. 1957)	352 U.S. 419	6 S. & D. 193.
E. & J. Distributing Co. (Jacob Colon et al. d/b/a) *v.* F.T.C. (C.A. 2 1952)	193 F. 2d 179	5 S. & D. 349.
Certiorari denied (1952)	344 U.S. 823	
Eastman Kodak Co. *v.* F.T.C. (C.A. 2 1946)	158 F. 2d 592	4 S. & D. 585.
Certiorari denied (1947)	330 U.S. 828	
Eastman Kodak Co. et al. *v.* F.T.C. (C.A. 2 1925)	7 F. 2d 994	1 S. & D. 422.

Name of Case	Reference	Reported in—
Eastman Kodak Co. et al.; F.T.C. *v.* (Sup. Ct. 1927)	274 U.S. 619	1 S. & D. 616.
E. B. Muller & Co. et al. *v.* F.T.C. (C.A. 6 1944)	142 F. 2d 511	4 S. & D. 151.
Eclipse Sleep Products of New England Inc., et al. *v.* F.T.C. (D.C.D. Mass. 1962)	Not reported	7 S. & D. 525.
Eclipse Sleep Products of New England Inc., et al.; F.T.C. *v.* (D.C.D. Mass. 1963)	Not reported	7 S. & D. 773.
Edelmann & Co., E., *v.* F.T.C. (C.A. 7 1956)	239 F. 2d 152	6 S. & D. 113.
Certiorari denied (1958)	355 U.S. 941	
Educational Surveys (Larry M. Deeter); U.S. *v.* (D.C.E.D. Wash. 1959)	Not reported	6 S. & D. 916.
Educators Association, Inc., et al. *v.* F.T.C. (C.A. 2 1939)	108 F. 2d 470	3 S. & D. 171.
(C.A. 2 1940)	110 F. 2d 72	3 S. & D. 208.
(C.A. 2 1941)	118 F. 2d 562	3 S. & D. 356.
Edward P. Paul & Co., Inc. *v.* F.T.C. (C.A.D.C. 1948)	169 F. 2d 294	4 S. & D. 734.
Edwin Cigar Co., Inc.; F.T.C. *v.* (C.A. 2 1933)	67 F. 2d 993	2 S. & D. 246.
F. F. Drew & Co., Inc. *v.* F.T.C. (C.A. 2 1956)	235 F. 2d 735	6 S. & D. 34.
Certiorari denied (1957)	352 U.S. 969	
Eghan, Eli (t/a Ox'O Gas Co.) *v.* F.T.C. (C.A. 2 1947)	Not reported	4 S. & D. 666.
E. Griffiths Hughes Inc. *v.* F.T.C. (C.A.D.C. 1933)	63 F. 2d 362	2 S. & D. 213.
(C.A. 2 1935)	77 F. 2d 886	2 S. & D. 300.
Certiorari denied (1935)	296 U.S. 617	
Einiger Mills, Inc., et al.; U.S. *v.* (D.C.D. Mass. 1966)	Not reported	8 S. & D. 1305.
E. J. Brach & Sons *v.* F.T.C. (C.A. 7 1939)	Not reported	3 S. & D. 133.
Ekco Products Co. *v.* F.T.C. (C.A. 7 1965)	347 F. 2d 745	7 S. & D. 1278.
Electric Bond & Share Co. (A. E. Smith, et al.); F.T.C. *v.* (D.C.S.D.N.Y. 1929)	34 F. 2d 323	1 S. & D. 709.
(D.C.S.D.N.Y. 1932)	1 F. Supp. 247	2 S. & D. 191.
Electrolysis Associates, Inc., et al.; F.T.C. *v.* (D.C.S.D.N.Y. 1940)	Not reported	3 S. & D. 681.
Electro Thermal Co. *v.* F.T.C. (C.A. 9 1937)	91 F. 2d 477	2 S. & D. 412.
Certiorari denied (1937)	302 U.S. 748	
Elizabeth Arden, Inc., et al. *v.* F.T.C. (C.A. 2 1946)	156 F. 2d 132	4 S. & D. 490.
Certiorari denied (1947)	331 U.S. 806	
Elliot Knitwear, Inc. et al. *v.* F.T.C. (C.A. 2 1959)	266 F. 2d 787	6 S. & D. 566.
Elliot Knitwear, Inc., et al.; U.S. *v.* (D.C.S.D.N.Y. 1966)	Not reported	8 S. & D. 366.
(D.C.S.D.N.Y. 1969)	Not reported	8 S. & D. 1309.
Elmer C. Adams, Sr., and Adams Dairy Co. et al. *v.* F.T.C. (C.A. 8 1961)	296 F. 2d 861	7 S. & D. 269.
Certiorari denied (1962)	369 U.S. 864	
Elmer Candy Co.; U.S. *v.* (D.C.E.D. La. 1940)	Not reported	3 S. & D. 725.
Elmer J. Schnackenberg et al.; Paul Theodore Cheff (Holland Furnace) *v.* (Sup. Ct. 1966)	384 U.S. 373	8 S. & D. 176.
Elmo Co., Inc., The, *v.* F.T.C. (C.A.D.C. 1967)	389 F. 2d 550	8 S. & D. 610.
Certiorari denied (1968)	392 U.S. 905	
Elmo Division of Drive-X Co., Inc., The, et al. *v.* Paul Rand Dixon et al. (C.A.D.C. 1965)	348 F. 2d 342	7 S. & D. 1124.
El Moro Cigar Co. *v.* F.T.C. (C.A. 4 1939)	107 F. 2d 429	3 S. & D. 166.
Emile M. LaPeyre et al. *v.* F.T.C. (C.A. 5 1966)	366 F. 2d 117	8 S. & D. 343.
Empire Builders Co. (Harry Stroiman d/b/a);		

Name of Case	Reference	Reported in—
F.T.C. *v.* (C.A. 8 1970)	428 F. 2d 808	8 S. & D. 1229.
Empire Merchandise Corp. et al. *v.* F.T.C. (C.A. 2 1944)	Not reported	4 S. & D. 183.
Empire Press, Inc., et al.; U.S. *v.* (D.C.N.D. Ill. 1961)	Not reported	7 S. & D. 1440.
Encyclopaedia Britannica, Inc., et al. *v.* F.T.C. (C.A. 7 1975)	517 F. 2d 1013	9 S. & D. 1360.
Engman, Lewis A., et al.; American Brands, Inc. *v.* (C.A. 2 1975)	527 F. 2d 115	9 S. & D. 1542.
Engman, Lewis A., et al.; Glenn W. Turner *v.* (D.C. D.C. 1973)	Not reported	9 S. & D. 767.
Engman, Lewis A., et al.; Liggett & Myers, Inc. *v.*		
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1446.
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1525.
(C.A. 2 1975)	527 F. 2d 115	9 S. & D. 1542.
Engman, Lewis A., et al.; Loew's Theatres, Inc. *v.*		
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1446.
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1525.
(C.A. 2 1975)	527 F. 2d 115	9 S. & D. 1542.
Engman, Lewis A., et al.; Philip Morris Inc. *v.*		
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1446.
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1525.
(C.A. 2 1975)	527 F. 2d 115	9 S. & D. 1542.
Engman, Lewis A., et al.; R. J. Reynolds Tobacco Co. *v.*		
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1446.
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1525.
(C.A. 2 1975)	527 F. 2d 115	9 S. & D. 1542.
Engman, Lewis A., et al.; Sydney N. Floersheim *v.* (C.A. D.C. 1973)	494 F. 2d 949	9 S. & D. 766.
Enurtone Co. (Maurice J. Feil et al. t/a) *v.* F.T.C. (C.A. 9 1960)	285 F. 2d 879	6 S. & D. 875.
Environmental Protection Agency *v.* Patsy T. Mink, et al. (Sup. Ct. 1973)	410 U.S. 73 94 S. Ct. 827	9 S. & D. 457.
Epstein, Murray, et al.; U.S. *v.* (D.C.S.D. N.Y. 1964)	Not reported	7 S. & D. 1447.
Erickson Hair and Scalp Specialists *v.* F.T.C. (C.A. 7 1959)	272 F. 2d 318	6 S. & D. 697.
Certiorari denied (1960)	362 U.S. 940	
Erie Laboratories, Inc., etc.; F.T.C. *v.* (D.C.N.D. Ohio 1940)	Not reported	3 S. & D. 704.
Erie Sand and Gravel Co. *v.* F.T.C. (C.A. 3 1961)	291 F. 2d 279	7 S. & D. 118.
E. R. Page Co., Inc., The; U.S. *v.* (D.C.E.D. Mich. 1943)	Not reported	3 S. & D. 734.
Estrin, Louis, et al. (t/a Hudson Fur Dyeing Co.) *v.* F.T.C. (C.A. 3 1942)	Not reported	3 S. & D. 441.
Etablissements Rigaud, Inc., et al. *v.* F.T.C. (C.A. 2 1942)	125 F. 2d 590	3 S. & D. 446.
Eugene Dietzgen Co. et al. *v.* F.T.C. (C.A. 7 1944)	142 F. 2d 321	4 S. & D. 117.
Certiorari denied (1944)	323 U.S. 730	
Eugene I. Woodle, Inc., et al.; F.T.C. *v.* (D.C.D. Mass. 1959)	Not reported	6 S. & D. 656.

Name of Case	Reference	Reported in—
Evans Fur Co. et al.; F.T.C. *v.* (C.A. 7 1937)	88 F. 2d 1008	2 S. & D. 380.
Evans Novelty Co., etc. (Mitchell A. Bazelon et al. t/a) *v.* F.T.C. (C.A. 7 1942)	Not reported	3 S. & D. 441.
Evis Manufacturing Co., et al. *v.* F.T.C. (C.A. 9 1961)	287 F. 2d 831	7 S. & D. 52.
Certiorari denied (1961)	368 U.S. 824	
Excelsior Laboratory, Inc. *v.* F.T.C. (C.A. 2 1948)	171 F. 2d 484	4 S. & D. 792.
Exposition Press, Inc., et al. *v.* F.T.C. (C.A. 2 1961)	295 F. 2d 869	7 S. & D. 240.
Certiorari denied (1962)	370 U.S. 917	
Exquisite Form Brassiere, Inc. *v.* F.T.C. (C.A.D.C. 1961)	301 F. 2d 499	7 S. & D. 259.
Certiorari denied (1962)	369 U.S. 888	
(C.A.D.C. 1965)	360 F. 2d 492	7 S. & D. 1291.
Certiorari denied (1966)	384 U.S. 959	
Exxon Corporation; F.T.C. *v.* (D.C. D.C. 1974)	Not reported	9 S. & D. 905.
(C.A. D.C. 1975)	517 F. 2d 137	9 S. & D. 1411.
Exxon Corporation *v.* F.T.C., et al. (D.C. D.C. 1974)	384 F. Supp. 755	9 S. & D. 1077.
Fabricon Co. (William Bogolub doing business as); U.S. *v.* (D.C.N.D. Ill. 1967)	Not reported	8 S. & D. 1308.
Fair, Albert E., et al *v.* F.T.C. (C.A. 2 1944)	Not reported	4 S. & D. 178.
Fair, The, *v.* F.T.C. (C.A. 7 1959)	272 F. 2d 609	6 S. & D. 708.
Fairyfoot Products Co. *v.* F.T.C. (C.A. 7 1935)	80 F. 2d 684	2 S. & D. 330.
Fairyfoot Products Co.; F.T.C. *v.* (C.A. 7 1938)	94 F. 2d 844	2 S. & D. 444.
F. A. Martoccio Co. (t/a/ Hollywood Candy Co.); F.T.C. *v.* (C.A. 8 1937)	87 F. 2d 561	2 S. & D. 381.
Certiorari denied (1937)	301 U.S. 691	
Family Publications Service, Inc.; Leila Mourning *v.* (Sup. Ct. 1973)	411 U.S. 356 93 S. Ct. 1652	9 S. & D. 638.
Family Record Plan, Inc., et al.; U.S. *v.* (D.C.C.D. Calif. 1970)	Not reported	8 S. & D. 1309.
Famous Pure Silk Hoisery Co. (Louis Dubinoff t/a); F.T.C. *v.* (C.A. 3 1938)	Not reported	2 S. & D. 459.
Farm Journal, Inc.; F.T.C. *v.* (C.A. 3 1955)	Not reported	5 S. & D. 739.
Fashion Originators' Guild of America, Inc., et al. *v.* F.T.C. (C.A. 2 1940)	114 F. 2d 80	3 S. & D. 269.
(Sup. Ct. 1941)	312 U.S. 457	3 S. & D. 345.
Feder, Abraham; U.S. *v.* (D.C. S.D.N.Y. 1972)	Not reported	9 S. & D. 1554.
Federated Department Stores, Inc.; U.S. *v.* (D.C.S.D.N.Y. 1966)	256 F. Supp. 318	8 S. & D. 338.
(D.C.S.D.N.Y. 1966)	261 F. Supp. 553	8 S. & D. 382.
Federated Nationwide Wholesalers Service, Garydean Corp. et al. *v.* F.T.C. (C.A. 2 1968)	398 F. 2d 253	8 S. & D. 785.
Feil, Maurice J., et al. (t/a Enurtone Co.) *v.* F.T.C. (C.A. 9 1960)	285 F. 2d 879	6 S. & D. 875.
Feitler, Bernice, et al. (t/a Gardner & Co.) *v.* F.T.C. (C.A. 9 1953)	201 F. 2d 790	5 S. & D. 491.
Certiorari denied (1953)	346 U.S. 814	
(D.C.D.C. 1954)	Not reported	5 S. & D. 677.
Feldman, Jerry L. and Checker Taxi Company, Inc. *v.* F.T.C. (D.C. N.D. Ill. 1975)	Not reported	9 S. & D. 1326.
Fifteen Cases of Silk Scarves, More or Less,		

Name of Case	Reference	Reported in—
Containing Approximately 7414 Dozen Scarves; F.T.C. *v.* (D.C.S.D.N.Y. 1954)	Not reported	5 S. & D. 704.
Fioret Sales Co., Inc. et al. *v.* F.T.C. (C.A. 2 1938)	100 F. 2d 358	2 S. & D. 481.
(C.A. 2 1939)	Not reported	3 S. & D. 108.
Fire Safety Services, Inc., et al.; U.S. *v.* (D.C. Md. 1962)	Not reported	7 S. & D. 1442.
Firestone Tire & Rubber Co., The; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
Firestone Tire & Rubber Co., The, *v.* F.T.C. (C.A. 5 1966)	360 F. 2d 470	8 S. & D. 145.
Certiorari denied (1967)	385 U.S. 1002	
(C.A. 6 1973)	481 F. 2d 246	9 S. & D. 706.
Certiorari denied (1973)	414 U.S. 1112	
First National City Bank, et al. *v.* F.T.C., et al. (D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1551.
Firth, Lemuel, et al. *v.* F.T.C. (C.A. 1 1945)	Not reported	4 S. & D. 426.
Floersheim Sales Co., etc. (Sydney N. Floersheim trading as) *v.* F.T.C. (C.A. 9 1969)	411 F. 2d 874	8 S. & D. 920.
Certiorari denied (1970)	396 U.S. 1002	
Floersheim, Sydney, *In re* (C.A. 9 1963)	316 F. 2d 423	7 S. & D. 666.
Floersheim, Sydney N. (trading as Floersheim Sales Co., etc.) *v.* F.T.C. (C.A. 9 1969)	411 F. 2d 876	8 S. & D. 920.
Certiorari denied (1970)	396 U.S. 1002	
Floersheim, Sydney N. *v.* Caspar N. Weinberger (D.C. D.C. 1972)	346 F. Supp. 950	9 S. & D. 220.
Floersheim, Sydney N. *v.* Lewis A. Engman, et al. (C.A. D.C. 1973)	494 F. 2d 949	9 S. & D. 819.
Flotill Products, Inc. F.T.C. *v.* (D.C.N.D. Calif. 1959)	Not reported	6 S. & D. 665.
Flotill Products, Inc.; *v.* F.T.C. (C.A. 9 1960)	278 F. 2d 850	6 S. & D. 798.
Certiorari denied (1960)	364 U.S. 920	
Flotill Products, Inc., et al. *v.* F.T.C. (C.A. 9 1966)	358 F. 2d 224	8 S. & D. 69.
Flotill Products, Inc., et al.; F.T.C. *v.* (Sup. Ct. 1967)	389 U.S. 179	8 S. & D. 596.
Fluegelman & Co., Inc., N. *v.* F.T.C. (C.A. 2 1930)	37 F. 2d 59	2 S. & D. 62.
Fluidless Non-Tact Lenses, Inc., et al.; U.S. *v.* (D.C.E.D. Mich. 1963)	Not reported	7 S. & D. 1444.
Flynn & Emrich Co. *v.* F.T.C. (C.A. 4 1931)	52 F. 2d 836	2 S. & D. 141.
Folds et al. *v.* F.T.C. (C.A. 7 1951)	187 F. 2d 658	5 S. & D. 271.
Folger & Co., J. A. *v.* F.T.C. (C.A. 5 1964)	Not reported	7 S. & D. 857.
Fong Poy et al. *v.* F.T.C. (C.A. 9 1941)	124 F. 2d 398	3 S. & D. 427.
Fong Poy et al.; U.S. *v.* (D.C.N.D. Calif. 1962)	Not reported	7 S. & D. 1441.
Food Marketers, Inc., and W. Earl Graham; F.T.C. *v.* (D.C.E.D. La. 1963)	Not reported	7 S. & D. 663.
Ford Motor Co. *v.* F.T.C. (C.A. 6 1940)	Not reported	3 S. & D. 310.
(C.A. 6 1941)	120 F. 2d 175	3 S. & D. 378.
Certiorari denied (1941)	314 U.S. 668	
Foremost Dairies, Inc. *v.* F.T.C. (C.A. 5 1965)	Not reported	7 S. & D. 1148.
Foremost Dairies, Inc. *v.* F.T.C. (C.A. 5 1965)	348 F. 2d 674	7 S. & D. 1303.
Certiorari denied (1965)	382 U.S. 959	
Foremost-McKesson, Inc., and William W. Morison; F.T.C. *v.* (D.C.N.D. Calif. 1970)	Not reported	8 S. & D. 1231.
Forster Mfg. Co., Inc., et al. *v.* F.T.C. (C.A. 1 1964)	335 F. 2d 47	7 S. & D. 943.
Certiorari denied (1965)	380 U.S. 906	
(C.A. 1 1966)	361 F. 2d 340	8 S. & D. 166.

Name of Case	Reference	Reported in—
Certiorari denied (1967)	385 U.S. 1093	
Rehearing denied (1967)	387 U.S. 938	
Fort Howard Paper Co. et al. *v.* F.T.C. (C.A. 7 1946)	156 F. 2d 899	4 S. & D. 496.
Certiorari denied (1946)	329 U.S. 795	
Foster Canning, Inc., et al. *v.* F.T.C. (C.A. 7 1957)	246 F. 2d 458	6 S. & D. 355.
Foster Wheeler Corp. (Grand Jury Proc.) (C.A. 3 1962)	309 F. 2d 440	7 S. & D. 567.
Foucha, Norman J. (American Aluminum Corp.); F.T.C. *v.* (D.C.N.D. Ala. 1970)	Not reported	8 S. & D. 1092.
Foucha, Norman J., et al.; F.T.C. *v.* (D.C. N.D. Ala. 1973)	356 F. Supp. 21	9 S. & D. 605.
Foucha, Norman J., et al. *v.* F.T.C. (D.C. N.D. Ala. 1973)	Not reported	9 S. & D. 759.
Fox Film Corporation *v.* F.T.C. (C.A. 2 1924)	296 Fed. 353	1 S. & D. 331.
Fox, I. J., Inc. et al.; U.S. *v.* (D.C.N.D. Ohio 1963)	Not reported	7 S. & D. 1444.
Frank Sibert et al. *v.* F.T.C. (C.A. 2 1966)	367 F. 2d 364	8 S. & D. 375.
Fred Meyer, Inc., et al. *v.* F.T.C. (C.A. 9 1966)	359 F. 2d 351	8 S. & D. 82.
Certiorari denied (1967)	386 U.S. 908	
Certiorari granted limited to one question (1967)	386 U.S. 907	
Fred Meyer, Inc., et al.; F.T.C. *v.* (Sup. Ct. 1968)	390 U.S. 341	8 S. & D. 684.
Frederick Chusid; F.T.C. *v.* (D.C. N.D. Ill. 1974)	Not reported	9 S. & D. 912.
Freed, N.C., Company, Inc., et al. *v.* Board of Governors of the Federal Reserve System, et al. (C.A. 2 1973)	473 F. 2d 1210	9 S. & D. 451.
Certiorari denied (1973)	414 U.S. 827	
Freeman, Joseph (Gift Products, Inc. et al.); U.S. *v.* (D.C.N.D. Ill. 1960)	Not reported	6 S. & D. 786.
Freeman, Orville L.; The Great Atlantic & Pacific Tea Co., Inc. *v.* (C.A.D.C. 1966)	369 F. 2d 952	8 S. & D. 368.
Freeman, Orville; Safeway Stores, Inc. *v.* (C.A.D.C. 1966)	396 F. 2d 952	8 S. & D. 368.
Frelich, Inc. *v.* F.T.C. (C.A. 2 1952)	194 F. 2d 504	5 S. & D. 374.
Fresh Grown Preserve Corp. et al., *v.* F.T.C. (C.A. 2 1942)	125 F. 2d 917	3 S. & D. 460.
(C.A. 2 1943)	139 F. 2d 200	3 S. & D. 617.
Fried, Leo, et al. *v.* F.T.C. (C.A. 2 1942)	Not reported	3 S. & D. 527.
Fried Woolen Corp., Joe, et al.; U.S. *v.* (D.C.S.D.N.Y. 1960)	Not reported	6 S. & D. 917.
Frito-Lay, Inc. *v.* F.T.C. (D.C.E.D. Tex. 1966)	Not reported	8 S. & D. 143.
(C.A. 5 1967)	380 F. 2d 8	8 S. & D. 504.
Frito-Lay, Inc., and PepsiCo, Inc.; U.S. *v.* (D.C.S.D.N.Y. 1970)	Not reported	8 S. & D. 1310.
Froman, Harry (t/a Supreme Sales Co., etc.) *v.* F.T.C. (C.A. 2 1944)	Not reported	4 S. & D. 181.
Fruchtman, Irwin; U.S. *v.* (C.A. 6 1970)	421 F. 2d 1019	8 S. & D. 1103.
Certiorari denied (1970)	400 U.S. 849	
Fruit Growers' Express, Inc. *v.* F.T.C. (C.A. 7 1921)	274 Fed. 205	1 S. & D. 134.
Application dismissed (1923)	261 U.S. 629	
Fruitvale Canning Co. *v.* F.T.C. (C.A. 9 1957)	Not reported	6 S. & D. 172.
Fry, Lloyd A., Roofing Co. et al. *v.* F.T.C. (C.A. 7 1966)	371 F. 2d 277	8 S. & D. 401.
Fulton Co., John J. *v.* F.T.C. (C.A. 9 1942)	130 F. 2d 85	3 S. & D. 499.
Certiorari denied (1942)	317 U.S. 679	

Name of Case	Reference	Reported in—
G. Leach & Co.; U.S. *v.* (D.C.E.D. Pa. 1944)	Not reported	4 S. & D. 819.
Gallo, Julio R.; F.T.C. *v.*		
(D.C. D.C. 1973)	Not reported	9 S. & D. 782
(D.C. D.C. 1973)	Not reported	9 S. & D. 806
Galter *v.* F.T.C. (C.A. 7 1951)	186 F. 2d 810	5 S. & D. 252.
Certiorari denied (1951)	342 U.S. 818	
Gamble-Skogmo, Inc., et al. *v.* F.T.C. (C.A. 8 1954)	211 F. 2d 106	5 S. & D. 603.
Gardner & Co. (Bernice Feitler et al. t/a) *v.* F.T.C. (C.A. 9 1953)	201 F. 2d 790	5 S. & D. 491.
Certiorari denied (1953)	346 U.S. 814	
(D.C.D.C. 1954)	Not reported	5 S. & D. 677.
Gardner and North Roofing and Siding Corporation *v.* Board of Governors of the Federal Reserve System, et al. (C.A. D.C. 1972)	464 F. 2d 838	9 S. & D. 314.
Garment Mfrs. Assn., Inc., et al. *v.* F.T.C. (D.C.S.C. 1934)	Not reported	2 S. & D. 265.
Garofalo, C. James (Masterkraft Guild Weavers, Inc.); U.S. *v.* (D.C.D.N.J. 1956)	Not reported	6 S. & D. 912.
Gartner, Robert J. (Charles F. Gomez et al.); U.S. *v.* (D.C. Nebr. 1967)	Not reported	8 S. & D. 1307.
Gates Rental, Inc., et al. *v.* F.T.C. (D.C. N.D. Ga. 1975)	Not reported	9 S. & D. 1442
Gay Games, Inc., et al. *v.* F.T.C. (C.A. 10 1953)	204 F. 2d 197	5 S. & D. 514.
(D.C.D.C. 1954)	Not reported	5 S. & D. 677.
Gelb et al. *v.* F.T.C. (C.A. 2 1944)	144 F. 2d 580	4 S. & D. 271.
Gellman Brothers; U.S. *v.* (D.C. Minn. 1943)	Not reported	3 S. & D. 737.
Gellman, Nate, et al. (d/b/a Gellman Brothers) *v.* F.T.C. (C.A. 8 1961)	206 F. 2d 666	7 S. & D. 111.
General Auto Supplies, Inc., et al. (National Parts Warehouse et al.) *v.* F.T.C. (C.A. 7 1965)	346 F. 2d 311	7 S. & D. 1229.
Certiorari dismissed (1965)	382 U.S. 923	
General Electric Co. (Grand Jury Proc.) (C.A. 3 1962)	309 F. 2d 440	7 S. & D. 567.
General Foods Corp. *v.* F.T.C.		
(C.A. 7 1948)	Not reported	4 S. & D. 770.
(C.A. 3 1959)	267 F. 2d 439	6 S. & D. 575.
Certiorari denied (1959)	361 U.S. 923	
(C.A. 3 1967)	386 F. 2d 936	8 S. & D. 581.
Certiorari denied (1968)	391 U.S. 919	
(D.C. W.D. Mich. 1973)	Not reported	9 S. & D. 571.
(D.C. W.D. Mich. 1973)	Not reported	9 S. & D. 768.
General Merchandise Co. (David Kritzik d/b/a) *v.* F.T.C. (C.A. 7 1942)	125 F. 2d 351	3 S. & D. 444.
General Motors Corp. et al. *v.* F.T.C. (C.A. 2 1940)	114 F. 2d 33.	3 S. & D. 282.
Certiorari denied (1941)	312 U.S. 682	
(C.A. 6 1942)	Not reported	3 S. & D. 506.
(C.A. 6 1965)	352 F. 2d 415	7 S. & D. 1409.
General Portland Cement Co.; F.T.C. *v.* (C.A.D.C. 1970)	430 F. 2d 510	8 S. & D. 1212.
General Products Corp. (Ray S. Kalwajtys et al. d/b/a) *v.* F.T.C. (C.A. 7 1956)	237 F. 2d 654	6 S. & D. 72.
Certiorari denied (1957)	352 U.S. 1025	
General Products Corp. (Ray S. Kalwajtys et al. d/b/a); U.S. *v.* (D.C.N.D. Ill. 1959)	Not reported	6 S. & D. 917.
General Tire & Rubber Co., The; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31.	6 S. & D. 220.

Name of Case	Reference	Reported in—
Gen-O-Pak (Lester Rothschild t/a) *v.* F.T.C. (C.A. 7 1952)	200 F. 2d 39	5 S. & D. 441.
Certiorari denied (1953)	345 U.S. 941	
Genuine Parts Co. *v.* F.T.C. (D.C.N.D. Ga. 1970)	313 F. Supp. 855	8 S. & D. 1180.
(C.A. 5 1971)	445 F. 2d 1382	9 S. & D. 78.
George H. Lee Co.; F.T.C. *v.* (C.A. 8 1935)	76 F. 2d 1008	2 S. & D. 291.
George H. Lee Co. *v.* F.T.C. (C.A. 8 1940)	113 F. 2d 583	3 S. & D. 277.
George's Radio and Television Co., Inc., et al.; U.S. *v.* (D.C.D.C. 1962)	Not reported	7 S. & D. 1440.
George T. Robertson et al. *v.* F.T.C. (C.A. 4 1969)	415 F. 2d 49	8 S. & D. 995.
George Ziegler Co.; F.T.C. *v.* (C.A. 7 1937)	90 F. 2d 1007	2 S. & D. 397.
Ger-Ro-Mar, Inc., et al. *v.* F.T.C. (C.A. 7 1975)	518 F. 2d 33	9 S. & D. 1363.
Gerrard Co., Inc., The, et al. *v.* F.T.C. (C.A. 7 1942)	Not reported	3 S. & D. 491.
Gerson, Jonas (t/a Haven Co.) F.T.C. (C.A. 7 1963)	325 F. 2d 93	7 S. & D. 821.
Giant Food Inc. *v.* F.T.C. (C.A.D.C. 1962)	307 F. 2d 184	7 S. & D. 483.
Certiorari denied (1963)	372 U.S. 910	
(C.A.D.C. 1963)	322 F. 2d 977	7 S. & D. 710.
Certiorari dismissed (1964)	376 U.S. 967	
Gibson, H. R., Sr., et al.; F.T.C. *v.* (C.A. 5 1972)	460 F. 2d 605	9 S. & D. 290.
Gibson, H. R., Sr., et al. *v.* Al Cohen, et al. (D.C. S.D. Texas 1975)	Not reported	9 S. & D.
Gibson, H. R., Sr., et al. *v.* Harold Hassenfeld, et al. (D.C. E.D. Tenn. 1975)	Not reported	9 S. & D. 1530.
Gifford-Hill & Company, Inc. *v.* F.T.C., et al. (D.C. D.C. 1974)	Not reported	9 S. & D. 1125.
(C.A. D.C. 1975)	523 F. 2d 730	9 S. & D. 1537.
Gift Products, Inc., et al. (Joseph Freeman); U.S. *v.* (D.C.N.D. Ill. 1960)	Not reported	6 S. & D. 786.
Gimbel Brothers *v.* F.T.C. (C.A. 3 1962)	Not reported	7 S. & D. 549.
Gimbel Brothers, Inc. *v.* F.T.C. (C.A. 2 1941)	116 F. 2d 578	3 S. & D. 314.
Glade Candy Co., et al. *v.* F.T.C. (C.A. 10 1939)	106 F. 2d 962	3 S. & D. 139.
Certiorari denied (1940)	309 U.S. 675	
Gladstone-Arcuni, Inc. *v.* F.T.C. (C.A. 2 1968)	Not reported	8 S. & D. 856.
Gladstone, Emanuel; F.T.C. *v.* (D.C. N.D. Ga. 1971)	Not reported	9 S. & D. 6.
(C.A. 5 1971)	450 F. 2d 913	9 S. & D. 167.
Glen E. Jorgensen and C.I.T. Financial Corporation; F.T.C. *v.* (D.C. D.C. 1975)	Not reported	9 S. & D. 1352.
Glenn W. Turner *v.* Lewis A. Engman, et al. (D.C. D.C. 1973)	Not reported	9 S. & D. 766.
Globe Cardboard Novelty Co., Inc., et al. *v.* F.T.C. (C.A. 3 1951)	192 F. 2d 444	5 S. & D. 342.
Globe Feather & Down Co. (Buryl J. Lazar et al. t/a) *v.* F.T.C. (C.A. 7 1957)	240 F. 2d 176	6 S. & D. 167.
Globe Printing Co. (Morris Aron et al. t/a) *v.* F.T.C. (D.C.E.D. Pa. 1943)	50 F. Supp. 289	3 S. & D. 560.
Globe Readers Service, Inc., et al. *v.* F.T.C. (C.A. 7 1961)	285 F. 2d 692	7 S. & D. 1.
Gluck, Morris A. (Air Conditioning Training		

Name of Case	Reference	Reported in—
Corp. et al.); U.S. *v.* (D.C.S.D. Calif. 1956)	Not reported	6 S. & D. 912.
Goldberg, Max H. (t/a Novel Co.) *v.* F.T.C. (C.A. 7 1960)	283 F. 2d 299	6 S. & D. 839.
Goldcraft Portrait Studio, etc. (Eugene D. Petrey t/a) *v.* F.T.C. (C.A. 5 1951)	Not reported	5 S. & D. 327.
Golden Grain Macaroni Co.; F.T.C. *v.* (C.A. 9 1972)	472 F. 2d 882	9 S. & D. 430.
Certiorari denied (1973)	419 U.S. 918	
Goldfine, Bernard, et al. (Northfield Mills, Inc.); U.S. *v.* (D.C.D. Vt. 1960)	Not reported	6 S. & D. 919.
Goldman, Jacob L., et al. (t/a Atlas Health Appliance Co.); F.T.C. *v.* (D.C.S.D. Calif. 1940)	Not reported	3 S. & D. 696.
Gold Tone Studios, Inc., et al. *v.* F.T.C. (C.A. 2 1950)	183 F. 2d 257	5 S. & D. 200.
Gomez, Charles F. et al. (Robert J. Gartner); U.S. *v.* (D.C. Nebr. 1967)	Not reported	8 S. & D. 1307.
Good-Grape Co.; F.T.C. *v.* (C.A. 6 1930)	45 F. 2d 70	2 S. & D. 95.
Goodhope, Andrew C.; Seven-Up Co. *v.* (D.C. E.D. Mo. 1972)	349 F. Supp. 551	9 S. & D. 366.
Goodman, Abel Allan (t/a Weavers Guild) *v.* F.T.C. (C.A. 9 1957)	244 F. 2d 584	6 S. & D. 284.
Goodrich Co., The B. F., et al. *v.* F.T.C.		
(C.A. D.C. 1953)	208 F. 2d 829	5 S. & D. 572.
(D.C. D.C. 1955)	134 F. Supp. 39	5 S. & D. 734.
(D.C. D.C. 1962)	Not reported	7 S. & D. 488.
(D.C. D.C. 1962)	Not reported	7 S. & D. 492.
(C.A. D.C. 1962)	Not reported	7 S. & D. 494.
(D.C. D.C. 1962)	Not reported	7 S. & D. 524.
(C.A. D.C. 1964)	336 F. 2d 754	7 S. & D. 956.
(C.A. D.C. 1967)	383 F. 2d 942	8 S. & D. 543.
Goodrich Co., The B.F., et al.; F.T.C. *v.*		
(C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
(Sup. Ct. 1965)	381 U.S. 739	7 S. & D. 1263.
Goodrich Co., The B.F.; U.S. *v.* (D.C.N.D. Ohio 1957)	Not reported	6 S. & D. 914.
Goodyear Tire & Rubber Co. *v.* F.T.C.		
(C.A. 6 1937)	92 F. 2d 677	2 S. & D. 422.
(C.A. 6 1939)	101 F. 2d 620	3 S. & D. 63.
Certiorari denied (1939)	308 U.S. 557	
(D.C.D.C. 1950)	88 F. Supp. 789	5 S. & D. 162.
(C.A. 7 1964)	331 F. 2d 394	7 S. & D. 900.
(Sup. Ct. 1965)	381 U.S. 357	7 S. & D. 1238.
Rehearing denied (1965)	382 U.S. 873	
(D.C. Del. 1975)	396 F. Supp. 1125	9 S. & D. 1293.
Goodyear Tire & Rubber Co., Inc., et al.; F.T.C. *v.*		
(Sup. Ct. 1938)	304 U.S. 257	2 S. & D. 456.
(C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
Gotlieb, Lenard, et al. (t/a Reed's Cut Rate Drug Store, etc.); F.T.C. *v.* (D.C.N.D. W. Va. 1940)	Not reported	3 S. & D. 686.
Graber Mfg. Co., Inc., et al. *v.* Paul Rand Dixon et al. (D.C.D.C. 1963)	233 F. Supp. 1020	7 S. & D. 810.
Graham, W. Earl, and Food Marketers, Inc.; F.T.C. *v.* (D.C.E.D. La. 1963)	Not reported	7 S. & D. 663.
Gramer, Walter W. *v.* F.T.C. (C.A. 9 1951)	Not reported	5 S. & D. 348.
Gramer, Walter W.; U.S. *v.* (D.C.D. Minn. 1956)	Not reported	6 S. & D. 911.
Grand Jury Proceedings, *In re* (C.A. 3 1962)	309 F. 2d 440	7 S. & D. 567.
Grand Rapids Furniture Co. *v.* F.T.C. (C.A.		

Name of Case	Reference	Reported in—
3 1943)	134 F. 2d 332	3 S. & D. 550.
Grand Rapids Varnish Co.; F.T.C. *v.* (C.A. 6 1929)	41 F. 2d 996	1 S. & D. 724.
Grand Union Co., The, *v.* F.T.C. (C.A. 2 1962)	300 F. 2d 92	7 S. & D. 329.
Graphited Lubricants Co. (Harry Augen d/b/a) *v.* F.T.C. (C.A. 2 1954)	Not reported	5 S. & D. 599.
Gratz et al.; F.T.C. *v.* (C.A. 2 1919)	258 Fed. 314	1 S. & D. 43.
(Sup. Ct. 1920)	253 U.S. 421	1 S. & D. 69.
Great Atlantic & Pacific Tea Co., The, *v.* F.T.C. (C.A. 3 1939)	106 F. 2d 667	3 S. & D. 146.
Certiorari denied (1940)	308 U.S. 625	
Great Atlantic & Pacific Tea Co., Inc., The, *v.* Orville L. Freeman (C.A.D.C. 1966)	369 F. 2d 952	8 S. & D. 368.
Great Minneapolis Surplus Store, Inc., The, et al.; U.S. *v.* (D.C.D. Minn. 1963)	Not reported	7 S. & D. 1443.
Great Western Distributing Co., et al. *v.* F.T.C. (C.A. 9 1964)	338 F. 2d 967	7 S. & D. 1029.
Greater Kansas City Gas & Air Conditioning Company, et al.; U.S. *v.* (D.C. W.D. Mo. 1975)	Not reported	9 S. & D. 1557.
Green, Harry W.; F.T.C. *v.* (D.C.S.D.N.Y. 1966)	252 F. Supp. 153	8 S. & D. 53.
Green Supply Co., etc.; F.T.C. *v.* (D.C.D. Minn. 1942)	Not reported	3 S. & D. 510.
Gross, Herman (Elliot Knitwear, Inc., et al.) *v.* F.T.C. (C.A. 2 1959)	266 F. 2d 787	6 S. & D. 566.
Grove Laboratories *v.* F.T.C. (C.A. 5 1969)	418 F. 2d 489	8 S. & D. 1041.
Grove Laboratories, Inc. *v.* F.T.C. (D.C.D.C. 1964)	Not reported	7 S. & D. 858.
Guaranteed Silverware Distributors, etc. (R. D. Anderson d/b/a); U.S. *v.* (D.C.W.D. Ky. 1965)	Not reported	8 S. & D. 1305.
Guarantee Veterinary Co. et al. *v.* F.T.C. (C.A. 2 1922)	285 Fed. 853	1 S. & D. 246.
Guignon, Paul C., et al. (Anheuser-Busch, Inc.); F.T.C. *v.* (D.C.E.D. Mo. 1966)	261 F. Supp. 215	8 S. & D. 377.
(C.A. 8 1968)	390 F. 2d 323	8 S. & D. 640.
Gulf Oil Corp. *v.* F.T.C. (C.A. 5 1945)	150 F. 2d 106	4 S. & D. 374.
Gulf Refining Co. *v.* F.T.C. (C.A. 3 1922)	282 Fed. 81	1 S. & D. 226.
Gulf Refining Co.; F.T.C. *v.* (Sup. Ct. 1923)	261 U.S. 463	1 S. & D. 306.
Guziak, John A. *v.* F.T.C. (C.A. 8 1966)	361 F. 2d 700	8 S. & D. 188.
Certiorari denied (1967)	385 U.S. 1007	
Gynex Corp. (Bureau of Hygiene); U.S. *v.* (D.C.S.D.N.Y. 1942)	Not reported	3 S. & D. 731.
H. R. Gibson, Sr., et al.; F.T.C. *v.* (C.A. 5 1972)	460 F. 2d 605	9 S. & D. 290.
H. R. Gibson, Sr., et al. *v.* Al Cohen, et al. (D.C. S.D. Texas 1975)	Not reported	9 S. & D. 1510.
H. R. Gibson, Sr., et al. *v.* Harold Hassenfeld, et al. (D.C. E.D. Tenn. 1975)	Not reported	9 S. & D. 1530.
Hall Clothes, Inc., Robert, et al.; U.S. *v.* (D.C.S.D.N.Y. 1957)	Not reported	6 S. & D. 913.
Hall, James B., Jr., Inc.; F.T.C. *v.* (C.A. 2 1933)	67 F. 2d 993	2 S. & D. 246.
Hall, Joseph B., et al. and The Kroger Co. *v.* William F. Lamke (D.C.N.D. Ill. 1962)	Not reported	7 S. & D. 470.
Hallmark, Inc., et al.; F.T.C. v (D.C.N.D. Ill. 1958)	170 F. Supp. 24	6 S. & D. 452.
(C.A. 7 1959)	265 F. 2d 433	6 S. & D. 539.
Halperin, Abe (Universal Educational Guild, Inc., et al.); U.S. *v.* (D.C.E.D.N.Y. 1966)	Not reported	8 S. & D. 1306.

Name of Case	Reference	Reported in—
Halperin, Isadore, et al. (t/a Wellworth Sales		3 S. & D. 472.
Co.) *v.* F.T.C. (C.A. 2 1942)	Not reported.	
Halseth, Perry (t/a Perry Sales Co.) *v.*		5 S. & D. 678.
F.T.C. (C.A. 7 1954)	Not reported.	
Certiorari denied (1955)	348 U.S. 928	
Hamilton Manufacturing Co. *v.* F.T.C. (C.A. D.C. 1952)	194 F. 2d 346	5 S. & D. 360.
Hammond Lumber Co.; F.T.C. *v.* (C.A. 9 1929)	Not reported	1 S. & D. 682.
Hammond, Snyder Co., Inc.; F.T.C. *v.* (D.C.D. Md. 1922)	284 Fed. 886	1 S. & D. 254.
(Sup. Ct. 1925)	267 U.S. 586	1 S. & D. 408.
Hansen Baking Co., Inc., et al. *v.* F.T.C. (C.A. 9 1966)	366 F. 2d 795	8 S. & D. 351.
Certiorari denied (1967)	386 U.S. 932	
Harbor Banana Distributors, Inc. *v.* F.T.C. (C.A. 5 1974)	499 F. 2d 395	9 S. & D. 1090.
Hargo Woolen Mills, Inc., et al.; U.S. *v.* (D.C.D.N.H. 1966)	Not reported	8 S. & D. 1305.
Harlem Paper Products Corp. et al. *v.* F.T.C. (C.A. 2 1957)	240 F. 2d 341	6 S. & D. 136.
Certiorari denied (1957)	355 U.S. 820	
Harlich Mfg. Co. (Leo Lichtenstein d/b/a) *v.* F.T.C. (C.A. 9 1952)	194 F. 2d 607	5 S. & D. 367.
Certiorari denied (1952)	344 U.S. 819	
(D.C.D.C. 1954)	Not reported	5 S. & D. 677.
Harrell, John R. and Natalia E.; F.T.C. *v.* (D.C.E.D. Ill. 1962)	205 F. Supp. 17	7 S. & D. 474.
(C.A. 7 1963)	313 F. 2d 854	7 S. & D. 643.
Harriet Hubbard Ayer, Inc. *v.* F.T.C. (C.A. 2 1926)	15 F. 2d 274	1 S. & D. 569.
Certiorari denied (1927)	273 U.S. 759	
Harry W. Green; F.T.C. *v.* (D.C.S.D.N.Y. 1966)	252 F. Supp. 153	8 S. & D. 53.
Harsam Distributors, Inc., et al. *v.* F.T.C. (C.A. 2 1959)	263 F. 2d 396	6 S. & D. 528.
Hartman Wholesale Drug Co., Inc., et al.; F.T.C. *v.* (D.C.N.D. Ill. 1938)	Not reported	3 S. & D. 629.
Haskelite Manufacturing Corp. *v.* F.T.C. (C.A. 7 1942)	127 F. 2d 765	3 S. & D. 485.
Hassenfeld, Harold, et al.; Gibson, H.R. Sr., et al. *v.* (D.C.E.D. Tenn. 1975)	Not reported	9 S. & D. 1530.
Hastings Manufacturing Co. *v.* F.T.C. (C.A. 6 1946)	153 F. 2d 253	4 S. & D. 460.
Certiorari denied (1946)	328 U.S. 853	
Hauptman Feather Co., Inc., et al.; U.S. *v.* (D.C.E.D.N.Y. 1957)	Not reported	6 S. & D. 914.
Hauptman, Jacob; U.S. *v.* (D.C.E.D. Pa. 1964)	Not reported	7 S. & D. 1445.
Haven Co. (Jonas Gerson t/a) *v.* F.T.C. (C.A. 7 1963)	325 F. 2d 93	7 S. & D. 821.
Haynes & Co., Inc., Justin, *v.* F.T.C. (C.A. 2 1939)	105 F. 2d 988	3 S. & D. 134.
Certiorari denied (1939)	308 U.S. 616	
Hearst Corp.; U.S. *v.* (D.C.S.D.N.Y. 1963)	Not reported	7 S. & D. 1444.
Heater, John Clifford *v.* F.T.C. (C.A. 9 1974)	503 F. 2d 321	9 S. & D. 1099.
Heavenly Creations, Inc., et al. *v.* F.T.C. (C.A. 2 1964)	339 F. 2d 7	7 S. & D. 1035.
Certiorari denied (1965)	380 U.S. 955	

Name of Case	Reference	Reported in—
Heinz Co., H.J., et al. *v.* F.T.C. (C.A. 7 1957)	246 F. 2d 458	6 S. & D. 355.
Heinz W. Kirchner (d/b/a Universe Co.) *v.* F.T.C. (C.A. 9 1964)	337 F. 2d 751	7 S. & D. 1018.
Helbros Watch Co., Inc., et al. *v.* F.T.C. (C.A.D.C. 1962)	310 F. 2d 868	7 S. & D. 596.
Certiorari denied (1963)	372 U.S. 976	
Helen Ardelle, Inc., et al. *v.* F.T.C. (C.A. 9 1939)	101 F. 2d 718	3 S. & D. 59.
Helene Curtis Industries, Inc.; U.S. *v.* (D.C.N.D. Ill. 1974)	Not reported	9 S. & D. 1556.
Heller & Son, Inc., L., et al. *v.* F.T.C. (C.A. 7 1951)	191 F. 2d 954	5 S. & D. 327.
Henry Broch & Co. *v.* F.T.C. (C.A. 7 1958)	261 F. 2d 725	6 S. & D. 464.
(C.A. 7 1960)	285 F. 2d 764	6 S. & D. 843.
Henry Broch & Co.; F.T.C. *v.* (Sup. Ct. 1960)	363 U.S. 166	6 S. & D. 800.
Henry Broch & Co.; F.T.C. *v.* (Sup. Ct. 1962)	368 U.S. 360	7 S. & D. 305.
Herbal Medicine Co. (George Earl McKewen et al. t/a); U.S. *v.* (D.C.D. Md. 1940)	Not reported	3 S. & D. 726.
Herbal Medicine Co. et al.; U.S. *v.* (D.C.D. Md. 1944)	Not reported	4 S. & D. 817.
Herbold Laboratory, Inc., et al.; U.S. *v.* (D.C.C.D. Calif. 1967)	267 F. Supp. 53	8 S. & D. 485.
(D.C.C.D. Calif. 1967)	Not reported	8 S. & D. 1307.
Herbold Laboratory, Inc., et al. *v.* U.S. (C.A. 9 1969)	413 F. 2d 342	8 S. & D. 977.
Hershey Chocolate Corp., et al. *v.* F.T.C. (C.A. 3 1941)	121 F. 2d 968	3 S. & D. 392.
Herzfeld et al. (d/b/a Stephen Rug Mills) *v.* F.T.C. (C.A. 2 1944)	140 F. 2d 207	4 S. & D. 109.
Herzog & Co., Jack; F.T.C. *v.* (C.A. 2 1945)	150 F. 2d 450	4 S. & D. 399.
(C.A. 2 1946)	Not reported	4 S. & D. 582.
Heuser, Herman, *v.* F.T.C. (C.A. 7 1925)	4 F. 2d 632	1 S. & D. 404.
Heusner & Son, H.N., *v.* F.T.C. (C.A. 3 1939)	106 F. 2d 596	3 S. & D. 136.
Hill, Joe B., et al. (t/a McAfee Candy Co., etc.) *v.* F.T.C. (C.A. 5 1941)	124 F. 2d 104	3 S. & D. 436.
Hillman Periodicals, Inc. *v.* F.T.C. (C.A. 2 1949)	174 F. 2d 122	5 S. & D. 103.
Hills Bros. *v.* F.T.C. (C.A. 9 1926)	9 F. 2d 481	1 S. & D. 467.
Certiorari denied (1926)	270 U.S. 662	
Hilton Watch & Clock Co., Inc., et al. *v.* F.T.C. (C.A.D.C. 1963)	Not reported	7 S. & D. 655.
Hindman, Seymour S. (Distinctive Emblem & Uniform Corp. et al.); U.S. *v.* (D.C.D.N.J. 1960)	179 F. Supp. 926	6 S. & D. 715.
(D.C.D.N.J. 1960)	Not reported	6 S. & D. 918.
Hires Turner Glass Co.; F.T.C. *v.* (C.A. 3 1935)	81 F. 2d 362	2 S. & D. 315.
Hirzel Canning Co., et al. *v.* F.T.C. (C.A. 7 1957)	246 F. 2d 458	6 S. & D. 355.
Hiss Shoes, Inc., Dr.; U.S. *v.* (D.C.S.D. Ohio 1956)	Not reported	6 S. & D. 912.
H.J. Heinz Co. et al. *v.* F.T.C. (C.A. 7 1957)	246 F. 2d 458	6 S. & D. 355.
H. M. Prince Textiles, Inc., et al.; U.S. *v.* (D.C.S.D.N.Y. 1966)	262 F. Supp. 383	8 S. & D. 1305.
H.N. Heusner & Son *v.* F.T.C. (C.A. 3 1939)	106 F. 2d 596	3 S. & D. 136.
Hobart Corporation *v.* F.T.C., et al. (D.C. Del. 1975)	396 F. Supp. 1125	9 S. & D. 1293.
Hoboken White Lead & Color Works Inc.; F.T.C. *v.* (C.A. 2 1931)	Not reported	2 S. & D. 108.
(C.A. 2 1933)	67 F. 2d 551	2 S. & D. 241.
Hofeller Candy Co., Bob, *v.* F.T.C. (C.A. 7 1936)	82 F. 2d 647	2 S. & D. 338.

Name of Case	Reference	Reported in—
Certiorari denied (1936)	299 U.S. 557	
(C.A. 7 1942)	Not reported	3 S. & D. 473.
Hoffberger, Samuel H. (Pompeian Olive Oil Corp.); F.T.C. *v.* (D.C.D. Md. 1956)	145 F. Supp. 164	6 S. & D. 42.
Hoffberger, Samuel H. (Pompeian Olive Oil Corp.), *v.* F.T.C. (C.A. 4 1957)	242 F. 2d 81	6 S. & D. 225.
Certiorari denied (1957)	353 U.S. 957	
Hoffman Aircraft Co. et al.; U.S. *v.* (D.C. Kans. 1967)	Not reported	8 S. & D. 1307.
Hoffman Engineering Co. (Nathan Hoffman d/b/a); F.T.C. *v.* (C.A. 2 1935)	Not reported	2 S. & D. 327.
Hoffmann, Royce George, et al.; U.S. *v.* (D.C. Kansas 1971)	Not reported	9 S. & D. 104.
Holiday Magic, Inc., et al. *v.* F.T.C. (D.C. D.C. 1973)	Not reported	9 S. & D. 602.
Holland Furnace Co. *v.* F.T.C. (C.A. 7 1959)	269 F. 2d 203	6 S. & D. 645.
Certiorari denied (1960)	361 U.S. 932	
Holland Furnace Co. *v.* F.T.C. (C.A. 7 1961)	295 F. 2d 302	7 S. & D. 234.
Holland Furnace Co. et al., *In re* (C.A. 7 1965)	341 F. 2d 548	7 S. & D. 1101.
Certiorari denied (1965)	381 U.S. 924	
Rehearing denied (1965)	382 U.S. 873	
Holland Furnace Co. *v.* James A. Purcell (D.C.W.D. Mich. 1954)	125 F. Supp. 74	5 S. & D. 679.
Holloway & Co., M.J., et al.; F.T.C. *v.* (C.A. 7 1936)	84 F. 2d 910	2 S. & D. 347.
Certiorari denied (1936)	299 U.S. 590	
(C.A. 7 1938)	94 F. 2d 802	2 S. & D. 439.
(C.A. 7 1940)	Not reported	3 S. & D. 263.
Hollywood Candy Co. (F.A. Martoccio Co. t/a); F.T.C. *v.* (C.A. 8 1937)	87 F. 2d 561	2 S. & D. 381.
Certiorari denied (1937)	301 U.S. 691	
Hollywood Film Studios; U.S. *v.* D.C. C.D. Calif. 1973)	Not reported	9 S. & D. 1555
Holst Publishing Co. et al.; U.S. *v.* (D.C.S.D. Iowa 1940)	Not reported	3 S. & D. 724.
Home Diathermy Co., Inc.; U.S. *v.* (D.C.S.D. N.Y. 1959)	Not reported	6 S. & D. 683.
(D.C.S.D.N.Y. 1959	Not reported	6 S. & D. 917.
Houbigant, Inc., et al. *v.* F.T.C. (C.A. 2 1944)	139 F. 2d 1019	4 S. & D. 107.
Certiorari denied (1944)	323 U.S. 763	
Hoving Corp. *v.* F.T.C. (C.A. 2 1961)	290 F. 2d 803	7 S. & D. 106.
Howard Co., J. M. (Esther Zitserman t/a) *v.* F.T.C. (C.A. 8 1952)	200 F. 2d 519	5 S. & D. 457.
Howe et al. *v.* F.T.C. (C.A. 9 1945)	148 F. 2d 561	4 S. & D. 328.
Certiorari denied (1945)	326 U.S. 741	
Hudson Co., The J.L., *v.* F.T.C. (C.A. 6 1941)	Not reported	3 S. & D. 373.
Hudson Fur Dyeing Co. (Louis Estrin et al. t/a) *v.* F.T.C. (C.A. 3 1942)	Not reported	3 S. & D. 441.
Hughes, Inc., E. Griffiths *v.* F.T.C. (C.A.D.C. 1933)	63 F. 2d 362	2 S. & D. 213.
(C.A. 2 1935)	77 F. 2d 886	2 S. & D. 300.
Certiorari denied (1935)	296 U.S. 617	
Hunter Mills Corp. et al. *v.* F.T.C. (C.A. 2 1960)	284 F. 2d 70	6 S. & D. 848.
Certiorari denied (1961)	366 U.S. 903	
Hunt Foods and Industries, Inc.; F.T.C. *v.* (D.C.S.D. Calif. 1959)	178 F. Supp. 448	6 S. & D. 673.
Hunt Foods and Industries, Inc. *v.* F.T.C. (C.A. 9 1960)	286 F. 2d 803	6 S. & D. 850.
Certiorari denied (1961)	365 U.S. 877	
Hurst & Son, T.C. *v.* F.T.C. (D.C.E.D. Va. 1920)	268 Fed. 874	1 S. & D. 81.

Name of Case	Reference	Reported in—
Huston, George W. *v.* Wayne E. Kaplan et al. (D.C.D.C. 1962)	Not reported	7 S. & D. 599.
Huttner, Daniel (Sanitary Feather Co.); U.S. *v.* (D.C.N.D. Ill. 1958)	Not reported	6 S. & D. 914.
Ice Cream Manufacturers, International Association of, et al. *v.* F.T.C. (D.C.S.C. 1936)	Not reported	2 S. & D. 337.
I. J. Fox, Inc., et al.; U.S. *v.* (D.C.N.D. Ohio 1963)	Not reported	7 S. & D. 1444.
Illinois Lumber & Material Dealers Assn., Inc. *v.* F.T.C. (C.A. 7 1938)	97 F. 2d 1005	2 S. & D. 466.
Imperial Candy Co. et al *v.* F.T.C. (C.A. 9 1939)	101 F. 2d 718	3 S. & D. 59.
In re , See name of party.		
Independent Directory Corp. et al. *v.* F.T.C. (C.A. 2 1951)	188 F. 2d 468	5 S. & D. 277.
Independent Grocers Alliance Distributing Co. *v.* F.T.C. (C.A. 7 1953)	203 F. 2d 941	5 S. & D. 519.
Indiana Quartered Oak Co. *v.* F.T.C. (C.A. 2 1928)	26 F. 2d 340	1 S. & D. 682.
Certiorari denied (1928)	278 U.S. 623	
(C.A. 2 1932)	58 F. 2d 182	2 S. & D. 184.
Inecto, Inc.; F.T.C. *v.* (C.A. 2 1934)	70 F. 2d 370	2 S. & D. 279.
(C.A. 2 1935)	Not reported	2 S. & D. 288.
Infra Insulation, Inc., et al. *v.* F.T.C. (C.A. D.C. 1953)	Not reported	5 S. & D. 591.
Ingersoll-Rand Co. (Grand Jury Proc.)(C.A. 3 1962)	309 F. 2d 440	7 S. & D. 567.
Ink Co. of America, The, etc. (Cornelius P. Van Schaack, Jr. t/a); U.S. *v.* (D.C.N.D. Ill. 1943)	Not reported	3 S. & D. 732.
Inland Rubber Corp.; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
Inland Steel Company *v.* F.T.C., et al. (D.C. Del. 1975)	396 F. Supp. 1125	9 S. & D. 1293
International Art Co., et al. *v.* F.T.C. (C.A. 7 1940)	109 F. 2d 393	3 S. & D. 188.
Certiorari denied (1940)	310 U.S. 632	
International Association of Ice Cream Manufacturers et al. *v.* F.T.C. (D.C.S.C. 1936)	Not reported	2 S. & D. 337.
International Association of Photographers et al.; U.S. *v.* (D.C.S.D. Calif. 1965)	Not reported	7 S. & D. 1449.
International Creditors Corp. (Melvin G. Rabin d/b/a); F.T.C. *v.* (D.C.E.D. Pa. 1969)	Not reported	8 S. & D. 1004.
International Paper Co.; F.T.C. *v.* (C.A. 2 1956)	241 F. 2d 372	6 S. & D. 119.
International Parts Corp. *v.* F.T.C. (C.A. 7 1943)	133 F. 2d 883	3 S. & D. 535.
International Salt Co.; U.S. *v.* (D.C.N.D. Ill. 1949)	80 F. Supp. 419	4 S. & D. 779.
(C.A. 7 1949)	174 F. 2d 703	5 S. & D. 125.
(Sup. Ct. 1950)	338 U.S. 632	5 S. & D. 167.
(D.C.N.D. Ill. 1951)	Not reported	5 S. & D. 800.
International Shoe Co. *v.* F.T.C. (C.A. 1 1928)	29 F. 2d 518	1 S. & D. 693.
(Sup. Ct. 1930)	280 U.S. 291	2 S. & D. 53.
Iric Manufacturing Co., Inc., et al.; F.T.C. *v.* (D.C.S.D. N.Y. 1957)	Not reported	6 S. & D. 908.
Ironized Yeast Co. (J.G. Dodson et al. t/a) *v.* F.T.C. (C.A. 6 1935)	Not reported	2 S. & D. 303.
Certiorari denied (1935)	296 U.S. 623	
Irving Drew Corp., The; U.S. *v.* (D.C.S.D. Ohio 1956)	Not reported	6 S. & D. 911.

Name of Case	Reference	Reported in—
Irving Rifkin; U.S. *v.* (D.C. S.D.N.Y. 1974)	Not reported	9 S. & D. 1556.
Irwin Fruchtman; U.S. *v.* (C.A. 6 1970)	421 F. 2d 1019	8 S. & D. 1103.
Certiorari denied (1970)	400 U.S. 849	
Irwin, Milton, et al. (t/a Associated Laboratories) *v.* F.T.C. (C.A. 8 1944)	143 F. 2d 316	4 S. & D. 198.
ITT Continental Baking Co.; U.S. *v.* (C.A. 10 1972)	462 F. 2d 1104	9 S. & D. 306.
(C.A. 10 1073)	485 F. 2d 16	9 S. & D. 775.
Certiorari granted (1974)	416 U.S. 968	
(Sup. Ct. 1975)	420 U.S. 223 95 S. Ct. 926	9 S. & D. 1187.
ITT Continental Baking Company *v.* F.T.C. (C.A.D.C. 1975)	515 F. 2d 367	9 S. & D. 1376.
Jack Herzog & Co.; F.T.C. *v.* (C.A. 2 1945)	150 F. 2d 450	4 S. & D. 399.
(C.A. 2 1946)	Not reported	4 S. & D. 582.
Jackson, Richard, et al.; F.T.C. *v.* (D.C.W.D. Wash. 1974)	Not reported	9 S. & D. 842.
Jackson Sales Co., The (Robert C. Bundy t/a) *v.* F.T.C. (C.A. 5 1941)	Not reported	3 S. & D. 417.
Jackson, William K.; Associated Merchandising Corp. et al. *v.* (D.C.D. Md. 1969)	Not reported	8 S. & D. 888.
Jacob Siegel Co. *v.* F.T.C. (C.A. 3 1944)	150 F. 2d 751	4 S. & D. 294.
(C.A. 3 1945)	Not reported	4 S. & D. 422.
(Sup. Ct. 1946)	327 U.S. 608	4 S. & D. 476.
Jacobson, Irving Roy, et al.; U.S. *v.* (D.C.W. D. Wis. 1944)	Not reported	4 S. & D. 817.
Jaffe, Benjamin *v.* F.T.C. (C.A. 7 1941)	123 F. 2d 814	3 S. & D. 422.
Jaffe (Eugene Russell) *v.* F.T.C. (C.A. 7 1943)	139 F. 2d 112	3 S. & D. 610.
Certiorari denied (1944)	321 U.S. 791	
J.A. Folger & Co. *v.* F.T.C. (C.A. 5 1964)	Not reported	7 S. & D. 857.
James, R.B., et al. (t/a Chicago Board Co.) *v.* F.T.C. (C.A. 7 1958)	253 F. 2d 78	6 S. & D. 385.
Certiorari denied (1958)	358 U.S. 821	
Jantzen, Inc.; F.T.C. *v.* (C.A. 9 1966)	356 F. 2d 253	8 S. & D. 59.
(Sup. Ct. 1967)	386 U.S. 228	8 S. & D. 425.
(C.A. 9 1967)	383 F. 2d 981	8 S. & D. 578.
J.B. Lippincott Co. *v.* F.T.C. (C.A. 3 1943)	137 F. 2d 490	3 S. & D. 584.
J.B. Williams Co., Inc., The, and Parkson Advertising Agency, Inc. *v.* F.T.C. (C.A. 6 1967)	381 F. 2d 884	8 S. & D. 524.
J. B. Williams Company, Inc., et al.; U.S. *v.* (D.C.S.D.N.Y. 1973)	354 F. Supp. 521	9 S. & D. 483.
(C.A. 2 1974)	498 F. 2d 414	9 S. & D. 938.
J. B. Williams Co., Inc.; F.T.C. *v.* (D.C.S.D.N.Y. 1975)	Not reported	9 S. & D. 1502.
J. C. Martin Co.; etc. (John Kaslow d/b/a) *v.* Paul Rand Dixon, et al. (D.C.D.C. 1963)	Not reported	7 S. & D. 665.
(C.A.D.C. 1963)	Not reported	7 S. & D. 703.
Certiorari denied (1964)	377 U.S. 907	
J. C. Martin Corp. *v.* F.T.C. (C.A. 3 1965)	346 F. 2d 147	7 S. & D. 1228.
Certiorari denied (1966)	382 U.S. 975	
J. C. Martin Corp. et al. *v.* F.T.C. (C.A. 7 1957)	242 F. 2d 530	6 S. & D. 251.
Jenkins, Edward L., et al. (t/a Antisepto Products Co., etc.); F.T.C. *v.* (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 649.
Jenkins, Roland S. (Artas Mfg. & Sales Corp., The, et al.); U.S. *v.* (D.C.N.D. Ohio 1966)	Not reported	8 S. & D. 1306.
Jergens-Woodbury Sales Corp. *v.* F.T.C. (C. A. 6 1943)	Not reported	3 S. & D. 550.
J.E. Todd, Inc. *v.* F.T.C. (C.A.D.C. 1944)	145 F. 2d 858	4 S. & D. 291.

Name of Case	Reference	Reported in—
Jerome Blank, President, National Brands, Inc., etc.; F.T.C. *v.* (D.C. S.D. Fla. 1973)	Not reported	9 S. & D. 814.
Jerry L. Feldman and Checker Taxi Company, Inc.; F.T.C. *v.* (D.C. N.D. Ill. 1975)	Not reported	9 S. & D. 1326.
Jewel Companies, Inc., et al. *v.* F.T.C.		
(C.A. 7 1970)	482 F. 2d 1155	8 S. & D. 1241.
(D.C. N.D. Ill. 1972)	Not reported	9 S. & D. 245.
(C.A. 7 1973)	479 F. 2d 1323	9 S. & D. 598.
J.L. Hudson Co., The, *v.* F.T.C. (C.A. 6 1941)	Not reported	3 S. & D. 373.
J. M. Howard Co. (Esther Zitserman t/a) *v.* F.T.C. (C.A. 8 1952)	200 F. 2d 519	5 S. & D. 457.
Joe Fried Woolen Corp., et al.; U.S. *v.* (D.C. S.D.N.Y. 1960)	Not reported	6 S. & D. 917.
John A. Guziak *v.* F.T.C. (C.A. 8 1966)	361 F. 2d 700	8 S. & D. 188.
Certiorari denied (1967)	385 U.S. 1007	
John Bodner, Jr., and Shell Oil Co. *v.* F.T.C., et al.		
(D.C. D.C. 1974)	Not reported	9 S. & D. 1122.
(D.C. D.C. 1975)	Not reported	9 S. & D. 1161.
(D.C. D.C. 1975)	Not reported	9 S. & D. 1227.
John Clifford Heater, et al. *v.* F.T.C. (C.A. 9 1974)	503 F. 2d 321	9 S. & D. 1099.
John H. Pahlman (Anheuser-Busch, Inc.); F.T.C. *v.* (C.A. 8 1968)	390 F. 2d 323	8 S. & D. 640.
John J. Fulton Co. *v.* F.T.C. (C.A. 9 1942)	130 F. 2d 85	3 S. & D. 499.
Certiorari denied (1942)	317 U.S. 679	
John Spector *v.* F.T.C., et al. (D.C. S.D. Calif. 1973)	Not reported	9 S. & D. 612.
Johnson Candy Co., Walter H. *v.* F.T.C. (C.A. 7 1935)	78 F. 2d 717	2 S. & D. 303.
Johnson Hair and Scalp Clinic *v.* F.T.C. (C.A. 5 1959)	266 F. 2d 560	6 S. & D. 572.
Certiorari denied (1959)	361 U.S. 914	
Jones Co., Inc., H.C.; F.T.C. *v.* (D.C.D. Md. 1922)	284 Fed. 886	1 S. & D. 254.
(Sup. Ct. 1925)	267 U.S. 586	1 S. & D. 408.
Jorgensen, Glen E. and C.I.T. Financial Corporation; F.T.C. *v.* (D.C. D.C. 1975)	Not reported	9 S. & D. 1352.
Joseph A. Kaplan & Sons, Inc. *v.* F.T.C. (C.A.D.C. 1965)	347 F. 2d 785	7 S. & D. 1204.
Joseph Campbell Co. et al. *v.* F.T.C. (C.A. 7 1957)	246 F. 2d 458	6 S. & D. 355.
Joseph J. Broussard *v.* Socony Mobile Oil Co., Inc. et al. (C.A. 5 1965)	350 F. 2d 346	7 S. & D. 1294.
Joseph S. Kujawski; F.T.C. *v.* (D.C.N.D. Ga. 1969)	298 F. Supp. 1288	8 S. & D. 907.
Joyce Alexander; F.T.C. *v.* (D.C.N.D. Ga. 1969)	298 F. Supp. 1288	8 S. & D. 907.
J. Silverman & Associates, etc. (Jack Silverman t/a) *v.* F.T.C. (C.A. 9 1944)	145 F. 2d 751	4 S. & D. 283.
J. Silverman & Associates, etc. (Michel Lipman et al. t/a) *v.* F.T.C. (C.A. 9 1945)	148 F. 2d 823	4 S. & D. 322.
Judson L. Thomson Mfg. Co. *v.* F.T.C. (C.A. 1 1945)	150 F. 2d 952	4 S. & D. 412.
Certiorari denied (1945)	326 U.S. 776	
Julius Levitt; F.T.C. *v.* (D.C.N.D. Ga. 1969)	298 F. Supp. 1288	8 S. & D. 907.
Juniperwood Ranch, Inc.; F.T.C. *v.* (D.C. C.D. Calif. 1975	Not reported	9 S. & D. 1260.
Justin Haynes & Co., Inc. *v.* F.T.C. (C.A. 2		

Name of Case	Reference	Reported in—
1939)	105 F. 2d 988	3 S. & D. 134.
Certiorari denied (1939)	308 U.S. 616	
Juvenile Shoe Co., Inc. *v.* F.T.C. (C.A. 9 1923)	289 Fed. 57	1 S. & D. 313.
Certiorari denied (1923)	263 U.S. 705	
J. Weingarten, Inc. *v.* F.T.C. (D.C.E.D. Tex. 1963)	Not reported	7 S. & D. 736.
J. Weingarten, Inc.; F.T.C. *v.* (C.A. 5 1964)	336 F. 2d 687	7 S. & D. 1000.
Certiorari denied (1965)	380 U.S. 908	
J. Weller Co. et al. *v.* F.T.C. (C.A. 7 1957)	246 F. 2d 458	6 S. & D. 355.
K. & S. Sales Co. et al.; U.S. *v.* (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 723.
Kagen Corp., Theodore, et al. *v.* F.T.C. (C.A. D.C. 1960)	283 F. 2d 371	6 S. & D. 837.
Certiorari denied (1961)	365 U.S. 843	
Kalin, Benjamin D.; U.S. *v.* (D.C. N.D. W.D. Ia. 1971)	Not reported	9 S. & D. 1553.
Kalwajtys, Ray S. et al. (d/b/a General Products Corp.) *v.* F.T.C. (C.A. 7 1956)	237 F. 2d 654	6 S. & D. 72.
Certiorari denied (1957)	352 U.S. 1025	
Kalwajtys, Ray S., et al., (d/b/a General Products Corp.); U.S. *v.* (D.C.N.D. Ill. 1959)	Not reported	6 S. & D. 917.
Kaplan & Sons, Inc., Joseph A., *v.* F.T.C. (C.A.D.C. 1965)	347 F. 2d 785	7 S. & D. 1204.
Kaplan, Blanche (t/a Progressive Medical Co., etc.); F.T.C. *v.* (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 656.
Kaplan, Wayne E., et al.; Eugene T. Wanderer *v.* (D.C.D.C. 1962)	Not reported	7 S. & D. 523.
Kaplan, Wayne E., et al.; Eugene T. Wanderer et al. (Midwest Warehouse Distributors, Inc.) *v.* (D.C.D.C. 1962)	Not reported	7 S. & D. 599.
Karns, Saul J.; U.S. *v.* (D.C.S.D.N.Y. 1964)	Not reported	7 S. & D. 1445.
Karol, Irene, *v.* F.T.C. (C.A. 2 1952)	194 F. 2d 504	5 S. & D. 374.
Kaslow, John (d/b/a J.C. Martin Co., etc.). *v.* Paul Rand Dixon et al. (D.C.D.C. 1963)	Not reported	7 S. & D. 665.
(C.A.D.C. 1963)	Not reported	7 S. & D. 703.
Certiorari denied (1964)	377 U.S. 907	
Kastor & Bros., Inc., Adolph, *v.* F.T.C. (C.A. 2 1943)	138 F. 2d 824	3 S. & D. 612.
Kay, Abbott E.; F.T.C. *v.* (C.A. 7 1929)	35 F. 2d 160	1 S. & D. 1162.
Certiorari denied (1930)	281 U.S. 764	
Keasbey & Mattison Co. et al. *v.* F.T.C. (C.A. 6 1947)	159 F. 2d 940	4 S. & D. 605.
Keele Hair & Scalp Specialists, Inc., et al *v.* F.T.C. (C.A. 5 1960)	275 F. 2d 18	6 S. & D. 719.
Keller, Louis et al. (d/b/a Casey Concession Co.) *v.* F.T.C. (C.A. 7 1942)	132 F. 2d 59	3 S. & D. 520.
Kelley, James; F.T.C. *v.* (C.A. 2 1937)	87 F. 2d 1004	2 S. & D. 381.
Kent Fur Co., et al.; F.T.C. *v.* (C.A. 7 1937)	88 F. 2d 1008	2 S. & D. 380.
Ken Whitmore, Inc., et al.; F.T.C. *v.* (D.C.D. Mass. 1953)	Not reported	5 S. & D. 784.
Kennecott Copper Corp. *v.* F.T.C. (C.A. 10 1972)	467 F. 2d 67	9 S. & D. 341.
Keppel & Bro., Inc., R.F., *v.* F.T.C. (C.A. 3 1933)	63 F. 2d 81	2 S. & D. 204.
Keppel & Bro., Inc., R.F.; F.T.C. *v.* (Sup. Ct. 1934)	291 U.S. 304	2 S. & D. 259.
Kerran, Frank A., et al. (d/b/a Double Eagle Refining Co.) *v.* F.T.C. (C.A. 10 1959)	265 F. 2d 246	6 S. & D. 533.
Certiorari denied (1959)	361 U.S. 818	
Keuffel & Esser Co. et al. *v.* F.T.C. (C.A. 7 1944)	142 F. 2d 321	4 S. & D. 117.
Certiorari denied (1944)	323 U.S. 730	

Name of Case	Reference	Reported in—
Kidder Oil Co. *v.* F.T.C. (C.A. 7 1941)	117 F. 2d 892	3 S. & D. 317.
Kinney-Rome Co. *v.* F.T.C. (C.A. 7 1921)	275 Fed. 665	1 S. & D. 140.
Kirchner, Heinz W. (d/b/a Universe Co.) *v.* F.T.C. (C.A. 9 1964)	337 F. 2d 751	7 S. & D. 1018.
Kirt & Co., James S., et al. *v.* F.T.C. (C.A.7 1932)	59 F. 2d 179	2 S. & D. 172.
Certiorari denied (1932)	287 U.S. 663	
Kirschmann Lumber Co.; F.T.C. *v.* (C.A. 2 1929)	Not reported	1 S. & D. 682.
Klapp, Charles L., (t/a The Cardinal Co., etc.); F.T.C. *v.* (D.C.E.D. Mo. 1939)	Not reported	3 S. & D. 651.
Klesner, Alfred (d/b/a Shade Shop); F.T.C. *v.* (C.A.D.C. 1925)	6 F. 2d 701	1 S. & D. 430.
(Sup. Ct. 1927)	274 U.S. 145	1 S. & D. 608.
(C.A.D.C. 1928)	25 F. 2d 524	1 S. & D. 677.
(Sup. Ct. 1929)	280 U.S. 19	1 S. & D. 1166.
Klimate-Pruf Manufacturing Co.; U.S. *v.* (D.C.M.D.N.C. 1940)	Not reported	3 S. & D. 725.
Knoll Associates, Inc. *v.* F.T.C. (C.A. 7 1968)	397 F. 2d 530	8 S. & D. 772.
Knoll Associates, Inc. *v.* Paul Rand Dixon et al. (D.C.S.D.N.Y. 1964)	232 F. Supp. 283	7 S. & D. 937.
Kobi Co., J.W., *v.* F.T.C. (C.A. 2 1927)	23 F. 2d 41	1 S. & D. 661.
Koch, Carl E., et al.; U.S. *v.* (D.C.N.D. Ill. 1942)	Not reported	3 S. & D. 730.
Koch et al. *v.* F.T.C. (C.A. 6 1953)	206 F. 2d 311	5 S. & D. 552.
Koch Laboratories, Inc. (William F. Koch, et al.); F.T.C. *v.* (D.C.E.D. Mich 1942)	Not reported	3 S. & D. 720.
Koch Laboratories, Inc., et al. *v.* F.T.C. (C.A. 6 1944)	Not reported	4 S. & D. 811.
Kongo Chemical Co., Inc.; U.S. *v.* (D.C.S.D. N.Y. 1944)	Not reported	4 S. & D. 818.
Koolish, Philip Harry, et al. (t/a Standard Distributing Co.) *v.* F.T.C. (C.A. 7 1942)	129 F. 2d 64	3 S. & D. 492.
Certiorari denied (1942)	317 U.S. 683	
(C.A. 7 1942)	Not reported	3 S. & D. 497.
Korber Hats, Inc., et al. *v.* F.T.C. (C.A. 1 1962)	311 F. 2d 358	7 S. & D. 611.
Koscot Interplanetary, Inc. (D.C. M.D. Fla. 1973)	Not reported	9 S. & D. 786.
Koscot Interplanetary, Inc.; U.S. *v.* (D.C. M.D. Fla. 1973)	Not reported	9 S. & D. 791.
(D.C. M.D. Fla. 1973)	Not reported	9 S. & D. 805.
Koster-Pearl Furs, Inc., et al.; U.S. *v.* (D.C. S.D.N.Y. 1962)	Not reported	7 S. & D. 1443.
Kritzik, David (d/b/a General Merchandise Co.) *v.* F.T.C. (C.A. 7 1942)	125 F. 2d 351	3 S. & D. 444.
Kroger Co., The, and Beatrice Foods Co. *v.* F.T.C. (D.C.D.C. 1966)	Not reported	8 S. & D. 139.
(C.A.D.C. 1966)	Not reported	8 S. & D. 142.
Kroger Co., The, and Joseph B. Hall et al. *v.* William F. Lemke (D.C.N.D. Ill. 1962)	Not reported	7 S. & D. 470.
Kroger Co. *v.* F.T.C. (C.A. 6 1971)	438 F. 2d 1372	9 S. & D. 9.
Certiorari denied (1971)	404 U.S. 871	
Kuehn, Fred V., *v.* Wayne E. Kaplan et al. (D.C.D.C. 1962)	Not reported	7 S. & D. 699.
Kujawski, Joseph S.; F.T.C. *v.* (D.C.N.D. Ga. 1969)	298 F. Supp. 1288	8 S. & D. 907.
Kulin Waste Co. et al.; F.T.C. *v.* (D.C.D. Mass. 1957)	Not reported	6 S. & D. 906.
Kulin Waste Co., et al. (Michael Silver) *v.* F.T.C. (C.A. 1 1960)	Not reported	6 S. & D. 837.

Name of Case	Reference	Reported in—
Lady Carole Coats, Inc., et al.; U.S. *v.* (D.C. S.D.N.Y. 1954)	Not reported	5 S. & D. 807.
Lafayette Iron Works, Inc.; U.S. *v.* (D.C.D. N.J. 1964)	Not reported	7 S. & D. 917.
Lake Erie Canning Co. of Sandusky et al. *v.* F.T.C. (C.A. 7 1957)	246 F. 2d 458	6 S. & D. 355.
Lakeland Nurseries Sales Corp. *v.* F.T.C. (D.C.D.C. 1962)	Not reported	7 S. & D. 593.
L. & C. Mayers Co., Inc. *v.* F.T.C. (C.A. 2 1938)	97 F. 2d 365	2 S. & D. 460.
Lane, Albert, *v.* F.T.C. (C.A. 9 1942)	130 F. 2d 48	3 S. & D. 501.
Langendorf United Bakeries, Inc. *v.* F.T.C. (C.A. 9 1966)	366 F. 2d 795	8 S. & D. 351.
Certiorari denied (1967)	386 U.S. 932	
Lanteen Laboratories, Inc.; U.S. *v.* (D.C.N.D. Ill. 1945)	Not reported	4 S. & D. 821.
LaPeyre, Emile M., et al. *v.* F.T.C. (C.A. 5 1966)	366 F. 2d 117	8 S. & D. 343.
La Salle Extension University *v.* F.T.C. (C.A. 7 1954)	Not reported	5 S. & D. 707.
(C.A. 7 1973)	Not reported	9 S. & D. 793.
Certiorari denied (1974)	417 U.S. 909	
La Salle Extension University et al. (Stenographic Machines, Inc.) *v.* F.T.C. (C.A. 7 1955)	Not reported	5 S. & D. 739.
(C.A. 7 1956)	233 F. 2d 755	6 S. & D. 14.
Lawrence Blanket Company et al.; U.S. *v.* (D.C. Mass. 1965)	Not reported	7 S. & D. 1449.
Lawrence, Herbert E., *v.* Wayne E. Kaplan, et al. (D.C.D.C. 1962)	Not reported	7 S. & D. 599.
Lazar, Buryl J., et al. (t/a Globe Feather & Down Co.) *v.* F.T.C. (C.A. 7 1957)	240 F. 2d 176	6 S. & D. 167.
L. Buchman Co., Inc., The, et al. *v.* F.T.C. (C.A. 2 1956)	235 F. 2d 344	6 S. & D. 30.
Leach & Co., G.; U.S. *v.* (D.C.E.D. Pa. 1944)	Not reported	4 S. & D. 819.
Leader Novelty Candy Co., Inc.; F.T.C. *v.* (C.A. 2 1937)	92 F. 2d 1002	2 S. & D. 418.
Leavitt, Louis, *v.* F.T.C. (C.A. 2 1926)	16 F. 2d 1019	1 S. & D. 582.
Leavitt, Louis, *In re* (C.A. 2 1935)	Not reported	2 S. & D. 334.
Lee Boyer's Candy *v.* F.T.C. (C.A. 9 1942)	128 F. 2d 261	3 S. & D. 487.
Lee Co., George H.; F.T.C. *v.* (C.A. 8 1935)	76 F. 2d 1008	2 S. & D. 291.
Lee Co., George H., *v.* F.T.C. (C.A. 8 1940)	113 F. 2d 583	3 S. & D. 277.
Lee et al. (Sherwin et al.); U.S. *v.* (D.C.N.D. Tex. 1923)	290 Fed. 517	1 S. & D. 1006.
Lee et al. (Sherwin et al.); U.S. *v.* (C.A. 5 1924)	297 Fed. 704	1 S. & D. 1046.
(Sup. Ct. 1925)	268 U.S. 369	1 S. & D. 1065.
Lee Rubber & Tire Corp.; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
Lehigh Portland Cement Co. *v.* F.T.C. (D.C.E.D. Va. 1967)	Not reported	8 S. & D. 523.
(D.C.E.D. Va. 1968)	291 F. Supp. 628	8 S. & D. 849.
(C.A. 4 1969)	416 F. 2d 971	8 S. & D. 1053.
Lehigh Portland Cement Co. (Ralph L. Browning); F.T.C. *v.* (C.A.D.C. 1970)	435 F. 2d 96	8 S. & D. 1273.
Lehrman Furs, Inc., et al.; U.S. *v.* (D.C.S.D. N.Y. 1961)	Not reported	7 S. & D. 1439.
Leila Mourning *v.* Family Publications Service, Inc. (Sup. Ct. 1973)	411 U.S. 356 93 S. Ct. 1652	9 S. & D. 638.
Leisenring, Edwin L., et al. (t/a U.S. Drug		

Name of Case	Reference	Reported in—
& Sales Co., etc.); F.T.C. *v.* (D.C.D. Colo. 1940)	Not reported	3 S. & D. 666.
Lekas & Drivas, Inc. *v.* F.T.C. (C.A. 2 1944)	145 F. 2d 976	4 S. & D. 293.
Lemke, William F.; Joseph B. Hall et al. (and The Kroger Co.) *v.* (D.C.N.D. Ill. 1962)	Not reported	7 S. & D. 470.
Lenco Spring Co. (Maurice J. Lenett et al. d/b/a) *v.* F.T.C. (C.A.D.C. 1953)	Not reported	5 S. & D. 529.
Lenco Spring Co. (Maurice J. Lenett et al. d/b/a); U.S. *v.* (D.C.D. Mass. 1962)	Not reported	7 S. & D. 1442.
Lenett, Maurice J., et al. (d/b/a Lenco Spring Co.) *v.* F.T.C. (C.A.D.C. 1953)	Not reported	5 S. & D. 529.
Lenett, Maurice J., et al. (d/b/a Lenco Spring Co.); U.S. *v.* (D.C.D. Mass. 1962)	Not reported	7 S. & D. 1442.
Lenox, Inc. *v.* F.T.C. (C.A. 2 1969)	417 F. 2d 126	8 S. & D. 1037.
Leon A. Tashof *v.* F.T.C. (C.A.D.C. 1970)	437 F. 2d 707	8 S. & D. 1291.
Lesinsky Co., H., *v.* F.T.C. (C.A. 5 1922)	277 Fed. 657	1 S. & D. 181.
Lester S. Cotherman et al. *v.* F.T.C. (C.A. 5 1969)	417 F. 2d 587	8 S. & D. 1008.
Lever Bros. Co. *v.* F.T.C.		
(D.C. Me. 1971)	325 F. Supp. 371	9 S. & D. 60.
(C.A. 1 1971)	Not reported	9 S. & D. 65.
Levitt, Julius; F.T.C. *v.* (D.C.N.D. Ga. 1969)	298 F. Supp. 1288	8 S. & D. 907.
Levore Co. et al.; U.S. *v.* (D.C.N.D. Ill. 1941)	Not reported	3 S. & D. 728.
Lewyn Drug, Inc.; F.T.C. *v.* (D.C.S.D. Calif. 1939)	Not reported	3 S. & D. 633.
L.G. Balfour Co. et al. *v.* F.T.C. (D.C.E.D. Va. 1964)	Not reported	7 S. & D. 889.
(C.A. 7 1971)	442 F. 2d 1	9 S. & D. 26.
L. Heller & Son, Inc., et al. *v.* F.T.C. (C.A. 7 1951)	191 F. 2d 954	5 S. & D. 327.
Libbey-Owens-Ford Glass Co. *v.* F.T.C. (C.A. 6 1965)	352 F. 2d 415	7 S. & D. 1409.
Liberty Co., etc. (Joe B. Hill et al. t/a) *v.* F.T.C. (C.A. 5 1941)	124 F. 2d 104	3 S. & D. 436.
Lichtenstein, et al. *v.* F.T.C. (C.A. 9 1952)	194 F. 2d 607	5 S. & D. 367.
Certiorari denied (1952)	344 U.S. 819	
Lichtenstein, Leo (d/b/a Harlich Mfg. Co.) *v.* F.T.C. (D.C.D.C. 1954)	Not reported	5 S. & D. 677.
Liggett & Myers Tobacco Co. *v.* F.T.C. (D.C.S.D.N.Y. 1952)	108 F. Supp. 573	5 S. & D. 450.
Liggett & Myers Tobacco Co.; F.T.C. *v.* (C.A. 2 1953)	203 F. 2d 955	5 S. & D. 527.
Liggett & Myers, Inc. *v.* Lewis A. Engman, et al.		
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1446.
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1525.
(C.A. 2 1975)	527 F. 2d 115	9 S. & D. 1542.
Lighthouse Rug Co. *v.* F.T.C. (C.A. 7 1929)	35 F. 2d 163	1 S. & D. 1172.
Lipman, Michel, et al. (t/a Chief Statistician, etc.) *v.* F.T.C. (C.A. 9 1945)	148 F. 2d 823	4 S. & D. 322.
Lippincott Co., J.B., *v.* F.T.C. (C.A. 3 1943)	137 F. 2d 490	3 S. & D. 584.
Lipton, Thomas J., Inc. *v.* F.T.C., et al. (D.C. Del. 1975)	396 F. Supp. 1125	9 S. & D. 1293.
Liquor Trades Stabilization Bureau, Inc., et al. *v.* F.T.C. (C.A. 9 1941)	121 F. 2d 455	3 S. & D. 377.
Lisner & Co., L., *v.* F.T.C. (C.A. 7 1951)	191 F. 2d 954	5 S. & D. 327.
Litchfield Woolen Mills Co. et al.; U.S. *v.* (D.C.D. Minn. 1964)	Not reported	7 S. & D. 1447.
Litton Industries; U.S. *v.* (C.A. 9 1972)	462 F. 2d 14	9 S. & D. 299.
Livingston Automotive Supply Co., Inc., et		

Name of Case	Reference	Reported in—
al. *v.* F.T.C. (C.A. 2 1954)	Not reported	5 S. & D. 599.
Livingston, Jules (t/a Maryland Distributors, etc.,); U.S. *v.* (D.C.D. Md. 1957)	Not reported	6 S. & D. 914.
L. Lisner & Co. *v.* F.T.C. (C.A. 7 1951)	191 F. 2d 954	5 S. & D. 327.
Lloyd A. Fry Roofing Co. et al *v.* F.T.C. (C.A. 7 1966)	371 F. 2d 277	8 S. & D. 401.
L. M. Clothing Co., Inc., et al.; U.S. *v.* (D.C.S.D.N.Y. 1961)	Not reported	7 S. & D. 1439.
Loesch Hair Experts *v.* F.T.C. (C.A. 4 1958)	257 F. 2d 882	6 S. & D. 428.
Certiorari denied (1958)	358 U.S. 883	
Loesch, William T.; U.S. *v.* (D.C.S.D. Tex. 1963)	Not reported	7 S. & D. 1443.
Loew's Theatres, Inc. *v.* Lewis A. Engman, et al. (D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1446.
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1525.
(C.A. 2 1975)	527 F. 2d 115	9 S. & D. 1542.
Lomax, H. L. (t/a Lomax Rug Mills) *v.* F.T.C. (C.A. 3 1932)	Not reported	2 S. & D. 160.
Lone Star Cement Corp. *v.* F.T.C. (D.C.W.D. Wash. 1964)	Not reported	7 S. & D. 922.
(C.A. 9 1964)	339 F. 2d 505	7 S. & D. 1060.
Loomis, Worth; F.T.C. *v.* (C.A.D.C. 1970)	430 F. 2d 510	8 S. & D. 1212.
Loose-Wiles Biscuit Co. *v.* F.T.C. (C.A. 2 1924)	299 Fed. 733	1 S. & D. 345.
Certiorari denied (1924)	266 U.S. 613	
Lorillard Co., P.; F.T.C. *v.* (D.C.S.D.N.Y. 1922)	283 Fed. 999	1 S. & D. 239.
(Sup. Ct. 1924)	264 U.S. 298	1 S. & D. 341.
Lorillard Co., P., *v.* F.T.C. (C.A. 4 1950)	186 F. 2d 52	5 S. & D. 210.
Lorillard Co., P., *v.* F.T.C. (C.A. 3 1959)	267 F. 2d 439	6 S. & D. 575.
Certiorari denied (1959)	361 U.S. 923	
Lorilland Co., P., *In re* (C.A. 4 1959)	Not reported	6 S. & D. 490.
Loughran, Alma, et al. (t/a Alma's Home Made Candies) *v.* F.T.C. (C.A. 8 1944)	143 F. 2d 431	4 S. & D. 214.
Love Television & Stereo Rental, Inc., et al. *v.* F.T.C. (C.A. 5 1974)	498 F. 2d 1088	9 S. & D. 1158.
Lowenthal, Edward (t/a Thomas Webster, etc.,); U.S. *v.* (D.C.N.D. Ill. 1956)	Not reported	6 S. & D. 912.
(C.A. 7 1957)	248 F. 2d 397	6 S. & D. 365.
(D.C.D. Ariz. 1959)	Not reported	6 S. & D. 916.
Lucas, William L.; F.T.C. *v.* (C.A.D.C. 1970)	430 F. 2d 510	8 S. & D. 1212.
Lukens Steel Co. and United States Steel Corp. *v.* F.T.C. (D.C. D.C. 1975)	Not reported	9 S. & D. 1317.
Luria Brothers and Co., Inc., et al. *v.* F.T.C. (C.A. 3 1968)	389 F. 2d 847	8 S. & D. 615.
Certiorari denied (1968)	393 U.S. 829	
Lustberg, Nast & Co., Inc. *v.* F.T.C. (C.A. 2 1944)	Not reported	4 S. & D. 185.
Luxurious Woolens, Ltd., et al.; F.T.C. *v.* (D.C.S.D.N.Y. 1955)	Not reported	5 S. & D. 790.
Lytle, Andrew J. et al. *v.* F.T.C. (C.A. 6 1944)	Not reported	4 S. & D. 270.
MacFadden Publications, Inc. *v.* F.T.C. (D.C. S.C. 1929)	Not reported	1 S. & D. 704.
(C.A.D.C. 1930)	37 F. 2d 822	2 S. & D. 65.
MacFadden Publications, Inc., et al.; U.S. *v.* (D.C.S.D.N.Y. 1965)	Not reported	7 S. & D. 1449.
Macher Watch & Jewelry Co., etc. *v.* F.T.C. (C.A. 2 1942)	126 F. 2d 420	3 S. & D. 467.
Macy & Co., Inc., R.H., *v.* F.T.C. (C.A. 2		

Name of Case	Reference	Reported in—
1964)	326 F. 2d 445	7 S. & D. 849.
Macy & Co., Inc., R. H., *v.* Wilmer L. Tinley et al. (D.C.D.C. 1965)	249 F. Supp. 778	7 S. & D. 1430.
Madway Main Line Homes, Inc., et al. (Main Line Lumber & Millwork Co. et al.); U.S. *v.* (D.C.E.D. Pa. 1966)	Not reported	8 S. & D. 1305.
Magic Weave, Inc., et al.; U.S. *v.* (D.C.D. Mass. 1962)	Not reported	7 S. & D. 1442.
Magnaflo Co., Inc. *v.* F.T.C. (C.A.D.C. 1965)	343 F. 2d 318	7 S. & D. 1122.
Magnecoil Co., Inc.; U.S. *v.* (D.C.D. Utah 1945)	Not reported	4 S. & D. 822.
Mahler Co., Inc., D.J.; F.T.C. *v.* (D.C.R.I. 1940)	Not reported	3 S. & D. 691.
Mahler's, Inc., et al.; F.T.C. *v.* (D.C.D.R.I. 1954)	Not reported	5 S. & D. 634.
Main Line Lumber & Millwork Co. et al. (Madway Main Line Homes, Inc., et al.); U.S. *v.* (D.C.E.D. Pa. 1966)	Not reported	8 S. & D. 1305.
Maisel Trading Post, Inc.; F.T.C. *v.* (C.A. 10 1935)	77 F. 2d 246	2 S. & D. 292.
(C.A. 10 1935)	79 F. 2d 127	2 S. & D. 319.
(C.A. 10 1936)	84 F. 2d 768	2 S. & D. 355.
Maison-Pichel, Inc.; F.T.C. *v.* (D.C.S.D. N.Y. 1934)	Not reported	2 S. & D. 266.
Maloney Oil & Mfg. Co. *v.* F.T.C. (C.A. 3 1922)	282 Fed. 81	1 S. & D. 226.
Maloney Oil & Mfg. Co.; F.T.C. *v.* (Sup. Ct. 1923)	261 U.S. 463	1 S. & D. 306.
Maltz, Marshall (Peerless Products, Inc.), et al. *v.* F.T.C. (C.A. 7 1960)	284 F. 2d 825	6 S. & D. 844.
Certiorari denied (1961)	365 U.S. 844	
Maltz, Marshall (t/a Benmar Sales Co.) *v.* F.T.C. (C.A. 7 1955)	Not reported	5 S. & D. 740.
Manager, Retail Credit Company, Miami Branch Office; F.T.C. *v.* (D.C. D.C. 1973)	357 F. Supp. 347	9 S. & D. 629.
(C.A. D.C. 1975)	515 F. 2d 988	9 S. & D. 1246.
Mandel Brothers, Inc. *v.* F.T.C. (C.A. 7 1958)	254 F. 2d 18	6 S. & D. 388.
Mandel Brothers, Inc.; F.T.C. *v.* (Sup. Ct. 1959)	359 U.S. 385	6 S. & D. 557.
Mandel Brothers, Inc., et al. *v.* F.T.C. (C.A. 7 1941)	Not reported	3 S. & D. 371.
Manhattan Brewing Co. *v.* F.T.C. (C.A. 7 1946)	Not reported	4 S. & D. 454.
Mannis, Samuel A. (t/a Samuel A. Mannis & Co.) *v.* F.T.C. (C.A. 9 1961)	293 F. 2d 774	7 S. & D. 214.
Mansfield Tire & Rubber Co., The; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
Marcel Co. (Grady L. Rushing d/b/a) *v.* F.T.C. (C.A. 5 1963)	320 F. 2d 280	7 S. & D. 731.
Certiorari denied (1964)	375 U.S. 986	
March of Time Candies, Inc., et al. *v.* F.T.C. (C.A. 7 1939)	104 F. 2d 999	3 S. & D. 116.
Certiorari denied (1939)	308 U.S. 610	
Marco Sales Co. *v.* F.T.C. (C.A. 2 1971)	453 F. 2d 1	9 S. & D. 174.
Marcus, Richard S. (t/a Stanton Blanket Co.) *v.* F.T.C. (C.A. 2 1965)	354 F. 2d 85	7 S. & D. 1423.
Maremont Corp. *v.* F.T.C. (C.A. 7 1970)	431 F. 2d 124	8 S. & D. 1233.
Margulies, David W., *v.* F.T.C. (C.A. 3 1964)	339 F. 2d 603	7 S. & D. 1076.
Marietta Mfg. Co. *v.* F.T.C. (C.A. 7 1931)	50 F. 2d 641	2 S. & D. 129.
Mark & Co., Clayton (Triangle Conduit & Cable		

Name of Case	Reference	Reported in—
Co. Inc.) *v.* F.T.C. (C.A. 7 1948)	168 F. 2d 175	4 S. & D. 741.
(Sup. Ct. 1949)	336 U.S. 956	5 S. & D. 102.
Markin, David R., et al.; F.T.C. *v.* (D.C. W.D. Mich. 1974)	391 F. Supp. 865	9 S. & D. 1138.
Marlene's, Inc., et al. *v.* F.T.C. (C.A. 7 1954)	216 F. 2d 556	5 S. & D. 694.
Marlo Furniture Co. *v.* F.T.C. (D.C.D.C. 1967)	Not reported	8 S. & D. 536.
Marquette Cement Mfg. Co. *v.* F.T.C. (C.A. 7 1945)	147 F. 2d 589	4 S. & D. 307.
Marshall Field & Co. et al. *v.* F.T.C. (C.A. 7 1941)	Not reported	3 S. & D. 371.
Martha Beasley Associates (J. V. Cordes et al. t/a); F.T.C. *v.* (D.C.E.D. Mich. 1939)	Not reported	3 S. & D. 635.
Martin Co., J. C., etc. (John Kaslow d/b/a) *v.* Paul Rand Dixon et al. (D.C.D.C. 1963)	Not reported	7 S. & D. 665.
(C.A.D.C. 1963)	Not reported	7 S. & D. 703.
Certiorari denied (1964)	377 U.S. 907	
Martin Corp., J.C., *v.* F.T.C. (C.A. 3 1965)	346 F. 2d 147	7 S. & D. 1228.
Certiorari denied (1966)	382 U.S. 975	
Martin Corp., J. C., et al. *v.* F.T.C. (C.A. 7 1957)	242 F. 2d 530	6 S. & D. 251.
Martin Marietta Corp. *v.* F.T.C. (C.A. 7 1967)	376 F. 2d 430	8 S. & D. 464.
Certiorari denied (1967)	389 U.S. 923	
Martoccio Co., F.A. (t/a Hollywood Candy Co.); F.T.C. *v.* (C.A. 8 1937)	87 F. 2d 561	2 S. & D. 381.
Certiorari denied (1937)	301 U.S. 691	
Marvin Accessories, Inc.; U.S. *v.* (D.C.S.D. N.Y. 1969)	Not reported	8 S. & D. 1306.
Mary Carter Paint Co. et al. *v.* F.T.C. (C.A. 5 1964)	333 F. 2d 654	7 S. & D. 929.
Mary Carter Paint Co. et al.; F.T.C. *v.* (Sup. Ct. 1965)	382 U.S. 46	7 S. & D. 1403.
Maryland Baking Co. *v.* F.T.C. (C.A. 4 1957)	243 F. 2d 716	6 S. & D. 260.
Maryland Distributors, etc. (Jules Livingston t/a); U.S. *v.* (D.C.D. Md. 1957)	Not reported	6 S. & D. 914.
Mary Muffet, Inc., et al. *v.* F.T.C. (C.A. 2 1952)	194 F. 2d 504	5 S. & D. 374.
Marx Baking Co.; U.S. *v.* (D.C. Colo. 1970)	Not reported	8 S. & D. 1097.
Masland Duraleather Co. et al. *v.* F.T.C. (C.A. 3 1929)	34 F. 2d 733	1 S. & D. 1155.
Masterkraft Guild Weavers, Inc. (C. James Garofalo); U.S. *v.* (D.C.D.N.J. 1956)	Not reported	6 S. & D. 912.
Maxwell Distributing Co., Inc.; F.T.C. *v.* (D.C.D.N.J. 1956)	Not reported	6 S. & D. 29.
Mayers Co., Inc., L. & C., *v.* F.T.C. (C.A. 2 1938)	97 F. 2d 365	2 S. & D. 460.
Maynard Coal Co. *v.* F.T.C. (D.C.S.C. 1920)	Not reported	1 S. & D. 60.
(D.C.S.C. 1923)	Not reported	1 S. & D. 294.
Maynard Coal Co.; F.T.C. *v.* (C.A.D.C. 1927)	22 F. 2d 873	1 S. & D. 647.
May's Cut Rate Drug Co.; F.T.C. *v.* (D.C.N. D.W. Va. 1940)	Not reported	3 S. & D. 676.
May's Cut Rate Drug Co. of Charleston; F.T.C. *v.* (D.C.S.D.W. Va. 1940)	Not reported	3 S. & D. 674.
McAfee Candy Co., etc. (Joe B. Hill et al. t/a) *v.* F.T.C. (C.A. 5 1941)	124 F. 2d 104	3 S. & D. 436.
McCormick, Charles P. (McCormick & Co., Inc.); F.T.C. *v.* (D.C.D. Md. 1956)	145 F. Supp. 164	6 S. & D. 42.
McCormick, Charles P. (McCormick & Co., Inc.) *v.* F.T.C. (C.A. 4 1957)	242 F. 2d 81	6 S. & D. 225.
Certiorari denied (1957)	353 U.S. 957	

Name of Case	Reference	Reported in—
McKewen, George Earl, et al. (t/a Herbal Medicine Co.); U.S. *v.* (D.C.D. Md. 1940)	Not reported	3 S. & D. 726.
(D.C.D. Md. 1944)	Not reported	4 S. & D. 817.
McKinley-Roosevelt College of Arts and Sciences *v.* F.T.C. (C.A. 7 1941)	Not reported	3 S. & D. 364.
McLean & Son, A., et al.; F.T.C. *v.* (C.A. 7 1936)	84 F. 2d 910	2 S. & D. 347.
Certiorari denied (1936)	299 U.S. 590	
(C.A. 7 1938)	94 F. 2d 802	2 S. & D. 439.
(C.A. 7 1940)	Not reported	3 S. & D. 261.
Melley, Leonard (National Educators, Inc., et al.); U.S. *v.* (D.C.D.C. 1962)	Not reported	7 S. & D. 1441.
Mellon National Corporation *v.* F.T.C., et al. (D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1551.
Mells Manufacturing Co.; U.S. *v.* (D.C.E.D. N.Y. 1941)	Not reported	3 S. & D. 726. 3 S. & D. 726
Melster Candy Co.; U.S. *v.* (D.C.W.D. Wis. 1943)	Not reported	3 S. & D. 734.
Mennen Co. *v.* F.T.C. (C.A. 2 1923)	288 Fed. 774	1 S. & D. 298.
Certiorari denied (1923)	262 U.S. 759	
Mennie, F.L., etc. *v.* F.T.C. (C.A. 8 1932)	56 F. 2d 1084	2 S. & D. 161.
Mentho-Mulsion, Inc., et al. *v.* F.T.C. (C.A. 5 1941)	Not reported	3 S. & D. 355.
Menzies, John T. (Crosse & Blackwell Co.); F.T.C. *v.* (D.C.D. Md. 1956)	145 F. Supp. 164	6 S. & D. 42.
Menzies, John T. et al. (Cross & Blackwell Co.) *v.* F.T.C. (C.A. 4 1957)	242 F. 2d 81	6 S. & D. 225.
Certiorari denied (1957)	353 U.S. 957	
Merck & Co., Inc. *v.* F.T.C. (C.A. 6 1968)	392 F. 2d 921	8 S. & D. 725.
Merck & Co., Inc., *v.* F.T.C., et al. (D.C. Del. 1975)	396 F. Supp. 1125	9 S. & D. 1293.
Merit Health Appliance Co. (George S. Mogilner et al. t/a); F.T.C. *v.* (D.C.S.D. Calif. 1941)	Not reported	3 S. & D. 715.
Metropolitan Bag & Paper Distributors Assn. Inc., et al. *v.* F.T.C. (C.A. 2 1957)	240 F. 2d 341	6 S. & D. 136.
Certiorari denied (1957)	355 U.S. 819	
Meyer, Fred, Inc., et al. *v.* F.T.C. (C.A. 9 1966)	359 F. 2d 351	8 S. & D. 82.
Certiorari denied (1967)	386 U.S. 908	
Certiorari granted limited to one question (1967)	396 U.S. 907	
Meyer, Fred, Inc., et al.; F.T.C. *v.* (Sup. Ct. 1968)	390 U.S. 341	8 S. & D. 684.
Michigan Bulb Co. et al. *v.* F.T.C. (C.A. 6 1958)	Not reported	6 S. & D. 464.
Mick Dalton et al.; U.S. *v.* (D.C. Nebr. 1965)	Not reported	7 S. & D. 1449.
Mid-South Distributors et al. *v.* F.T.C. (C.A. 5 1961)	287 F. 2d 512	7 S. & D. 41.
Certiorari denied (1961)	368 U.S. 838	
Mid-Tex Corp. et al. *v.* F.T.C. (C.A. 2 1960)	Not reported	6 S. & D. 796.
Mid-West Bottle Cap Co.; U.S. *v.* (D.C.N.D. Ill. 1958)	Not reported	6 S. & D. 915.
Mid West Mills, Inc.; F.T.C. *v.* (C.A. 7 1937)	90 F. 2d 723	2 S. & D. 407.
Mid-West Portrait Service, etc. (Cornelius P. Van Schaack, Jr. t/a); U.S. *v.* (D.C.N.D. Ill. 1943)	Not reported	3 S. & D. 732.
Mid-West Sales Syndicate, etc. (Cornelius P. Van Schaack, Jr. t/a): U.S. *v.* (D.C.N.D. Ill. 1943)	Not reported	3 S. & D. 732.
Midwest Studios, Inc.; U.S. *v.* (D.C.D. Ore. 1942)	Not reported	3 S. & D. 729.

Name of Case	Reference	Reported in—
(D.C.D. OPRE. 1952)	Not reported	5 S. & D. 805.
Midwest Warehouse Distributors, Inc. (Eugene T. Wanderer) *v.* Wayne E. Kaplan et al. (D.C.D.C. 1962)	Not reported	7 S. & D. 599.
Miles Laboratories, Inc. *v.* F.T.C. (D.C.D.C. 1943)	50 F. Supp. 434	3 S. & D. 575.
(C.A.D.C. 1944)	140 F. 2d 683	4 S. & D. 112.
Certiorari denied (1944)	322 U.S. 752	
Milk & Ice Cream Can Institute et al. *v.* F.T.C. (C.A. 7 1946)	152 F. 2d 478	4 S. & D. 440.
Miller Co., Charles N.; F.T.C. *v.* (C.A. 1 1938)	97 F. 2d 563	2 S. & D. 464.
Miller Drug Co. (Julius Miller t/a); F.T.C. *v.* (D.C.W.D.N.Y. 1940)	Not reported	3 S. & D. 706.
Millers' National Federation, et al *v.* F.T.C. (D.C.S.C. 1926)	Not reported	1 S. & D. 554.
Millers' National Federation, et al.; F.T.C. *v.* (C.A.D.C. 1927)	23 F. 2d 968	1 S. & D. 654.
Millers' National Federation, et al. *v.* F.T.C. (D.C.S.C. 1930)	Not reported	2 S. & D. 79.
Millers' National Federation, et al.; F.T.C. *v.* (C.A.D.C. 1931)	47 F. 2d 428	2 S. & D. 110.
Miller, Ward J. (t/a Amber-Ita); F.T.C. *v.* (C.A. 6 1935)	Not reported	2 S. & D. 329.
Millinery Creators' Guild, Inc., et al. *v.* F.T.C. (C.A. 2 1940)	109 F. 2d 175	3 S. & D. 175.
(Sup. Ct. 1941)	312 U.S. 469	3 S. & D. 352.
Milwaukee Boiler Mfg. Co.; U.S. *v.* (D.C.E.D. Wis. 1970)	Not reported	8 S. & D. 1110.
Mink, Patsy T., et al.; Environmental Protection Agency *v.*	410 U.S. 73	9 S. & D. 457.
(Sup. Ct. 1973)	93 S. Ct. 827	
Minneapolis, Chamber of Commerce of, et al. *v.* F.T.C. (C.A. 8 1922)	280 Fed. 45	1 S. & D. 193.
(C.A. 8 1926)	13 F. 2d 673	1 S. & D. 502.
Minneapolis-Honeywell Regulator Co. *v.* F.T.C. (C.A. 7 1951)	191 F. 2d 786	5 S. & D. 307.
Minneapolis-Honeywell Regulator Co.; F.T.C. *v.* (Sup. Ct. 1952)	344 U.S. 206	5 S. & D. 464.
Minnesota Mining & Mfg. Co. *v.* New Jersey Wood Finishing Co. (Sup. Ct. 1965)	381 U.S. 311	7 S. & D. 1211.
Minter Brothers, etc. *v.* F.T.C. (C.A. 3 1939)	102 F. 2d 69	3 S. & D. 51.
Mishawaka Woolen Mfg. Co. *v.* F.T.C. (C.A. 7 1922)	283 Fed. 1022	1 S. & D. 238.
(Sup. Ct. 1923)	260 U.S. 748	1 S. & D. 238.
Mississippi River Corp. *v.* F.T.C. (C.A. 8 1972)	454 F. 2d 1083	9 S. & D. 199.
Missouri Farmers Assn., Inc.; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
Missouri Portland Cement Co.; F.T.C. *v.* (D.C. W.D. Mo. 1972)	Not reported	9 S. & D. 250.
(D.C. W.D. Mo. 1973)	Not reported	9 S. & D. 572.
M. J. Holloway & Co. et al.; F.T.C. *v.* (C.A. 7 1936)	84 F. 2d 910	2 S. & D. 347.
Certiorari denied (1936)	299 U.S. 590	
(C.A. 7 1938)	94 F. 2d 802	2 S. & D. 439.
(C.A. 7 1940)	Not reported	3 S. & D. 263.
Mobil Oil Corporation; F.T.C. *v.* (D.C. D.C. 1974)	Not reported	9 S. & D. 905.
(C.A. D.C. 1975)	517 F. 2d 137	9 S. & D. 1411.
Modell, Henry, et al.; U.S. *v.* (D.C.S.D.N.Y. 1960)	Not reported	6 S. & D. 918.

Name of Case	Reference	Reported in—
Modern Hat Works (Jacob Schachnow t/a) *v.* F.T.C. (C.A. 3 1941)	Not reported	3 S. & D. 361.
Modernistic Candies, Inc., et al. *v.* F.T.C. (C.A. 7 1944)	145 F. 2d 454	4 S. & D. 288.
Modern Manner Clothes (Joseph Rosenblum et al. d/b/a) *v.* F.T.C. (C.A. 2 1951)	192 F. 2d 392	5 S. & D. 347.
Certiorari denied (1952)	343 U.S. 905	
(C.A. 2 1954)	214 F. 2d 338	5 S. & D. 671.
Modern Marketing Service, Inc., et al. *v.* F.T.C. (C.A. 7 1945)	149 F. 2d 970	4 S. & D. 379.
Modern Rug Co., Inc., et al.; U.S. *v.* (D.C.S. D.N.Y. 1961)	Not reported	7 S. & D. 1440.
Moffet, John G., *v.* Wayne E. Kaplan et al. (D.C.D.C. 1962)	Not reported	7 S. & D. 599.
Mogilner, George S., et al. (t/a Merit Health Appliance Co.); F.T.C. *v.* (D.C.S.D. Calif. 1941)	Not reported	3 S. & D. 715.
Mohawk Refining Corp. et al. *v.* F.T.C. (C.A. 3 1959)	263 F. 2d 818	6 S. & D. 522.
Certiorari denied (1959)	361 U.S. 814	
Mohr, Mitchell S. (t/a National Research Co. et al.) *v.* F.T.C. (C.A. 9 1959)	272 F. 2d 401	6 S. & D. 684.
Certiorari denied (1960)	362 U.S. 920	
Moir, John, et al. (d/b/a Chase & Sanborn) *v.* F.T.C. (C.A. 1 1926)	12 F. 2d 22	1 S. & D. 489.
Monroe Auto Equipment Co. *v.* F.T.C. (C.A. 7 1965)	347 F. 2d 401	7 S. & D. 1271.
Certiorari denied (1966)	382 U.S. 1009	
Montebello Distillers, Inc.; U.S. *v.* (D.C.D. Md. 1941)	Not reported	3 S. & D. 726.
Montgomery Ward & Co., Inc.; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
Montgomery Ward & Co., Inc. *v.* F.T.C. (C.A. 7 1967)	379 F. 2d 666	8 S. & D. 506.
Moog Industries, Inc. *v.* F.T.C. (C.A. 8 1956)	238 F. 2d 43	6 S. & D. 91.
(Sup. Ct. 1958)	355 U.S. 411	6 S. & D. 382.
Moore & Co., William C.; U.S. *v.* (D.C.W.D. Wash. N.D. 1961)	Not reported	7 S. & D. 1439.
Moore Business Forms, Inc. *v.* F.T.C. (C.A. D.C. 1962)	307 F. 2d 188	7 S. & D. 512.
Moore Products Corp. et al.; U.S. *v.* (D.C. S.D.N.Y. 1963)	Not reported	7 S. & D. 1445.
Moretrench Corp. *v.* F.T.C. (C.A. 2 1942)	127 F. 2d 792	3 S. & D. 480.
Morgan Guaranty Trust Company of New York, et al. *v.* F.T.C., et al. (D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1551.
Morison, William W., and Foremost-McKesson, Inc.; F.T.C. *v.* (D.C.N.D. Calif. 1970)	Not reported	8 S. & D. 1231.
Morris & Co., Ltd, Inc., Philip, *v.* F.T.C. (C.A. D.C. 1953)	Not reported	5 S. & D. 790.
Morrissey & Co., Chas. T., et al.; F.T.C. *v.* (C.A. 7 1931)	47 F. 2d 101	2 S. & D. 113.
Morton Salt Co. *v.* F.T.C. (C.A. 7 1940)	Not reported	3 S. & D. 215.
(C.A. 7 1947)	162 F. 2d 949	4 S. & D. 627.
Morton Salt Co.; F.T.C. *v.* (Sup. Ct. 1948)	334 U.S. 37	4 S. & D. 716.
Morton Salt Co.; U.S. *v.* (D.C.N.D. Ill. 1949)	80 F. Supp. 419	4 S. & D. 779.
(C.A. 7 1949)	174 F. 2d 703	5 S. & D. 125.
(Sup. Ct. 1950)	338 U.S. 632	5 S. & D. 167.
(D.C.N.D. Ill. 1951)	Not reported	5 S. & D. 800.
Morton;s, Inc., et al. *v.* F.T.C. (C.A. 1 1961)	286 F. 2d 158	7 S. & D. 6.

Name of Case	Reference	Reported in—
Moss, Inc., Samuel H., *v.* F.T.C. (C.A. 2 1945)	148 F. 2d 378	4 S. & D. 324.
Certiorari denied (1945)	326 U.S. 734	
(C.A. 2 1946)	155 F. 2d 1016	4 S. & D. 495.
Motion Picture Advertising Service Co., Inc. *v.* F.T.C. (C.A. 5 1952)	194 F. 2d 633	5 S. & D. 380.
Motion Picture Advertising Service Co., Inc.; F.T.C. *v.* (Sup. Ct. 1953)	344 U.S. 392	5 S. & D. 498.
Motor Equipment Specialty Co. (Hiram Barber d/b/a); U.S. v (D.C. Nebr. 1943)	Not reported	3 S. & D. 734.
Mourning, Leila *v.* Family Publications Service, Inc. (Sup. Ct. 1973)	411 U.S. 356 93 S. Ct. 1652	9 S. & D. 638.
Moye, E. T. (Moye Photographers); U.S. *v.* (D.C.D.C. 1959)	Not reported	6 S. & D. 917.
Mueller Co. *v.* F.T.C. (C.A. 7 1963)	323 F. 2d 44	7 S. & D. 785.
Certiorari denied (1964)	377 U.S. 923	
Mueller, Sidney J. (Mueller Hair Experts) *v.* U.S. (C.A. 5 1958)	262 F. 2d 443	6 S. & D. 470.
Mueller, Sidney J. (Mueller Hair Experts); U.S. *v.* (D.C.S.D. Tex. 1958)	Not reported	6 S. & D. 915.
Muffet, Inc., Mary, et al. *v.* F.T.C. (C.A. 2 1952)	194 F. 2d 504	5 S. & D. 374.
Muller & Co., E.B., et al. *v.* F.T.C. (C.A. 6 1944)	142 F. 2d 511	4 S. & D. 151.
Murray Space Shoe Corp. et al. *v.* F.T.C. (C.A. 2 1962)	304 F. 2d 270	7 S. & D. 480.
Mutual Printing Co.; U.S. *v.* (D.C.N.D. Ill. 1941)	Not reported	3 S. & D. 728.
Mytinger & Casselberry, Inc., et al. *v.* F.T.C. (C.A.D.C. 1962)	301 F. 2d 534	7 S. & D. 379.
N & W Enterprises, Inc., et al. (Janet L. Winters); U.S. *v.* (D.C.M.D. Fla. 1967)	Not reported	8 S. & D. 1306.
Nabisco, Inc. *v.* F.T.C. (C.A. 5 1972)	459 F. 2d 1023	9 S. & D. 287.
Nash-Finch Co.; F.T.C. *v.* (C.A.D.C. 1961)	288 F. 2d 407	7 S. & D. 37.
Nash-Finch Co. *v.* F.T.C. (D.C.D.C. 1960)	Not reported	6 S. & D. 830.
(D.C. Minn. 1964)	233 F. Supp. 910	7 S. & D. 973.
Nash, Inc., et al. *v.* F.T.C. (C.A. 3 1962)	Not reported	7 S. & D. 461.
National Association of Counter Freezer Manufacturer et al. *v.* F.T.C. (D.C.S.C. 1936)	Not reported	2 S. & D. 337.
National Association of Women's and Children's Apparel Salesmen, Inc., et al., *v.* F.T.C. (C.A. 5 1973)	479 F. 2d 139	9 S. & D. 660.
Certiorari denied (1973)	414 U.S. 1004	
National Bakers Services, Inc. *v.* F.T.C. (C.A. 7 1964)	329 F. 2d 365	7 S. & D. 885.
National Bakers Services, Inc.; U.S. *v.* (D.C. S.D. Fla. 1971)	Not reported	9 S. & D. 1553.
National Biscuit Co. *v.* F.T.C. (C.A. 2 1924)	299 Fed. 733	1 S. & D. 345.
Certiorari denied (1924)	266 U.S. 613	
(C.A. 5 1968)	400 F. 2d 270	8 S. & D. 796.
National Biscuit Co.; F.T.C. *v.* (D.C.S.D. N.Y. 1937)	18 F. Supp. 667	2 S. & D. 390.
National Biscuit Co.; U.S. *v.* (D.C.S.D.N.Y. 1938)	25 F. Supp. 329	2 S. & D. 477.
National Brands, Inc., Jerome Blank, President, Etc.; F.T.C. *v.* (D.C. S.D. Fla. 1973)	Not reported	9 S. & D. 814.
National Candy Co., et al. *v.* F.T.C. (C.A. 7 1939)	104 F. 2d 999	3 S. & D. 116.
Certiorari denied (1939)	308 U.S. 610	
National Casualty Co. *v.* F.T.C. (C.A. 6 1957)	245 F. 2d 883	6 S. & D. 335.
National Casualty Co.; F.T.C. *v.* (Sup. Ct.		

Name of Case	Reference	Reported in—
1958)	357 U.S. 560	6 S. & D. 432.
National Clearance Bureau, et al. (Edwin G. Axel), *In re* (C.A. 3 1960)	Not reported	6 S. & D. 816.
National Clearance Bureau *v.* F.T.C. (C.A. 3 1958)	255 F. 2d 102	6 S. & D. 396.
National Commission on Egg Nutrition; F.T.C. *v.* (D.C. N.D. Ill. 1974)	Not reported	9 S. & D. 1109.
(C.A. 7 1975)	517 F. 2d 485	9 S. & D. 1344.
National Dairy Products Corp. *v.* F.T.C. (Docket 7318) (C.A. 7 1968)	395 F. 2d 517	8 S. & D. 750.
Certiorari denied (1968)	393 U.S. 977	
National Dairy Products Corp. *v.* F.T.C. (Docket 8548) (C.A. 7 1969)	412 F. 2d 605	8 S. & D. 948.
National Dress Goods Co. *v.* F.T.C. (C.A. 2 1952)	194 F. 2d 504	5 S. & D. 374.
National Dynamics Corporation *v.* F.T.C. (C.A. 2 1974)	492 F. 2d 1333	9 S. & D. 862.
Certiorari denied (1975)	419 U.S. 933	
National Educators, Inc., et al. *v.* F.T.C. (C.A. D.C. 1955)	Not reported	5 S. & D. 741.
National Educators, Inc., et al. (Leonard Melley); U.S. *v.* (D.C.D.C. 1962)	Not reported	7 S. & D. 1441
National Employment Information Service (Samuel A. Cannon et al. d/b/a) *v.* F.T.C. (C.A.D.C. 1961)	295 F. 2d 546	7 S. & D. 238.
National Feather & Down Co., (Louis Buchwalter et al. t/a) *v.* F.T.C. (C.A. 2 1956)	235 F. 2d 344	6 S. & D. 30.
National Harness Mfrs. Assn. *v.* F.T.C. (C.A. 6 1919)	261 Fed. 170	1 S. & D. 47.
(C.A. 6 1920)	268 Fed. 705	1 S. & D. 86.
National Health Aids, Inc., et al.; F.T.C. *v.* (D.C.D. Md. 1952)	108 F. Supp. 340	5 S. & D. 429.
(D.C.D. Md. 1952)	Not reported	5 S. & D. 780.
National Kream Co., Inc., and National Foods, Inc. *v.* F.T.C. (C.A. 2 1938)	Not reported	2 S. & D. 466.
National Laboratories of St. Louis (Oliver L. Rohlfing t/a); U.S. *v.* (D.C.E.D. Mo. 1967)	Not reported	8 S. & D. 1307.
National Lead Co. et al. *v.* F.T.C. (C.A. 7 1955)	227 F. 2d 825	5 S. & D. 749.
Certiorari denied (1956)	351 U.S. 964	
National Lead Co. et al.; F.T.C. *v.* (Sup. Ct. 1957)	352 U.S. 419	6 S. & D. 193.
National Lead Co. et al. *v.* F.T.C. (C.A. 7 1957)	244 F. 2d 312	6 S. & D. 328.
National Macaroni Mfrs. Assn. et al. *v.* F.T.C. (C.A. 7 1965)	345 F. 2d 421	7 S. & D. 1181.
National Merchandising Co., etc. (Perce P. Green et al. t/a); F.T.C. *v.* (D.C.D. Minn. 1942)	Not reported	3 S. & D. 510.
National Optical Stores Co., etc. (Benjamin D. Ritholz et al.) *v.* F.T.C. (C.A. 2 1950)	Not reported	5 S. & D. 203.
National Outdoor Display, Inc.; U.S. *v.* (D.C. W.D. Tenn. 1973)	Not reported	9 S. & D. 1555.
National Parts Warehouse et al. (General Auto Supplies, Inc. et al.) *v.* F.T.C. (C.A. 7 1965)	346 F. 2d 311	7 S. & D. 1229.
Certiorari dismissed (1965)	382 U.S. 923	
National Petroleum Refiners Association, et al. *v.* F.T.C., et al.		
(D.C. D.C. 1972	340 F. Supp. 1343	9 S. & D. 260.
(C.A. D.C. 1973)	482 F. 2d 672	9 S. & D. 714.

Name of Case	Reference	Reported in—
Certiorari denied (1974)	415 U.S. 951	
(D.C. D.C. 1974)	392 F. Supp. 1052	9 S. & D. 1049.
(D.C. D.C. 1975)	Not reported	9 S. & D. 1384.
(D.C. D.C. 1975)	Not reported	9 S. & D. 1410.
National Press Photo Bureau, Inc., et al. *v.* F.T.C. (C.A. 2 1943)	Not reported	3 S. & D. 594.
National Research Co. et al. (Mitchell S. Mohr t/a) *v.* F.T.C. (C.A. 9 1959)	272 F.2D 401	6 S. & D. 684.
Certiorari denied (1960)	362 U.S. 920	
National Service Bureau et al. (Robert O. Bennett d/b/a) *v.* F.T.C. (C.A.D.C. 1952)	200 F. 2d 362	5 S. & D. 447.
National Silver Co. *v.* F.T.C. (C.A. 2 1937)	88 F. 2d 425	2 S. & D. 399.
(C.A. 2 1939)	Not reported	3 S. & D. 109.
(C.A. 2 1940)	Not reported	3 S. & D. 223.
National Supply Co., et al. (Perce P. Green et al. t/a); F.T.C. *v.* (D.C.D. Minn. 1942)	Not reported	3 S. & D. 510.
National Titanium Co.; U.S. *v.* (D.C.S.D. Calif. 1954)	Not reported	5 S. & D. 808.
National Toilet Co. *v.* F.T.C. (C.A. 7 1952)	Not reported	5 S. & D. 429.
National Toliet Co.; U.S. *v.* (D.C.W.D. Tenn. 1961)	Not reported	7 S. & D. 1440.
National Trade Publications Service, Inc., et al. *v.* F.T.C. (C.A. 8 1962)	300 F. 2d 790	7 S. & D. 455.
National Training Service, Inc., et al.; U.S. *v.* (D.C.D. Conn. 1963)	Not reported	7 S. & D. 1443.
Nationwide Clothiers, Inc., et al.; U.S. *v.* (D.C. E.D.N.Y. 1964)	Not reported	7 S. & D. 1445.
N.C. Freed, Inc., et al. *v.* Board of Governors of the Federal Reserve System, et al. (C.A. 2 1973)	473 F. 2d 1210	9 S. & D. 541.
Certiorari denied (1973)	414 U.S. 827	
Neff, George G. (d/b/a/ Prostex Co.) *v.* F.T.C. (C.A. 4 1941)	117 F. 2d 495	3 S. & D. 332.
Nelson & Sons, Inc., Sterling; Rangen, Inc., et al. *v.* (C.A. 9 1965)	351 F. 2d 851	7 S. & D. 1342.
Certiorari denied (1966)	383 U.S. 936	
New American Library of World Literature, Inc., et al. *v.* F.T.C. (C.A. 2 1954)	213 F. 2d 143	5 S. & D. 638.
(C.A. 2 1955)	227 F. 2d 384	5 S. & D. 749.
Newcomb, Dr. F.A., *v.* F.T.C. (C.A. 10 1950)	Not reported	5 S. & D. 199.
New Jersey Asbestos Co. *v.* F.T.C. (C.A. 2 1920)	264 Fed. 509	1 S. & D. 51.
New Jersey Wood Finishing Co.; Minnesota Mining & Mfg., Co. *v.* (Sup. Ct. 1965)	381 U.S. 311	7 S. & D. 1211.
New Standard Publishing Co., Inc., et al. *v.* F.T.C. (C.A. 4 1952)	194 F. 2d 181	5 S. & D. 376.
New York Feather Co., Inc., et al.; U.S. *v.* (D.C.E.D.N.Y. 1960)	Not reported	6 S. & D. 918.
New York Premium Novelty Co. (Alexander Weiler et al. d/b/a) *v.* F.T.C. (C.A. 2 1941)	Not reported	3 S. & D. 426.
Niehoff & Co., C.E. *v.* F.T.C. (C.A. 7 1957)	241 F. 2d 37	6 S. & D. 144.
Niehoff & Co., C.E.; F.T.C. *v.* (Sup. Ct. 1958)	355 U.S. 411	6 S. & D. 382.
Niresk Industries, Inc., et al. *v.* F.T.C. (C.A. 7 1960)	278 F. 2d 337	6 S. & D. 727.
Certiorari denied (1960)	364 U.S. 883	
Nitke, Samuel, *v.* F.T.C. (C.A.D.C. 1942)	Not reported	3 S. & D. 472.
Noel's Gay Games, Inc. et al. *v.* F.T.C. (C.A. 10 1953)	204 F. 2d 197	5 S. & D. 514.
(D.C.D.C. 1954)	Not reported	5 S. & D. 602.
(D.C.D.C. 1954)	Not reported	5 S. & D. 677.
Non-Plate Engraving Co., Inc.; F.T.C. *v.* (C.A. 2 1931)	49 F. 2d 766	2 S. & D. 115.

Name of Case	Reference	Reported in—
Norden Ship Supply Co., Inc. *v.* F.T.C. (C.A. 4 1921)	277 Fed. 206	1 S. & D. 166.
Certiorari denied (1922)	258 U.S. 618	
Normam J. Foucha (American Aluminum Corp.); F.T.C. *v.* (D.C.N.D. Ala. 1970)	Not reported	8 S. & D. 1092.
Norman J. Foucha, et al.; F.T.C. *v.* (D.C. N.D. Ala. 1973)	356 F. Supp. 21	9 S. & D. 605.
Norman J. Foucha, et al. *v.* F.T.C. (D.C. N.D. Ala. 1973)	Not reported	9 S. & D. 759.
Normandie Et Cie (John H. Davis et al. t/a) *v.* F.T.C. (C.A. 1 1942)	Not reported	3 S. & D. 465.
North American Accident Insurance Co. *v.* F.T.C. (C.A. 5 1958)	Not reported	6 S. & D. 451.
North American Philips Co., Inc. *v.* F.T.C. (C.A.D.C. 1959)	Not reported	6 S. & D. 683.
Northam Warren Corp. *v.* F.T.C. (C.A. 2 1932)	59 F. 2d 196	2 S. & D. 187.
Northern Feather Works, Inc. *v.* F.T.C. (C.A. 3 1956)	234 F. 2d 335	6 S. & D. 21.
Northfield Mills, Inc. (Bernard Goldfine and Horace Maxwell Goldfine); U.S. *v.* (D.C.D. Vt. 1960)	Not reported	6 S. & D. 919.
Northwest Industries, Inc. *v.* F.T.C., et al. (D.C. Del. 1975)	396 F. Supp. 1125	9 S. & D. 1293.
Novel Co. (Max H. Goldberg t/a) *v.* F.T.C. (C.A. 7 1960)	283 F. 2d 299	6 S. & D. 839.
N. Sumergrade & Sons (Bernard H. Sumergrade et al. t/a) *v.* F.T.C. (C.A. 3 1956)	234 F. 2d 335	6 S. & D. 21.
Nuarc Co., The, *v.* F.T.C. (C.A. 7 1963)	316 F. 2d 576	7 S. & D. 673.
Nu Grape Co. of America *v.* F.T.C. (C.A. 5 1932)	Not reported	2 S. & D. 179.
Nulomoline Co.; F.T.C. *v.* (C.A. 2 1918)	254 Fed. 988	1 S. & D. 35.
Oberlin, Robert C. (t/a Research Products Co.); F.T.C. *v.* (D.C.N.D. Ohio 1939)	Not reported	3 S. & D. 640.
Ogle, Kenneth R., et al. (t/a Approved Photographers Assn.); U.S. *v.* (D.C.S.D. Ohio 1963)	Not reported	7 S. & D. 1443.
Ohio Art Co.; U.S. *v.* (D.C.N.D. Ohio 1964)	Not reported	7 S. & D. 1445.
Ohio Leather Co. *v.* F.T.C. (C.A. 6 1930)	45 F. 2d 39	2 S. & D. 99.
O-Jib-Wa Medicine Co. (Kenneth W. Shafe t/a) et al. *v.* F.T.C. (C.A. 6 1958)	256 F. 2d 661	6 S. & D. 435.
OKC Corp. *v.* F.T.C. (C.A. 10 1972)	455 F. 2d 1159	9 S. & D. 215.
OKC Corp. and Oklahoma Land and Cattle Co.; F.T.C. *v.* (C.A. 5 1970)	Not reported	8 S. & D. 1220.
Oklahoma Land and Cattle Co. and OKC Corp.; F.T.C. *v.* (C.A. 5 1970)	Not reported	8 S. & D. 1220.
Olin Mathieson Chemical Corp. *v.* F.T.C. (C.A. 6 1966)	363 F. 2d 757	8 S. & D. 248.
Oliver Brothers, Inc., et al. *v.* F.T.C. (C.A. 4 1939)	102 F. 2d 763	3 S. & D. 86.
Olson Rug Co.; U.S. *v.* (D.C.N.D. Ill. 1960)	Not reported	6 S. & D. 918.
Omega Manufacturing Co., Inc., et al.; F.T.C. *v.* (D.C.S.D.N.Y. 1940)	Not reported	3 S. & D. 679.
Oppenheim, Collins & Co., Inc.; U.S. *v.* (D.C.S.D.N.Y. 1941)	Not reported	3 S. & D. 729.
Oppenheim, Oberndorf & Co., Inc. (d/b/a Sealpax Co.) *v.* F.T.C. (C.A. 4 1925)	5 F. 2d 574	1 S. & D. 409.
Oregon-Washington Plywood Co., *v.* F.T.C. (C.A. 9 1952)	194 F. 2d 48	5 S. & D. 362.
Orlan A. Saucke *v.* F.T.C. (D.C. N.D. Ga. 1971)	333 F. Supp. 1197	9 S. & D. 165.

Name of Case	Reference	Reported in—
Orton, Douglas T. (The Borden Co.); F.T.C. *v.* (D.C.S.D.N.Y. 1959)	175 F. Supp. 77	6 S. & D. 658.
(D.C.S.D.N.Y. 1959)	177 F. Supp. 241	6 S. & D. 661.
Orville Freeman; Safeway Stores, Inc. *v.* (C.A.D.C. 1966)	369 F. 2d 952	8 S. & D. 368.
Orville L. Freeman; The Great Atlantic & Pacific Tea Co., Inc. *v.* (C.A.D.C. 1966)	369 F. 2d 952	8 S. & D. 368.
Oscar Mayer & Co., Inc. *v.* F.T.C., et al. (D.C. Del. 1975)	396 F. Supp. 1125	9 S. & D. 1293.
Ostermoor & Co., Inc. *v.* F.T.C. (C.A. 2 1927)	16 F. 2d 962	1 S. & D. 589.
Ostler Candy Co. et al *v.* F.T.C. (C.A. 10 1939)	106 F. 2d 962	3 S. & D. 139.
Certiorari denied (1940)	309 U.S. 675	
Ox'O-Gas Co. (Eli Eghan t/a) *v.* F.T.C. (C.A. 2 1947)	Not reported	4 S. & D. 666.
Ozment, C.J., etc.; F.T.C. *v.* (C.A. 8 1936)	Not reported	2 S. & D. 335.
Pacific Gamble Robinson Co.; F.T.C. *v.* (C.A. 9 1962)	Not reported	7 S. & D. 573.
Pacific Molasses Co. et al. *v.* F.T.C. (C.A. 5 1966)	356 F. 2d 386	8 S. & D. 46.
Pacific States Paper Trade Assn., et al. *v.* F.T.C. (C.A. 9 1925)	4 F. 2d 457	1 S. & D. 384.
Pacific States Paper Trade Assn., et al.; F.T.C. *v.* (Sup. Ct. 1927)	273 U.S. 52	1 S. & D. 583.
(C.A. 9 1937)	88 F. 2d 1009	2 S. & D. 402.
Pacific Tire & Rubber Co.; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
Page Co., Inc., The E. R.; U.S. *v.* (D.C.E.D. Mich. 1943)	Not reported	3 S. & D. 734.
Page, Richard M. and Arrow Food Distributors, Inc., et al.; F.T.C. *v.* (D.C. N.D. Ga. 1974)	378 F. Supp. 1057	9 S. & D. 1053.
Pahlman, John H. (Anheuser-Busch, Inc.); F.T.C. *v.* (C.A. 8 1968)	390 F. 2d 323	8 S. & D. 640.
P. & D. Manufacturing Co., Inc. *v.* F.T.C. (C.A. 7 1957)	245 F. 2d 281	6 S. & D. 329.
Certiorari denied (1957)	355 U.S. 884	
Papercraft Corp. *v.* F.T.C. (D.C.W.D. Pa. 1970)	307 F. Supp. 1401	8 S. & D. 1084.
(C.A. 7 1973)	472 F. 2d 927	9 S. & D. 530.
Papercraft Corporation; U.S. *v.* (D.C. W.D. Penn. 1975)	393 F. Supp. 408	9 S. & D. 1262.
(D.C. W.D. Penn. 1975)	393 F. Supp. 415	9 S. & D. 1329.
(D.C. W.D. Penn. 1975)	Not reported	9 S. & D. 1557.
Paramount Famous-Lasky Corp. et al.; F.T.C. *v.* (C.A. 2 1932)	57 F. 2d 152	2 S. & D. 161.
Paramount Famous Lasky Corp. et al. *v.* U.S. (Sup. Ct. 1930)	282 U.S. 30	2 S. & D. 505.
Parfumerie Lido, Inc., et al.; U.S. *v.* (D.C. E.D.N.Y. 1964)	Not reported	7 S. & D. 1447.
Parfums Corday, Inc. *v.* F.T.C. (C.A. 2 1941)	120 F. 2d 808	3 S. & D. 392.
Parfums Corday, Inc.; U.S. *v.* (D.C.S.D.N.Y. 1962)	Not reported	7 S. & D. 1441.
Parke, Austin & Lipscomb, Inc., et al. *v.* F.T.C. (C.A. 2 1944)	142 F. 2d 437	4 S. & D. 168.
Certiorari denied (1944)	323 U.S. 753	
Parker Pen Co. *v.* F.T.C. (C.A. 7 1946)	159 F. 2d 509	4 S. & D. 597.
Park, Inc., Philip R., et al. *v.* F.T.C. (C.A. 9 1943)	136 F. 2d 428	3 S. & D. 581.
(C.A. 9 1944)	142 F. 2d 460	4 S. & D. 102.
Parkson Advertising Agency, Inc., and The J.B. Williams Co., Inc. *v.* F.T.C. (C.A. 6 1967)	381 F. 2d 884	8 S. & D. 524.

Name of Case	Reference	Reported in—
Pati-Port, Inc., et al. *v.* F.T.C. (C.A. 4 1963)	313 F. 2d 103	7 S. & D. 639.
Patsy T. Mink, et al.; Environmental Protection Agency, et al. *v.* (Sup. Ct. 1973)	410 U.S. 73 93 S. Ct. 827	9 S. & D. 457.
Paul & Co., Inc., Edward P., *v.* F.T.C. (C.A. D.C. 1948)	169 F. 2d 294	4 S. & D. 734.
Paul B. Elder Co.; U.S. *v.* (D.C. Del. 1974)	Not reported	9 S. & D. 1097.
Paul C. Guignon et al. (Anheuser-Busch, Inc.); F.T.C. *v.* (D.C.E.D. Mo. 1966)	261 F. Supp. 215	8 S. & D. 377.
(C.A. 8 1968)	390 F. 2d 323	8 S. & D. 640.
Paul R. Dooley, Inc., et al.; U.S. *v.* (D.C.S.D. Calif. 1958)	Not reported	6 S. & D. 915.
Paul Theodore Cheff (Holland Furnace) *v.* Elmer J. Schnackenberg et al. (Sup. Ct. 1966)	384 U.S. 373	8 S. & D. 176.
Pearsall Butter Co., B. S., *v.* F.T.C. (C.A. 7 1923)	292 Fed. 720	1 S. & D. 324.
Pease Co., C.F., et al. *v.* F.T.C. (C.A. 7 1944)	142 F. 2d 321	4 S. & D. 117.
Certiorari denied (1944)	323 U.S. 730	
Peerless Products, Inc. (Marshall Maltz), et al. *v.* F.T.C. (C.A. 7 1960)	284 F. 2d 825	6 S. & D. 844.
Certiorari denied (1961)	365 U.S. 844	
Pelta Furs (Jacques de Gorter et al. t/a) *v.* F.T.C. (C.A. 9 1957)	244 F. 2d 270	6 S. & D. 310.
Pep Boys-Manny, Moe & Jack, Inc. *v.* F.T.C. (C.A. 3 1941)	122 F. 2d 158	3 S. & D. 401.
PepsiCo, Inc. *v.* F.T.C. (D.C. S.D.N.Y. 1972)	343 F. Supp. 396	9 S. & D. 295.
PepsiCo, Inc.; F.T.C. *v.* (C.A. 2 1972)	472 F. 2d 179	9 S. & D. 407.
Certiorari denied (1973)	414 U.S. 876 94 S. Ct. 44	
(C.A. 2 1973)	477 F. 2d 24	9 S. & D. 614.
PepsiCo, Inc., and Frito-Lay, Inc.; U.S. *v.* (D.C.S.D.N.Y. 1970)	Not reported	8 S. & D. 1310.
Perfect Reconditioned Spark Plug Co., The, et al *v.* F.T.C. (C.A. 2 1941)	Not reported	3 S. & D. 375.
Perfect Voice Institute et al. *v.* F.T.C. (C.A. 7 1942)	Not reported	3 S. & D. 524.
Periodical Publishers' Service Bureau, Inc. *v.* F.T.C. (D.C. D.C. 1972)	Not reported	9 S. & D. 443.
Perloff et al. *v.* F.T.C. (C.A. 3 1945)	150 F. 2d 757	4 S. & D. 316.
Perma-Maid Co., Inc. *v.* F.T.C. (C.A. 6 1941)	121 F. 2d 282	3 S. & D. 397.
Perry Sales Co. (Perry Halseth t/a) *v.* F.T.C. (C.A. 7 1954)	Not reported	5 S. & D. 678.
Certiorari denied (1955)	348 U.S. 928	
Personal Drug Co. (Doris Savitch et al. t/a) *v.* F.T.C. (C.A. 2 1955)	218 F. 2d 817	5 S. & D. 727.
Personal Drug Co. (Doris Savitch et al. t/a); U.S. *v.* (D.C.E.D.N.Y. 1961)	Not reported	7 S. & D. 1440.
Peterson, W. H. (t/a Anchor Hocking Glass Corp.) *v.* F.T.C. (C.A. 6 1941)	124 F. 2d 187	3 S. & D. 426.
Petrey, Eugene D. (t/a Rembrandt Studio, etc.) *v.* F.T.C. (C.A. 5 1951)	Not reported	5 S. & D. 327.
Petrie, John (t/a B-X Laboratories, etc.); U.S. *v.* (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 723.
P.F. Collier & Son Corp. et al. *v.* F.T.C. (C.A. 6 1970)	427 F. 2d 261	8 S. & D. 1188.
Certiorari denied (1970)	400 U.S. 926	
Pfizer, Charles & Co., Inc. *v.* F.T.C. (C.A. 6 1966)	363 F. 2d 757	8 S. & D. 248.

Name of Case	Reference	Reported in—
(C.A. 6 1968)	401 F. 2d 574	8 S. & D. 807.
Certiorari denied (1969)	394 U.S. 920	
Phelps Dodge Refining Corp. et al. *v.* F.T.C. (C.A. 2 1943)	139 F. 2d 393	3 S. & D. 621.
Philadelphia Carpet Co. *v.* F.T.C. (C.A. 3 1965)	342 F. 2d 994	7 S. & D. 1152.
Philip Carey Mfg. Co., et al. *v.* F.T.C. (C.A. 6 1928)	29 F. 2d 49	1 S. & D. 687.
Philip Morris & Co., Ltd., Inc. *v.* F.T.C. (C.A. D.C. 1953)	Not reported	5 S. & D. 790.
Philip Morris Inc. *v.* Lewis A. Engman, et al. (D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1446.
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1525.
(C.A. 2 1975)	527 F. 2d 115	9 S. & D. 1542.
Philip R. Park, Inc., et al. *v.* F.T.C. (C.A. 9 1943)	136 F. 2d 428	3 S. & D. 581.
(C.A. 9 1944)	142 F. 2d 460	4 S. & D. 102.
Pillsbury Co., The, *v.* F.T.C. (C.A. 5 1966)	354 F. 2d 952	8 S. & D. 5.
Pioneer Advertising Co., etc. (Cornelius P. Van Schaack, Jr. t/a); U.S. *v.* (D.C.N.D. Ill. 1943)	Not reported	3 S. & D. 732.
Pittsburgh Cut Rate Drug Co.; F.T.C. *v.* (D.C. W.D. Pa. 1940)	Not reported	3 S. & D. 671.
Piuma, Joseph A.; U.S. *v.* (D.C.S.D. Calif. 1941)	40 F. Supp. 119	3 S. & D. 412.
Piuma, Joseph A., *v.* U.S. (C.A. 9 1942)	126 F. 2d 601	3 S. & D. 468.
Certiorari denied (1942)	317 U.S. 637	
Piuma, Joseph A.; U.S. *v.* (D.C.S.D. Calif. 1942)	Not reported	3 S. & D. 728.
Plantation Chocolate Co., Inc.; U.S. *v.* (D.C. E.D. Pa. 1941)	Not reported	3 S. & D. 727.
P. Lorillard Co.; F.T.C. *v.* (D.C.S.D.N.Y. 1922)	283 Fed. 999	1 S. & D. 239.
(Sup. Ct. 1924)	264 U.S. 298	1 S. & D. 341.
P. Lorillard Co. *v.* F.T.C. (C.A. 4 1950)	186 F. 2d 52	5 S. & D. 210.
P. Lorillard Co. *v.* F.T.C. (C.A. 3 1959)	267 F. 2d 439	6 S. & D. 575.
Certiorari denied (1959)	361 U.S. 923.	
P. Lorillard Co., *In re* (C.A. 4 1959)	Not reported	6 S. & D. 490.
Pompeian Olive Oil Corp. (Samuel H. Hoffberger); F.T.C. *v.* (D.C.D. Md. 1956)	145 F.Supp 164	6 S. & D. 42.
Pompeian Olive Oil Corp. (Samuel H. Hoffberger) *v.* F.T.C. (C.A. 4 1957)	242 F. 2d 81	6 S. & D. 225.
Certiorari denied (1957)	353 U.S. 957.	
Pond's Extract Co. *v.* F.T.C. (C.A. 2 1943)	Not reported	3 S. & D. 534.
Portwood Co. (Joseph L. Portwood et al. trading as) *v.* F.T.C. (C.A. 10 1969)	418 F. 2d 419	8 S. & D. 1053.
Portwood, Joseph L., et al. (trading as Portwood Co.) *v.* F.T.C. (C.A. 10 1969)	418 F. 2d 419	8 S. & D. 1053.
Positive Products Co., etc. (Earl Aronberg t/a); F.T.C. *v.* (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 647.
Positive Products Co., etc. (Earl Aronberg t/a) *v.* F.T.C. (C.A. 7 1942)	132 F. 2d 165	3 S. & D. 528.
Posner Shoes, Inc., Dr. A., *v.* F.T.C. (D.C. D.C. 1953)	Not reported	5 S. & D. 789.
(C.A.D.C. 1953)	Not reported	5 S. & D. 789.
Post-Graduate School of Nursing, Inc.; U.S. *v.* (D.C.N.D. Ill. 1963)	Not reported	7 S. & D 793.
(D.C.N.D. Ill. 1965)	Not reported	7 S. & D. 145
Post Institute Sales Corp., et al. *v.* F.T.C. (C.A. 2 1944)	Not reported	4 S. & D. 270.
Powe Lumber Co., Thos. E.; F.T.C. *v.* (C.A. 8 1929)	35 F. 2d 1017	1 S. & D. 682.

Name of Case	Reference	Reported in—
Poy, Fong, et al.; U.S. *v.* (D.C.N.D. Calif. 1962)	Not reported	7 S. & D. 1441.
Poy, Fong, et al. *v.* F.T.C. (C.A. 9 1941)	124 F. 2d 398	3 S. & D. 427.
Precision Electrotype Co. *v.* F.T.C. (C.A. 9 1953)	Not reported	5 S. & D. 512.
Premium Sales Co., etc. (Mitchell A. Bazelon, et al. t/a) *v.* F.T.C. (C.A. 7 1942)	Not reported	3 S. & D. 441.
Preparatory Training Institute *v.* F.T.C.(C.A. 3 1945)	Not reported	4 S. & D. 315.
Prima Products, Inc., et al. *v.* F.T.C. (C.A. 2 1954)	209 F. 2d 405	5 S. & D. 593.
Prince, H. M., Textiles, Inc., et al.; U.S. *v.* (D.C.S.D.N.Y. 1966)	262 F. Supp. 383	8 S. & D. 1305.
Procter & Gamble Co., et al. *v.* F.T.C. (C.A. 6 1926)	11 F. 2d 47	1 S. & D. 475.
Certiorari denied (1926)	273 U.S. 717	
Procter & Gamble Co., The, *v.* F.T.C. (D.C. D.C. 1962)	Not reported	7 S. & D. 462.
Procter & Gamble Co., The, *v.* F.T.C. (C.A. 6 1966)	358 F. 2d 74	8 S. & D. 107.
Procter & Gamble Co., The; F.T.C. *v.* (Sup. Ct. 1967)	386 U.S. 568	8 S. & D. 439.
Progressive Medical Co., etc. (Blanche Kaplan t/a); F.T.C. *v.* (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 656.
Progress Tailoring Co., et al. *v.* F.T.C. (C.A. 7 1946)	153 F. 2d 103	4 S. & D. 455.
(C.A. 7 1953)	Not reported	5 S & D. 592.
Prostex Co. (George G. Neff d/b/a) *v.* F.T.C. (C.A. 4 1941)	117 F. 2d 495	3 S. & D. 332.
Pruvo Pharmacal Co. et al.; U.S. *v.* (D.C.E.D. Wis. 1966)	Not reported	8 S. & D. 1306.
P. Sorensen Manufacturing Co., Inc. *v.* F.T.C. (C.A.D.C. 1957)	246 F. 2d 687	6 S. & D. 332.
Pure Silk Hosiery Mills, Inc.; F.T.C. *v.* (C.A. 7 1924)	3 F. 2d 105	1 S. & D. 371.
Purofied Down Products Corp. et al.; U.S. *v.* (D.C.E.D.N.Y. 1956)	Not reported	6 S. & D. 912.
Purolator Products, Inc. *v.* F.T.C. (C.A. 7 1965)	352 F. 2d 874	7 S. & D. 1364.
Certiorari denied, (Jan. 15, 1968)	389 U.S. 1045	
(C.A. 7 1973)	Not reported	9 S. & D. 769.
Pyramid Books; U.S. *v.* (D.C.S.D.N.Y. 1963)	Not reported	7 S. & D. 1443.
Q.R.S. Music Co. *v.* F.T.C. (C.A. 7 1926)	12 F. 2d 730	1 S. & D. 498.
Quality Bakers of America et al. *v.* F.T.C. (C.A. 1 1940)	114 F. 2d 393	3 S. & D. 287.
Queen Anne Candy Co. et al.; F.T.C. *v.* (C.A. 7 1936)	84 F. 2d 910	2 S. & D. 347.
Certiorari denied (1936)	299 U.S. 590	
(C.A. 7 1940)	Not reported	3 S. & D. 265.
Queen Chemical Co. (Charles Shrader t/a); F.T.C. *v.* (D.C.W.D. Pa. 1941)	Not reported	3 S. & D. 718.
Rabhor Co., Inc., The, *v.* F.T.C. (C.A. 2 1942)	Not reported	3 S. & D. 477.
Rabiner & Jontow, Inc. *v.* F.T.C. (C.A. 2 1967)	386 F. 2d 667	8 S. & D. 604.
Certiorari denied (1968)	390 U.S. 1004	
Rabin, Melvin G. (d/b/a International Creditors Corp.); F.T.C. *v.* (D.C.E.D. Pa. 1969)	Not reported	8 S. & D. 1004.
Radio-Television Training School *v.* F.T.C. (C.A.D.C. 1953)	Not reported	5 S. & D. 513.
Radio Training Assn. of America et al.; U.S. *v.* (D.C.S.D. Calif. 1963)	Not reported	7 S. & D. 1444.
Radio Wire Television, Inc., of New York, et al. *v.* F.T.C. (C.A. 2 1940)	Not reported	3 S. & D. 309.

Name of Case	Reference	Reported in—
Radley Furs, Inc., et al.; U.S. *v.* (D.C.S.D. N.Y. 1965)	Not reported	7 S. & D. 1450.
Raladam Co. *v.* F.T.C. (C.A. 6 1930)	42 F. 2d 430	2 S. & D. 81.
(C.A. 6 1941)	123 F. 2d 34	3 S. & D. 417.
Raladam Co.; F.T.C. *v.* (Sup. Ct. 1931)	283 U.S. 643	2 S. & D. 116.
(Sup. Ct. 1942)	316 U.S. 149	3 S. & D. 474.
Ralph Botsford (Botsford Ready-Mix Company); F.T.C. *v.* (D.C. W.D. Mo. 1973)	Not reported	9 S. & D. 572.
Ralph L. Browning; F.T.C. *v.* (D.C.D.C. 1969)	Not reported	8 S. & D. 918.
Rand, Howard, et al. (t/a Green Supply Co., etc.); F.T.C. *v.* (D.C.D. Minn. 4th Div. 1942)	Not reported	3 S. & D. 510.
Rangen, Inc., et al. *v.* Sterling Nelson & Sons, Inc. (C.A. 9 1965)	351 F. 2d 851	7 S. & D. 1342.
Certiorari denied (1966)	383 U.S. 936	
Rango Tablet Co. et al.; U.S. *v.* (D.C.S.D. Calif. 1945)	Not reported	4 S. & D. 819.
Rayex Corp. et al. *v.* F.T.C. (C.A. 2 1963)	317 F. 2d 290	7 S. & D. 696.
Ray Film Industries, Inc., Reid H., *v.* F.T.C. (C.A. 8 1951)	190 F. 2d 207	5 S. & D. 300.
Raymond Anderson; U.S. *v.* (D.C. S.D. Ohio 1975)	Not reported	9 S. & D. 1557.
Raymond Bros.-Clark Co. *v.* F.T.C. (C.A. 8 1922)	280 Fed. 529	1 S. & D. 212.
Raymond Bros.-Clark Co.; F.T.C. *v.* (Sup. Ct. 1924)	263 U.S. 565	1 S. & D. 336.
Raymond's, Inc., et al.; U.S. *v.* (D.C.D. Mass. 1966)	Not reported	8 S. & D. 1305.
Real Products Corp., et al.; F.T.C. *v.* (C.A. 2 1937)	90 F. 2d 617	2 S. & D. 404.
Red & White Corp., et al. *v.* F.T.C. (C.A. 7 1945)	149 F. 2d 970	4 S. & D. 379.
Redd, Oland D. (Woelfel Studio et al.); U.S. *v.* (D.C.W.D.N.Y. 1950)	Not reported	5 S. & D. 798.
Reddi-Spred Corp. *v.* F.T.C. (C.A. 3 1956)	229 F. 2d 557	6 S. & D. 1.
Reed, William T. (Reed Candy Co.); F.T.C. *v.* (D.C.N.D. Ill. 1956)	Not reported	6 S. & D. 26.
(C.A. 7 1957)	243 F. 2d 308	6 S. & D. 282.
Certiorari denied (1957)	355 U.S. 823	
Reed's Cut Rate Drug Store, etc. (Lenard Gotlieb et al. t/a); F.T.C. *v.* (D.C.N.D. W. Va. 1940)	Not reported	3 S. & D. 686.
Regal Accessories, Inc., et al.; U.S. *v.* (D.C. E.D.N.Y. 1967)	Not reported	8 S. & D. 1306.
Regina Corp., The, *v.* F.T.C. (C.A. 3 1963)	322 F. 2d 765	7 S. & D. 775.
Reid H. Ray Film Industries, Inc. *v.* F.T.C. (C.A. 8 1951)	190 F. 2d 207	5 S. & D. 300.
Reiffe & Sons, Inc., S., et al.; U.S. *v.* (D.C. S.D.N.Y. 1955)	Not reported	5 S. & D. 797n.
Rejuvenation Center Ltd. (Robert E. Sheldon, Beverlee Sheldon, a/k/a Beverlee Choate, and Terry Lee Arms, III, d/b/a); F.T.C. *v.* (D.C. W.D. Texas 1973)	Not reported	9 S. & D. 623.
(D.C. W.D. Texas 1973)	Not reported	9 S. & D. 923.
Reliable Premium House, etc. (Harry Froman t/a) *v.* F.T.C. (C.A. 2 1944)	Not reported	4 S. & D. 181.
Rembrandt Studio, etc. (Eugene D. Petrey t/a) *v.* F.T.C. (C.A. 5 1951)	Not reported	5 S. & D. 327.
Renaire Corp. (Pennsylvania) *v.* F.T.C. (C.A. 3 1957)	Not reported	6 S. & D. 258.
Certiorari denied (1957)	355 U.S. 829	

Name of Case	Reference	Reported in—
(C.A.D.C. 1957)	Not reported	6 S. & D. 259n.
(C.A. 3 1959)	Not reported	6 S. & D. 682.
Renaire Corp. (Pennsylvania) *v.* Joseph Callaway (C.A. 3 1957)	Not reported	6 S. & D. 258.
Certiorari denied (1957)	355 U.S. 829	
Renor Co., Inc., et al. (John T. Benson); U.S. *v.* (D.C.N.D. Ill. 1960)	Not reported	6 S. & D. 918.
Research Products Co. (Robert C. Oberlin t/a); F.T.C. *v.* (D.C.N.D. Ohio 1939)	Not reported	3 S. & D. 640.
Resort Car Rental System, Inc., et al. *v.* F.T.C. (C.A. 9 1975)	518 F. 2d 962	9 S. & D. 1318.
Retail Credit Company, Manager, Miami Branch Office; F.T.C. *v.*		
(D.C. D.C. 1973)	357 F. Supp. 347	9 S. & D. 629.
(D.C. D.C. 1975)	515 F. 2d 988	9 S. & D. 1246.
Retail Service Bureau, etc. (Edward Lowenthal t/a); U.S. *v.* (D.C.N.D. Ill. 1956)	Not reported	6 S. & D. 912.
Retonga Medicine Co.; U.S. *v.* (D.C.N.D. Ga. 1944)	Not reported	4 S. & D. 815.
Rettinger, David and Israel; U.S. *v.* (D.C. E.D.N.Y. 1964)	Not reported	7 S. & D. 1447.
Rettinger, David, *v.* F.T.C. (C.A. 2 1968)	392 F. 2d 454	8 S. & D. 743.
Revlon Products Corp. *v.* F.T.C. (C.A. 2 1955)	Not reported	5 S. & D. 731.
Rex Products Co., etc. (Earl Aronberg t/a) *v.* F.T.C. (C.A. 7 1942)	132 F. 2d 165	3 S. & D. 528.
Rex Products Co., etc. (Earl Aronberg t/a); F.T.C. *v.* (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 647.
Reynolds Metals Co. *v.* F.T.C. (C.A.D.C. 1962)	309 F. 2d 223	7 S. & D. 527.
Reynolds Tobacco Co., R.J., *v.* F.T.C. (C.A. 7 1951)	192 F. 2d 535	5 S. & D. 332.
R. H. Macy & Co., Inc. *v.* F.T.C. (C.A. 2 1964)	326 F. 2d 445	7 S. & D. 849.
R. H. Macy & Co., Inc. *v.* Wilmer L. Tinley et al. (D.C.D.C. 1965)	249 F. Supp. 778	7 S. & D. 1430.
Rhodes Pharmacal Co., Inc., et al.; F.T.C. *v.*		
(D.C.N.D. Ill. 1951)	Not reported	5 S. & D. 262.
(D.C.N.D. Ill. 1951)	Not reported	5 S. & D. 777.
(Sup. Ct. 1955)	348 U.S. 940	5 S. & D. 728.
Rhodes Pharmacal Co., Inc., et al. *v.* F.T.C.		
(C.A. 7 1951)	191 F. 2d 744	5 S. & D. 301.
(C.A. 7 1953)	208 F. 2d 382	5 S. & D. 582.
Rhodes Pharmacal Co., Inc., et al.; U.S. *v.*		
(D.C.E.D. Pa. 1951)	Not reported	5 S. & D. 801.
(D.C.N.D. Ill. 1964)	Not reported	7 S. & D. 1445.
Rice, Gerald A., et al.; U.S. *v.* (D.C.W.D. Wash. 1952)	Not reported	5 S. & D. 804.
Richard Jackson, et al.; F.T.C. *v.* (D.C. W.D. Wash. 1974)	Not reported	9 S. & D. 842.
Richard M. Page and Arrow Food Distributors, Inc., et al.; F.T.C. *v.* (D.C. N.D. Ga. 1974)	378 F. Supp. 1052	9 S. & D. 1053.
Richard S. Marcus (t/a Stanton Blanket Co.) *v.* F.T.C. (C.A. 2 1965)	354 F. 2d 85	7 S. & D. 1423.
Richter Concrete Corp. and Stewart Concrete and Material Co. *v.* F.T.C. (D.C.S.D. Ohio 1967)	Not reported	8 S. & D. 490.
Rifkin, Irving; U.S. *v.* (D.C. S.D.N.Y. 1974)	Not reported	9 S. & D. 1556.
Ritholz, Benjamin D.; F.T.C. *v.* (C.A. 7 1936)	Not reported	2 S. & D. 344.
Ritholz, Benjamin D., et al. *v.* F.T.C. (D.C. D.C. 1938)	Not reported	2 S. & D. 475.

Name of Case	Reference	Reported in—
(C.A.D.C. 1939)	105 F. 2d 937	3 S. & D. 126.
Ritholz, Benjamin D., et al. (National Optical Stores Co. etc.) *v.* F.T.C. (C.A. 2 1950)	Not reported	5 S. & D. 203.
Rittenhouse Candy Co. (Sol Block et al. t/a); F.T.C. *v.* (C.A. 3 1938)	Not reported	2 S & D. 436.
R.J. Reynolds Tobacco Co., *v.* F.T.C. (C.A. 7 1951)	192 F. 2d 535	5 S. & D. 332.
R.J. Reynolds Tobacco Co. *v.* Lewis A. Engman, et al. (D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1446.
(D.C. S.D.N.Y. 1975)	Not reported	9 S. & D. 1525.
(C.A. 2 1975)	527 F. 2d 115	9 S. & D. 1542.
Robbin & Co., A., *v.* F.T.C. (C.A. 7 1964)	337 F. 2d 441	7 S. & D. 1012.
Robert E. Sheldon, et al. (d/b/a Rejuvenation Center Ltd.); F.T.C. *v.*		
(D.C. W.D. Texas 1973)	Not reported	9 S. & D. 623.
(D.C. W.D. Texas 1973)	Not reported	9 S. & D. 804.
Robert Hall Clothes, Inc., et al.; U.S. *v.* (D.C. S.D.N.Y. 1957)	Not reported	6 S. & D. 913.
Robertson, George T., et al. *v.* F.T.C. (C.A. 4 1969)	415 F. 2d 49	8 S. & D. 995.
Robins Paper Co. of Baltimore City *v.* F.T.C. (C.A. 2 1957)	240 F. 2d 341	6 S. & D. 136.
Rock, Monica M., *v.* F.T.C. (C.A. 7 1941)	117 F. 2d 680	3 S. & D. 335.
Rodale Press, Inc., et al. *v.* F.T.C. (C.A.D.C. 1968)	407 F. 2d 1252	8 S. & D. 840.
Rodgers, William H., Jr. *v.* F.T.C. (C.A. 9 1974)	492 F. 2d 228	9 S. & D. 846.
Rogers Candy Co. et al. *v.* F.T.C. (C.A.9. 1939)	101 F. 2d 718	3 S. & D. 59.
Rogers Redemption Bureau, etc.; U.S. *v.* (D.C.D. Minn. 1945)	Not reported	4 S. & D. 820.
Rohlfing, Oliver L. (t/a National Laboratories of St. Louis); U.S. *v.* (D.C.E.D. Mo. 1967)	Not reported	8 S. & D. 1307.
Ron-Al Medicine Co., Dr., etc. (Irving Sofronski. t/a); F.T.C. *v.* (D.C.E.D. Pa. 1939)	Not reported	3 S. & D. 638.
Rorer, William H., Inc. *v.* F.T.C. (C.A. 2 1967)	374 F. 2d 622	8 S. & D. 432.
Rosenblum, Joseph, et al. (d/b/a Modern Manner Clothes) *v.* F.T.C. (C.A. 2 1951)	192 F. 2d 392	5 S. & D. 347.
Certiorari denied (1952)	343 U.S. 905	
(C.A. 2 1954)	214 F. 2d 338	5 S. & D. 671.
Rose, Stanley L. (Sew-Ezy Machine Co.); U.S. *v.* (D.C.D. Md. 1958)	Not reported	6 S. & D. 915.
Rosten, Bernard (t/a Bern Products Co.) *v.* F.T.C. (C.A. 2 1959)	263 F. 2d 620	6 S. & D. 530.
Rothschild, Lester (t/a Gen-O-Pak Co.) *v.* F.T.C. (C.A. 7 1952)	200 F. 2d 39	5 S. & D. 441.
Certiorari denied (1953)	345 U.S. 941	
Royal Baking Powder Co. *v.* F.T.C. (C.A. 2 1922)	281 Fed. 744	1 S. & D. 202.
(D.C.S.C. 1927)	Not reported	1 S. & D. 624.
(D.C.S.C. 1927)	Not reported	1 S. & D. 650.
(D.C.S.C. 1927)	Not reported	1 S. & D. 651.
(C.A.D.C. 1929)	32 F. 2d 966	1 S. & D. 701.
Certiorari denied (1929)	280 U.S. 572.	
(D.C.S.C. 1929)	Not reported	1 S. & D. 703.
Royal Bead Novelty Co. *v.* F.T.C. (C.A. 7 1951)	191 F. 2d 954	5 S. & D. 327.
Royal Milling Co. et al. *v.* F.T.C. (C.A. 6 1932)	58 F. 2d 581	2 S. & D. 180.
Royal Milling Co. et al.; F.T.C. *v.* (Sup. Ct. 1933)	288 U.S. 212	2 S. & D. 217.

Name of Case	Reference	Reported in—
Royal Oil Corp. et al. *v.* F.T.C. (C.A. 4 1959)	262 F. 2d 741	6 S. & D. 477.
Royce George Hoffmann; U.S. *v.* (D.C. Kan. 1971)	Not reported	9 S. & D. 1553.
R. T. Vanderbilt Co., Inc., et al.; U.S. *v.* (D.C. S.D.N.Y. 1944)	Not reported	4 S. & D. 815.
Ruberoid Co. *v.* F.T.C. (C.A. 2 1951)	189 F. 2d 893	5 S. & D. 295.
(C.A. 2 1951)	191 F. 2d 294	5 S. & D. 316.
Ruberoid Co.; F.T.C. *v.* (Sup. Ct. 1952)	343 U.S. 470	5 S. & D. 388.
Ruberoid Co. *v.* F.T.C. (Sup. Ct. 1952)	343 U.S. 470	5 S. & D. 388.
Rubin, William B. (The Sweets Co. of America, Inc.), et al.; F.T.C. *v.* (D.C.S.D.N.Y. 1956)	145 F. Supp. 171	6 S. & D. 52.
(C.A. 2 1957)	245 F. 2d 60	6 S. & D. 333.
Rushing, Grady L. (d/b/a Marcel Co.) *v.* F.T.C. (C.A. 5 1963)	320 F. 2d 280	7 S. & D. 731.
Certiorari denied (1964)	375 U.S. 986.	
Ryan Candy Co. (Southern Premium Mfg. Co. t/a); F.T.C. *v.* (C.A. 5 1936)	83 F. 2d 1008	2 S. & D. 342.
Safeway Stores, Inc. *v.* F.T.C. (C.A. 9 1966)	366 F. 2d 795	8 S. & D. 351.
Certiorari denied (1967)	386 U.S. 932.	
Safeway Stores, Inc. *v.* Orville Freeman (C.A. D.C. 1966)	369 F. 2d 952	8 S. & D. 368.
Safeway Stores, Inc.; U.S. *v.* (D.C.N.D. Tex. 1970)	Not reported	8 S. & D. 1210.
Saks & Co. *v.* F.T.C. (C.A. 2 1941)	Not reported	3 S. & D. 363.
Salisbury Co., The, *v.* F.T.C. (C.A. 8 1956)	230 F. 2d 954	6 S. & D. 5.
Salt Producers Assn. et al. *v.* F.T.C. (C.A. 7 1943)	134 F. 2d 354	3 S. & D. 542.
Salup, Jack (Charlotte Novelty Co.); U.S. *v.* (D.C.D. Md. 1958)	Not reported	6 S. & D. 915.
Samuel A. Mannis & Co. *v.* F.T.C. (C.A. 9 1961)	293 F. 2d774	7 S. & D. 214.
Samuel H. Moss, Inc. *v.* F.T.C. (C.A. 2 1945)	148 F. 2d 378	4 S. & D. 324.
Certiorari denied (1945)	326 U.S. 734.	
(C.A. 2 1946)	155 F. 2d 1016	4 S. & D. 495.
Sanders, Peter, et al. (d/b/a The Perfect Reconditioned Spark Plug Co.) *v.* F.T.C. (C.A. 2 1941)	Not reported	3 S. & D. 375.
S. & S. Pharmaceutical Co., Inc., et al. *v.* F.T.C. (C.A. 5 1969)	408 F. 2d 487	8 S. & D. 892.
Sandura Co. *v.* F.T.C. (C.A. 6 1964)	339 F. 2d 847	7 S. & D. 1077.
Sanitary Feather & Down Co., Inc., et al. *v.* F.T.C. (C.A. 2 1956)	235 F. 2d 344	6 S. & D. 30.
Sanitary Feather Co. (Daniel Huttner); U.S. *v.* (D.C.N.D. Ill. 1958)	Not reported	6 S. & D. 914.
San Juan Lumber Co., Inc.; U.S. *v.* (D.C.D. Colo. 1969)	313 F. Supp. 703	8 S. & D. 1061
Saucke, Orlan A. *v.* F.T.C. (D.C.N.D. Ga. 1971)	333 F. Supp. 1197	9 S. & D. 165.
Saunders Company et al., W.B.; U.S. *v.* (D.C. E.D. Pa. 1965)	Not reported	7 S. & D. 1448.
Savage Candy Co.; F.T.C. *v.* (C.A. 10 1937)	92 F. 2d 1003	2 S. & D. 421.
Sav-Cote Chemical Laboratories, Inc., et al.; U.S. *v.* (D.C.N.J. 1969)	Not reported	8 S. & D. 1308.
(D.C.N.J. 1969)	Not reported	9 S. & D. 1553.
Savitch, Doris, et al. (t/a Personal Drug Co.) *v.* F.T.C. (C.A. 2 1955)	218 F. 2d 817	5 S. & D. 727.
Savitch, Doris, et al. (t/a Personal Drug Co.); U.S. *v.* (D.C.E.D.N.Y. 1961)	Not reported	7 S. & D. 1440.
Sax, Chester (Consolidated Mfg. Co.), et al. *v.* F.T.C. (C.A. 4 1952)	199 F. 2d 417	5 S. & D. 426.

Name of Case	Reference	Reported in—
(D.C.D.C. 1954)	Not reported	5 S. & D. 677.
Sax, Max (Container Mfg. Co.), et al. *v.* F.T.C. (C.A. 4 1952)	199 F. 2d 417	5 S. & D. 426.
(D.C.D.C. 1954)	Not reported	5 S. & D. 677.
S. Buchsbaum & Co. *v.* F.T.C. (C.A. 7 1946)	153 F. 2d 85.	4 S. & D. 449.
(C.A. 7 1947)	160 F. 2d 121	4 S. & D. 621.
S. Buchsbaum & Co.; F.T.C. *v.* (Sup. Ct. 1946)	328 U.S. 818	4 S. & D. 482.
Schachnow, Jacob (t/a Modern Hat Works) *v.* F.T.C. (C.A. 3 1941)	Not reported	3 S. & D. 361.
Schambach, Fred, *v.* F.T.C. (C.A.D.C. 1953)	Not reported	5 S. & D. 580.
Schick Inc., et al. *v.* F.T.C. (C.A.D.C. 1961)	288 F. 2d 407	7 S. & D. 36.
Schiff, Harold, et al. (Sun Vacuum Cleaner Co.); U.S. *v.* (D.C.D. Md. 1962)	Not reported	7 S. & D. 1441.
Schnackenberg, Elmer J., et al.; Paul Theodore Cheff (Holland Furnace) *v.* (Sup. Ct. 1966)	384 U.S. 373	8 S. & D. 176.
Schrup et al.; American Brake Shoe Co. *v.* (D.C.D. Del. 1965)	Not reported	7 S. & D. 1357.
Schwartz International Textiles, Ltd., Bart *v.* F.T.C. (C.C.P.A. 1961)	289 F. 2d 665	7 S. & D. 86.
Scientific Living, Inc.; F.T.C. *v.* (D.C.M.D. Pa. 1957)	150 F. Supp. 495	6 S. & D. 263.
(C.A. 3 1958)	254 F. 2d 598	6 S. & D. 394.
Certiorari denied (1958)	358 U.S. 867	
Rehearing denied (1959)	358 U.S. 938	
Scientific Manufacturing Co., Inc., et al. *v.* F.T.C. (C.A. 3 1941)	124 F. 2d 640	3 S. & D. 430.
Scotch Woolen Mills *v.* F.T.C. (C.A. 7 1947)	Not reported	4 S. & D. 644.
Scott Paper Co. *v.* F.T.C. (C.A. 3 1962)	301 F. 2d 579	7 S. & D. 448.
(C.A. 3 1964)	Not reported	7 S. & D. 898.
Screen Broadcast Corp. et al. *v.* F.T.C. (C.A. 2 1944)	Not reported	4 S. & D. 178.
Sea Island Thread Co., Inc. *v.* F.T.C. (C.A. 2 1927)	22 F. 2d 1019	1 S. & D. 654.
Sealpax Co. (Oppenheim, Oberndorf & Co. Inc. d/b/a) *v.* F.T.C. (C.A. 4 1925)	5 F. 2d 574	1 S. & D. 409.
Sears, Roebuck & Co. *v.* F.T.C. (C.A. 7 1919)	258 Fed. 307	1 S. & D. 36.
(D.C.D.C. 1962)	210 F. Supp. 67	7 S. & D. 561.
Sears, Roebuck & Co.; U.S. *v.* (D.C.N.D. Ill. 1957)	Not reported	6 S. & D. 913.
Seborne Co. et al. *v.* F.T.C. (C.A. 7 1943)	135 F. 2d 676	3 S. & D. 570.
Seeburg Corp., The, et al. *v.* F.T.C. (D.C.E.D. Tenn. 1966)	Not reported	8 S. & D. 393.
Seeburg Corp., The, *v.* F.T.C. (C.A. 6 1970)	425 F. 2d 124	8 S. & D. 1146.
Certiorari denied (1970)	400 U.S. 866	
S. Dean Slough *v.* F.T.C. (C.A. 5 1968)	396 F. 2d 870	8 S. & D. 782.
Certiorari denied (1968)	393 U.S. 980	
Segal Lock & Hardware Co., Inc., et al. *v.* F.T.C. (C.A. 2 1944)	143 F. 2d 935	4 S. & D. 266.
Certiorari denied (1945)	323 U.S. 791	
Segal Optical Co. *v.* F.T.C. (C.A. 2 1944)	142 F. 2d 255	4 S. & D. 150.
Seiberling Rubber Co.; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
Seigmeister, Clifford, and Benrus Watch Co., Inc., et al. *v.* F.T.C. (C.A. 8 1965)	352 F. 2d 313	7 S. & D. 1386.
Certiorari denied (1966)	384 U.S. 939	
Sekov Corp. et al.; F.T.C. *v.* (D.C.S.D. Calif. 1940)	Not reported	3 S. & D. 669.
Select Magazines, Inc., and Time, Inc.; U.S. *v.* (D.C.S.D.N.Y. 1964)	Not reported	7 S. & D. 1448.
Seven-Up Co. *v.* Andrew C. Goodhope (D.C. E.D. Mo. 1972)	349 F. Supp. 551	9 S. & D. 366.
Seven-Up Company *v.* F.T.C., et al.		

Name of Case	Reference	Reported in—
(C.A. 8 1973)	478 F. 2d 755	9 S. & D. 670.
Certiorari denied (1973)	414 U.S. 1013	
Sewell, James H. (d/b/a Burns Cuboid Co.) *v.* F.T.C. (C.A. 9 1956)	240 F. 2d 228	6 S. & D. 60.
Sewell, James H. (d/b/a Burns Cuboid Co.); F.T.C. *v.* (Sup. Ct. 1957)	353 U.S. 969	6 S. & D. 60n.
Sew-Ezy Machine Co. (Stanley L. Rose); U.S. *v.* (D.C.D. Md. 1958)	Not reported	6 S. & D. 915.
Seydel Chemical Co. et al.; U.S. *v.* (D.C.D. N.J. 1958)	Not reported	6 S. & D. 914.
Seymour Sales Co., et al. *v.* F.T.C. (C.A.D.C. 1954)	216 F. 2d 633	5 S. & D. 700.
Certiorari denied (1955)	348 U.S. 928	
Sgro, Leonard; U.S. *v.* (D.C.N.D. Ohio 1964)	Not reported	7 S. & D. 1447.
Shade Shop (Alfred Klesner); F.T.C. *v.* (C.A. D.C. 1925)	6 F. 2d 701	1 S. & D. 430.
(Sup. Ct. 1927)	274 U.S. 145	1 S. & D. 608.
(C.A.D.C. 1928)	25 F. 2d 524	1 S. & D. 677.
(Sup. Ct. 1929)	280 U.S. 19	1 S. & D. 1166.
Shafe, Kenneth W. (t/a O-Jib-Wa Medicine Co.) et al *v.* F.T.C. (C.A. 6 1958)	256 F. 2d 661	6 S. & D. 435.
Shakespeare Co. *v.* F.T.C. (C.A. 6 1931)	50 F. 2d 758	2 S. & D. 126.
Shapiro Felt Rug Co. et al.; U.S. *v.* (D.C.D. N.J. 1953)	Not reported	5 S. & D. 807.
Shapiro William, et al. *v.* F.T.C. (C.A. 2 1942)	Not reported	3 S. & D. 527.
Sheffield Silver Co., Inc., The, *v.* F.T.C. (C.A. 2 1938)	98 F. 2d 676	2 S. & D. 472.
(C.A. 2 1940)	Not reported	3 S. & D. 260.
Shelbrooke Coats et al.; U.S. *v.* (D.C.S.D. N.Y. 1954)	Not reported	5 S. & D. 807.
Sheldon, Beverlee (a/k/a Beverlee Choate), et al.; F.T.C. *v.*		
(D.C. W.D. Texas 1973)	Not reported	9 S. & D. 623.
(D.C. W.D. Texas 1973)	Not reported	9 S. & D. 804.
Sheldon, Robert E., et al.; F.T.C. *v.*		
(D.C. W.D. Texas 1973)	Not reported	9 S. & D. 623.
(D.C. W.D. Texas 1973)	Not reported	9 S. & D. 804.
Shell Oil Company; F.T.C. *v.*		
(D.C.D.C. 1974)	Not reported	9 S. & D. 905.
(C.A.D.C. 1975)	517 F. 2d 137	9 S. & D. 1411.
Shell Oil Co., and John Bodner, Jr. *v.* F.T.C., et al		
(D.C.D.C. 1974)	Not reported	9 S. & D. 1122.
(D.C.D.C. 1975)	Not reported	9 S. & D. 1161.
(D.C.D.C. 1975)	Not reported	9 S. & D. 1227.
Shell Oil Co. *v.* F.T.C. (C.A. 5 1966)	360 F. 2d 470	8 S. & D. 145.
Certiorari denied (1967)	385 U.S. 1002	
Sherry, Martin A., and Curtiss-Wright Corp.; F.T.C. *v.* (D.C.D.C. 1969)	Not reported	8 S. & D. 935.
Sherry's Cut Rate Drug Co., Inc., F.T.C. *v.* (D.C.S.D.W.Va. 1940)	Not reported	3 S. & D. 701.
Sherwin Charles, et al. (Lee et al.); U.S. *v.* (D.C.N.D. Tex. 1923)	290 Fed. 517	1 S. & D. 1006.
Sherwin Charles, et al. (Lee et al.) *v.* U.S. (C.A. 5 1924)	297 Fed. 704	1 S. & D. 1046.
(Sup. Ct. 1925)	268 U.S. 369	1 S. & D. 1065.
Sherwin-Williams Co., The, *v.* F.T.C. (C.A. 7 1955)	227 F. 2d 825	5 S. & D. 749.
Certiorari denied (1956)	351 U.S. 964	
(C.A. 7 1957)	244 F. 2d 312	6 S. & D. 328.
Sherwin-Williams Co., The; F.T.C. *v.* (Sup. Ct. 1957)	352 U.S. 419	6 S. & D. 193.
Shimmerlik, George, et al. (*In re* Dolcin Corp.)		

Name of Case	Reference	Reported in—
(C.A.D.C. 1956)	247 F. 2d 524	6 S. & D. 123.
Certiorari denied (1957)	353 U.S. 988	
Shrader, Charles (t/a Queen Chemical Co.); F.T.C. *v.* (D.C.W.D. Pa. 1941)	Not reported	3 S. & D. 718.
Shreveport Macaroni Mfg. Co., Inc. *v.* F.T.C. (C.A. 5 1963)	321 F. 2d 404	7 S. & D. 747.
Certiorari denied (1964)	375 U.S. 971	
Shulton, Inc., *v.* F.T.C. (C.A. 7 1962)	305 F. 2d 36	7 S. & D. 472.
Shupe-Williams Candy Co. et al. *v.* F.T.C. (C.A. 10 1939)	106 F. 2d 962	3 S. & D. 139.
Certiorari denied (1940)	309 U.S. 675	
Sibert, Frank, et al. *v.* F.T.C. (C.A. 2 1966)	367 F. 2d 364	8 S. & D. 375.
Siegel Co., Jacob, *v.* F.T.C. (C.A. 3 1944)	150 F. 2d 751	4 S. & D. 294.
(C.A. 3 1945)	Not reported	4 S. & D. 422.
(Sup. Ct. 1946)	327 U.S. 608	4 S. & D. 476.
Sifers Confection Co. (H. I. Sifers, etc. t/a); F.T.C. *v.* (C.A. 8 1936)	84 F. 2d 999	2 S. & D. 346.
Signode Steel Strapping Co. *v.* F.T.C. (C.A. 4 1942)	132 F. 2d 48	3 S. & D. 511.
Silk Scarves, Fifteen Cases of, More or Less, Containing Approx. 7414 Dozen Scarves; F.T.C. *v.* (D.C.S.D.N.Y. 1954)	Not reported	5 S. & D. 704.
Silver Co., L.B. *v.* F.T.C. (C.A. 6 1923)	289 Fed. 985	1 S. & D. 278.
(C.A. 6 1923)	292 Fed. 752	1 S. & D. 327.
Silver, Michael (Kulin Waste Co. et al.), *v.* F.T.C. (C.A. 1 1960)	Not reported	6 S. & D. 837.
Silver Star Chinchilla, Inc.; U.S. *v.* (D.C. Minn. 1972)	Not reported	9 S. & D. 338.
Silverman & Associates, J., etc. (Jack Silverman t/a) *v.* F.T.C. (C.A. 9 1944)	145 F. 2d 751	4 S. & D. 283.
Silverman & Associates, J., etc. (Michel Lipman et al. t/a) *v.* F.T.C. (C.A. 9 1945)	148 F. 2d 823	4 S. & D. 322.
Simeon Management Corporation, et al.; F.T.C. *v.* (D.C. N.D. Calif. 1975)	391 F. Supp. 697	9 S. & D. 1271.
Simplicity Pattern Co., Inc. *v.* F.T.C. (C.A. D.C. 1958)	258 Fed. 673	6 S. & D. 409.
(Sup. Ct. 1959)	360 U.S. 55	6 S. & D. 587.
Simplicity Pattern Co., Inc.; F.T.C. *v.* (Sup. Ct. 1959)	360 U.S. 55	6 S. & D. 587.
Sinclair Refining Co. *v.* F.T.C. (C.A. 7 1921)	276 Fed. 686	1 S. & D. 145.
Sinclair Refining Co.; F.T.C. *v.* (Sup. Ct. 1923)	261 U.S. 463	1 S. & D. 306.
Skylark Originals, Inc., et al. *v.* F.T.C. (C.A. 3 1973)	474 F. 2d 1340	9 S. & D. 572.
Slough, S. Dean, *v.* F.T.C. (C.A. 5 1968)	396 F. 2d 870	8 S. & D. 782.
Certiorari denied (1968)	393 U.S. 980	
Smarz, William; U.S. *v.* (D.C. S.D.N.Y. 1972)	Not reported	9 S. & D. 1553.
Smith, A.E., et al.; F.T.C. *v.* (D.C.S.D.N.Y. 1929)	34 F. 2d 323	1 S. & D. 709.
(D.C.S.D.N.Y. 1932)	1 F. Supp. 247	2 S. & D. 191.
Smith Fencer Corp., et al.; U.S. *v.* (D.C. E.D. Mich. 1971)	Not reported	9 S. & D. 1553.
S.M.S.A. Corp. et al. (Stamina Industries); U.S. *v.* (D.C.S.D.N.Y. 1963)	Not reported	7 S. & D. 1445.
Snap-On Tools Corp. *v.* F.T.C. (C.A. 7 1962)	Not reported	7 S. & D. 610.
(C.A. 7 1963)	321 F. 2d 825	7 S. & D. 753.
Snappy Fashions, Inc.; U.S. *v.* (D.C.E.D. N.Y. 1959)	Not reported	6 S. & D. 916.
Socony Mobil Oil Co., Inc., et al.; Joseph J. Broussard *v.* (C.A. 5 1965)	350 F. 2d 346	7 S. & D. 1294.
Sofronski, Irving (t/a Dr. Ron-Al Medicine Co., etc.); F.T.C. *v.* (D.C.E.D. Pa. 1939)	Not reported	3 S. & D. 638.

Name of Case	Reference	Reported in—
Sol Blaine; F.T.C. *v.* (D.C.N.D. Ga. 1970)	308 F. Supp. 932	8 S. & D. 1100.
Sorensen Manufacturing Co., Inc., P., *v.* F.T.C. (C.A.D.C. 1957)	246 F. 2d 687	6 S. & D. 332.
S.O.U.P., Inc. *v.* F.T.C. (D.C.D.C. 1971)	449 F. 2d 1142	9 S. & D. 94.
Southern Hardware Jobbers Assn. et al. *v.* F.T.C. (C.A. 5 1923)	290 Fed. 773	1 S. & D. 316.
Southern Premium Mfg. Co. (t/a Ryan Candy Co.); F.T.C. *v.* (C.A. 5 1936)	83 F. 2d 1008	2 S. & D. 342.
Southgate Brokerage Co., Inc. *v.* F.T.C. (C.A. 4 1945)	150 F. 2d 607	4 S. & D. 403.
Certiorari denied (1945)	326 U.S. 774	
Sowles, M.H.; F.T.C. *v.* (D.C.D. Utah 1920)	Not reported	1 S. & D. 638.
Spalding & Bros., Inc., A.G. *v.* F.T.C. (C.A. 3 1962)	301 F. 2d 585	7 S. & D. 391.
Spector, John *v.* F.T.C., et al. (D.C.S.D. Calif. 1973)	Not reported	9 S. & D. 612.
Spencer Gifts, Inc., et al. *v.* F.T.C. (C.A. 3 1962)	302 F. 2d 267	7 S. & D. 469.
Sperry and Hutchinson Co., The, *v.* F.T.C. (D.C.S.D.N.Y. 1966)	256 F. Supp. 136	8 S. & D. 236.
(C.A. 5 1970)	432 F. 2d 146	8 S. & D. 1259.
Certiorari granted (1971)	401 U.S. 992	
Sperry Rand Corp. *v.* F.T.C. (C.A.D.C. 1961)	288 F. 2d 403	7 S. & D. 31.
Sperry & Hutchinson Co.; F.T.C. *v.* (Sup. Ct. 1972)	405 U.S. 233 92 S. Ct. 898	9 S. & D. 232.
Spicer, William Edgar, et al. *v.* F.T.C. (C.A. 6 1944)	Not reported	4 S. & D. 270.
Spiegel, Inc. *v.* F.T.C. (C.A. 7 1969)	411 F. 2d 481	8 S. & D. 942.
(C.A. 7 1974)	494 F. 2d 59	9 S. & D. 891.
Certiorari denied (1974)	419 U.S. 896	
S. Reiffe & Sons, Inc., et al.; U.S. *v.* (D.C.S.D.N.Y. 1955)	Not reported	5 S. & D. 797.
S.S.S. Co., Inc., et al. *v.* F.T.C. (C.A. 6 1969)	416 F. 2d 226	8 S. & D. 1030.
Stadley, Nolan B. (t/a Sterling Appliance Co.); F.T.C. *v.* (D.C.S.D. Calif. 1941)	Not reported	3 S. & D. 712.
Staley Mfg. Co., A.E., et al. *v.* F.T.C. (C.A. 7 1943)	135 F. 2d 453	3 S. & D. 556.
(C.A. 7 1944)	144 F. 2d 221	4 S. & D. 250.
Staley Mfg. Co., A.E., et al.; F.T.C. *v.* (Sup. Ct. 1945)	324 U.S. 746	4 S. & D. 346, 495.
Stancato, Joseph (d/b/a Stancato School of Accordion, etc.) *v.* Department of Justice, Federal Trade Commission (D.C.C.D. Calif. 1969)	Not reported	8 S. & D. 994.
Stancato School of Accordion, etc. (Joseph Stancato d/b/a) *v.* Department of Justice, Federal Trade Commission (D.C.C.D. Calif. 1969)	Not reported	8 S. & D. 994.
Standard American, Inc., et al.; F.T.C. *v.* (D.C.E.D. Pa. 1961)	195 F. Supp. 801	7 S. & D. 188.
(C.A. 3 1962)	306 F. 2d 231	7 S. & D. 501.
Standard Brands, Inc.; F.T.C. *v.* (C.A. 2 1951)	189 F. 2d 510	5 S. & D. 287.
Standard Container Manufacturers' Assn., Inc., et al. *v.* F.T.C. (C.A. 5 1941)	119 F. 2d 262	3 S. & D. 364.
Standard Distributing Co. (Philip Harry Koolish et al. t/a) *v.* F.T.C. (C.A. 7 1942)	129 F. 2d 64	3 S. & D. 492.
Certiorari denied (1942)	317 U.S. 683	
Rehearing denied (1942)	317 U.S. 711	
(C.A. 7 1942)	Not reported	3 S. & D. 497.
Standard Distributors, Inc., et al. *v.* F.T.C.		

Name of Case	Reference	Reported in—
(C.A. 2 1954)	211 F. 2d 7	5 S. & D. 619.
Standard Distributors, Inc., et al.; U.S. *v.* (D.C.N.D. Ill. 1967)	267 F. Supp. 7	8 S. & D. 479.
(D.C.N.D. Ill. 1968)	Not reported	8 S. & D. 1308.
Standard Education Society; F.T.C. *v.* (C.A. 7 1926)	14 F. 2d 947	1 S. & D. 567.
Standard Education Society et al.; F.T.C. *v.* (C.A. 2 1936)	86 F. 2d 692	2 S. & D. 366.
(Sup. Ct. 1937)	302 U.S. 112	2 S. & D. 429.
(C.A. 2 1938)	97 F. 2d 513	2 S. & D. 366.
Certiorari denied (1938)	305 U.S. 642	
Standard Education Society et al.; F.T.C. *v.* (C.A. 2 1942)	Not reported	3 S. & D. 525.
Standard Education Society; F.T.C. *v.* (C.A. 2 1945)	148 F. 2d 931	4 S. & D. 357.
Standard Education Society et al.; U.S. *v.* (D.C.N.D. Ill. 1943)	55 F. Supp. 189	3 S. & D. 603.
(D.C.N.D. Ill. 1955)	Not reported	5 S. & D. 810.
Standard Educators, Inc., et al. *v.* F.T.C. (C.A. D.C. 1973)	475 F. 2d 401	9 S. & D. 588.
Certiorari denied (1973)	414 U.S. 828	
Standard Mills, Inc., et al. *v.* F.T.C. (C.A. 2 1964)	Not reported	7 S. & D. 914.
Standard Motor Products, Inc. *v.* F.T.C. (C.A. 2 1959)	265 F. 2d 674	6 S. & D. 553.
Certiorari denied (1959)	361 U.S. 826	
Standard Motor Products, Inc.; F.T.C. *v.* (C.A. 2 1967)	371 F. 2d 613	8 S. & D. 413.
Standard Oil Co. *v.* F.T.C. (C.A. 7 1949)	173 F. 2d 210	5 S. & D. 89.
(Sup. Ct. 1951)	340 U.S. 231	5 S. & D. 221.
(C.A. 7 1954)	Not reported	5 S. & D. 600.
(C.A. 7 1956)	233 F. 2d 649	6 S. & D. 6.
(D.C.D.C. 1973)	Not reported	9 S. & D. 540.
Standard Oil Co.; F.T.C. *v.* (Sup. Ct. 1958)	355 U.S. 396	6 S. & D. 373.
(C.A.D.C. 1975)	517 F. 2d 137	9 S. & D. 1411.
Standard Oil Co. (Indiana); F.T.C. *v.* (D.C.D.C. 1974)	Not reported	9 S. & D. 905.
Standard Oil Co. of California; F.T.C. *v.* (D.C.D.C. 1974)	Not reported	9 S. & D. 905.
(C.A.D.C. 1975)	517 F. 2d 137	9 S. & D. 1411.
Standard Oil Co. of New Jersey et al. *v.* F.T.C. (C.A. 3 1922)	282 Fed. 81	1 S. & D. 226.
Standard Oil Co. of New Jersey et al.; F.T.C. *v.* (Sup. Ct. 1923)	261 U.S. 463	1 S. & D. 306.
Standard Oil Co. of New York *v.* F.T.C. (C.A. 2 1921)	273 Fed. 478	1 S. & D. 129.
Standard Sewing Equipment Corp., et al. *v.* F.T.C. (C.A. 2 1955)	Not reported	5 S. & D. 738.
Stanley Furs, Inc.; U.S. *v.* (D.C.S.D. Colo. 1973)	Not reported	9 S. & D. 1555.
Stanley Laboratories, Inc., et al. *v.* F.T.C. (C.A. 9 1943)	138 F. 2d 388	3 S. & D. 596.
Stanley Works *v.* F.T.C. (C.A. 2 1972)	469 F. 2d 498	9 S. & D. 367.
Certiorari denied (1973)	412 U.S. 928	
Stanton Blanket Co. (Richard S. Marcus t/a) *v.* F.T.C. (C.A. 2 1965)	354 F. 2d 85	7 S. & D. 1423.
Stanton, Druggist to Women, Clara, *v.* F.T.C. (C.A. 10 1942)	131 F. 2d 105	3 S. & D. 508.
Star Office Supply Co., et al. *v.* F.T.C. (C.A. 2 1971)	Not reported	9 S. & D. 443.
Certiorari denied (1972)	406 U.S. 918	

Name of Case	Reference	Reported in—
Startup Candy Co. *v.* F.T.C. (C.A. 10 1939)	102 F. 2d 1015	3 S. & D. 106.
State of California, Ex. Rel. C.B. Christensen, et al. *v.* F.T.C., et al.		
(D.C.N.D. Calif. 1974)	Not reported	9 S. & D. 1118.
(D.C.N.D. Calif. 1975)	Not reported	9 S. & D. 1373.
Stauffer Laboratories, Inc. *v.* F.T.C. (C.A. 9 1965)	343 F. 2d 75	7 S. & D. 1133.
Steelco Stainless Steel, Inc., et al. *v.* F.T.C. (C.A. 7 1951)	187 F. 2d 693	5 S. & D. 265.
Steelco Stainless Steel, Inc., et al.; U.S. *v.* (D.C.N.D. Ill. 1956)	Not reported	6 S. & D. 911.
Steffy, William C., et al., U.S. *v.* (D.C.N.D. Ill. 1943)	Not reported	3 S. & D. 735.
Stenographic Machines, Inc. (La Salle Extension University) *v.* F.T.C. (C.A. 7 1956)	233 F. 2d 755	6 S. & D. 14.
Stephen Rug Mills (Herzfeld et al. d/b/a) *v.* F.T.C. (C.A. 2 1944)	140 F. 2d 207	4 S. & D. 109.
(C.A. 7 1955)	Not reported	5 S. & D. 739.
Sterling Appliance Co. (Nolan B. Stadley t/a); F.T.C. *v.* (D.C.S.D. Calif. 1941)	Not reported	3 S. & D. 712.
Sterling Drug, Inc., et al.; F.T.C. *v.* (D.C. S.D.N.Y. 1963)	215 F. Supp. 327	7 S. & D. 655.
(C.A. 2 1963)	317 F. 2d 669	7 S. & D. 683.
Sterling Drug, Inc. *v.* F.T.C. (D.C.D.C. 1970)	Not reported	8 S. & D. 1285.
(C.A.D.C. 1971)	452 F. 2d 698	9 S. & D. 116.
(D.C.S.D.N.Y. 1973)	Not reported	9 S. & D. 816.
Sterling Materials Co., Inc., et al.; U.S. *v.* (D.C.E.D.N.Y. 1962)	Not reported	7 S. & D. 1441.
Sterling Nelson & Sons, Inc.; Rangen, Inc., et al. *v.* (C.A. 9 1965)	351 F. 2d 851	7 S. & D. 1342.
Certiorari denied (1966)	383 U.S. 936	
Stern & Stern Textiles, Inc.; U.S. *v.* (D.C.S.D.N.Y. 1966)	Not reported	8 S. & D. 1306.
Stetson Felt Mills (Dorfman et al. t/a) *v.* F.T.C. (C.A. 8 1944)	144 F. 2d 737	4 S. & D. 278.
Stevenson Corp., The, et al. *v.* F.T.C. (C.A. 2 1941)	Not reported	3 S. & D. 411.
Stewart Concrete and Material Co. and Richter Concrete Corp. *v.* F.T.C. (D.C.S.D. Ohio 1967)	Not reported	8 S. & D. 490.
Stokely-Van Camp, Inc., et al. *v.* F.T.C. (C.A. 7 1957)	246 F. 2d 458	6 S. & D. 355.
Stone Co., Arnold, *v.* F.T.C. (C.A. 5 1931)	49 F. 2d 1017	2 S. & D. 123.
St. Regis Paper Co. (Horace G. Barden et al.); F.T.C. *v.* (C.A. 7 1962)	304 F. 2d 731	7 S. & D. 495.
St. Regis Paper Co.; U.S. *v.* (D.C.S.D.N.Y. 1960)	181 F. Supp. 862	6 S. & D. 754.
(C.A. 2 1960)	295 F. 2d 607	6 S. & D. 863.
(D.C.S.D.N.Y. 1962)	Not reported	7 S. & D. 1441.
(D.C.S.D.N.Y. 1965)	240 F. Supp. 36	7 S. & D. 1145.
(C.A. 2 1966)	355 F. 2d 688	8 S. & D. 23.
St. Regis Paper Co. *v.* U.S. (Sup. Ct. 1961)	368 U.S. 208	7 S. & D. 284.
Rehearing denied (1962)	368 U.S. 972	
Stroiman, Harry (d/b/a Empire Builders Co.); F.T.C. *v.* (C.A. 8 1970)	428 F. 2d 808	8 S. & D. 1229.
Stuart & Co., C.H., et al.; U.S. *v.* (D.C.W.D. Wash. 1961)	Not reported	7 S. & D. 1439.
Suburban Propane Gas Corp. *v.* F.T.C. (D.C.S.D.N.Y. 1968)	Not reported	8 S. & D. 830.
(C.A. 2 1968)	Not reported	8 S. & D. 831.
Sumergrade & Sons, N. (Bernard H. Sumergrade		

Name of Case	Reference	Reported in—
et al. t/a) *v.* F.T.C. (C.A. 3 1956)	234 F. 2d 335	6 S. & D. 21.
Sun Cut Rate Drug Store (Howard Deckelbaum t/a); F.T.C. *v.* (D.C.S.D. W. Va. 1940)	Not reported	3 S. & D. 689.
Sun Oil Co. *v.* F.T.C. (C.A. 5 1961)	294 F. 2d 465	7 S. & D. 191.
(C.A. 5 1963)	Not reported	7 S. & D. 808.
(C.A. 7 1965)	350 F. 2d 624	7 S. & D. 1324.
Certiorari denied (1966)	382 U.S. 982	
Sun Oil Co.; F.T.C. *v.* (Sup. Ct. 1963)	371 U.S. 505	7 S. & D. 621.
Sun Vacuum Cleaner Co. (Harold Schiff et al.); U.S. *v.* (D.C.D. Md. 1962)	Not reported	7 S. & D. 1441.
Sunshine Art Studios, Inc., et al. *v.* F.T.C. (C.A. 1 1973)	481 F. 2d 1171	9 S. & D. 760.
Sunshine Biscuits, Inc. *v.* F.T.C. (C.A. 7 1962)	306 F. 2d 48	7 S. & D. 507.
Superior Oil Company, Inc.; F.T.C. *v.* (D.C.D.C. 1974)	Not reported	9 S. & D. 908.
(C.A.D.C. 1975)	517 F. 2d 137	9 S. & D. 1411.
Superior Products et al. *v.* F.T.C. (C.A. 4 1952)	199 F. 2d 417	5 S. & D. 426.
Superior Wool Batting, Inc.; U.S. *v.* (D.C. E.D.N.Y. 1962)	Not reported	7 S. & D. 1442.
Supreme Sales Co., etc. (Harry Froman t/a) *v.* F.T.C. (C.A. 2 1944)	Not reported	4 S. & D. 181.
Surf Sales Co. et al. *v.* F.T.C. (C.A. 7 1958)	259 F. 2d 744	6 S. & D. 453.
Surprise Brassiere Co., Inc. *v.* F.T.C. (C.A. 5 1969)	406 F. 2d 711	8 S. & D. 881.
Swanee Paper Corp. *v.* F.T.C. (C.A. 2 1961)	291 F. 2d 833	7 S. & D. 175.
Certiorari denied (1962)	368 U.S. 987	
Sweet Candy Co. *v.* F.T.C. (C.A. 10 1940)	112 F. 2d 168	3 S. & D. 229.
Sweet Candy Co.; U.S. *v.* (D.C.D. Utah 1942)	Not reported	3 S. & D. 731.
Sweets Co. of America, Inc. *v.* F.T.C. (C.A. 2 1940)	109 F. 2d 296	3 S. & D. 180.
Sweets Co. of America, Inc.; U.S. *v.* (D.C. N.J. 1942)	Not reported	3 S. & D. 732.
Sweets Co. of America, Inc., The (William B. Rubin), et al.; F.T.C. *v.* (D.C.S.D.N.Y. 1956)	145 F. Supp. 171	6 S. & D. 52.
(C.A. 2 1957)	245 F. 2d 60	6 S. & D. 333.
Swift & Co. *v.* F.T.C. (C.A. 7 1925)	8 F. 2d 595	1 S. & D. 392.
(Sup. Ct. 1926)	272 U.S. 554	1 S. & D. 575.
Swingline, Inc.; U.S. *v.* (D.C.E.D.N.Y. 1973)	Not reported	9 S. & D. 585.
(D.C.E.D.N.Y. 1974)	371 F. Supp. 37	9 S. & D. 827.
(D.C.E.D.N.Y. 1974)	Not reported	9 S. & D. 1556.
Sydney, Floersheim, *In re* (C.A. 9 1963)	316 F. 2d 423	7 S. & D. 666.
Sydney N. Floersheim *v.* Lewis A. Engman, et al. (C.A.D.C. 1973)	494 F. 2d 949	9 S. & D. 819.
Symbra-Ette, (Ger-Ro-Mar, Inc. t/a) et al. *v.* F.T.C. (C.A. 7 1975)	518 F. 2d 33	9 S. & D. 1363.
Tag Manufacturers Institute et al. *v.* F.T.C. (C.A. 1 1949)	174 F. 2d 452	5 S. & D. 105.
Tashof, Leon A., *v.* F.T.C. (C.A.D.C. 1970)	437 F. 2d 707	8 S. & D. 1291.
Techbestos, Inc.; U.S. *v.* (D.C.N.J. 1972)	Not reported	9 S. & D. 1554.
Ted Bates & Co., Inc. *v.* F.T.C. (C.A. 1 1962)	310 F. 2d 89	7 S. & D. 574.
(C.A. 1 1963)	326 F. 2d 517	7 S. & D. 824.
(C.A.D.C. 1975)	515 F. 2d 367	9 S. & D. 1376.
Ted Bates & Co., Inc.; F.T.C. *v.* (Sup. Ct. 1965)	380 U.S. 374	7 S. & D. 1152.

Name of Case	Reference	Reported in—
Temple Anthracite Coal Co. *v.* F.T.C. (C.A. 3 1931)	51 F. 2d 656	2 S. & D. 132.
Tennessee Coal, Iron & Railroad Co. *v.* F.T.C. (C.A. 5 1949)	Not reported	5 S. & D. 101.
Terry Lee Armas, III, et al. (d/b/a Rejuvenation Center, Ltd.); F.T.C. *v.*		
(D.C.W.D. Texas 1973)	Not reported	9 S. & D. 623.
(D.C.W.D. Texas 1973)	Not reported	9 S. & D. 804.
Texaco, Inc.; F.T.C. *v.*		
(D.C.D.C. 1974)	Not reported	9 S. & D. 905.
(C.A.D.C. 1975)	517 F. 2d 137	9 S. & D. 1411.
Texaco, Inc. *v.* F.T.C. (C.A. 5 1962)	301 F. 2d 662	7 S. & D. 463.
Certiorari denied (1962)	371 U.S. 822	
Texaco, Inc., and The B.F. Goodrich Co. *v.* F.T.C. (D.C.D.C. 1962)	Not reported	7 S. & D. 488.
(D.C.D.C. 1962)	Not reported	7 S. & D. 492.
(C.A.D.C. 1962)	Not reported	7 S. & D. 494.
(D.C.D.C. 1962)	Not reported	7 S. & D. 524.
(C.A.D.C. 1964)	336 F. 2d 754	7 S. & D. 956.
(C.A.D.C. 1967)	383 F. 2d 942	8 S. & D. 543.
Texaco, Inc., and The B.F. Goodrich Co.; F.T.C. *v.* (Sup. Ct. 1965)	381 U.S. 739	7 S. & D. 1263.
Texaco, Inc., et al.; F.T.C. *v.* (Sup. Ct. 1968)	393 U.S. 223	8 S. & D. 856.
Texas Co. (Standard Oil Co. of N.Y.) *v.* F.T.C. (C.A. 2 1921)	273 Fed. 478	1 S. & D. 129.
Texas, The State of; Double Eagle Lubricants, Inc. *v.* (D.C.N.D. Tex. 1965)	248 F. Supp. 515	7 S. & D. 1416.
Appeal dismissed (1966)	384 U.S. 434	
Textile and Apparel Group, American Importers Association et al. *v.* F.T.C. (C.A.D.C. 1969)	410 F. 2d 1052	8 S. & D. 895.
Certiorari denied (1969)	396 U.S. 910	
Thatcher Mfg. Co.; F.T.C. *v.* (C.A. 3 1925)	5 F. 2d 615	1 S. & D. 411.
Thatcher Mfg. Co. *v.* F.T.C. (Sup. Ct. 1926)	272 U.S. 554	1 S. & D. 575.
The Chase Manhattan Bank, et al. *v.* F.T.C., et al. (D.C.S.D.N.Y. 1975)	Not reported	9 S. & D. 1551.
The Goodyear Tire & Rubber Company *v.* F.T.C., et al. (D.C. Del. 1975)	396 F. Supp. 1125	9 S. & D. 1293.
The Great Atlantic & Pacific Tea Company, Inc., et al. *v.* F.T.C. (D.C.S.D.N.Y. 1974)	Not reported	9 S. & D. 1013.
The Superior Oil Company, Inc.; F.T.C. *v.* (C.A.D.C. 1975)	517 F. 2d 137	9 S. & D. 1411.
Theodore Kagen Corp. et al. *v.* F.T.C. (C.A. D.C. 1960)	233 F. 2d 371	6 S. & D. 837.
Certiorari denied (1961)	365 U.S. 843	
Thomas J. Lipton, Inc. *v.* F.T.C., et al. (D.C. Del. 1975)	396 F. Supp. 1125	9 S. & D. 1293.
Thomas Management Corp. et al,; U.S. *v.* (D.C.N.D. Ill. 1952)	Not reported	5 S. & D. 802.
Thomas Quilt Factories (Chester L. Thomas d/b/a) *v.* F.T.C. (C.A. 10 1940)	116 F. 2d 347	3 S. & D. 310.
Thomasville Chair Co. *v.* F.T.C. (C.A. 5 1962)	306 F. 2d 541	7 S. & D. 515.
Thompson Ramo Wooldridge, Inc. (Thompson Products, Inc.) *v.* F.T.C. (C.A. 6 1960)	Not reported	6 S. & D. 838.
Thomsen-King & Co., Inc., et al.; F.T.C. *v.* (D.C.N.D. Ill. 1940)	Not reported	3 S. & D. 658.
(C.A. 7 1940)	109 F. 2d 516	3 S. & D. 195.
Thomson Mfg. Co., Judson L., *v.* F.T.C. (C.A. 1 1945)	150 F. 2d 952	4 S. & D. 412.
Certiorari denied (1945)	326 U.S. 776	
Thyrole Products Co. (I. Ralph Weinstock t/a);		

Name of Case	Reference	Reported in—
F.T.C. *v.* (D.C.E.D. Pa. 1940)	Not reported	3 S. & D. 684.
Time Inc., and Select Magazines, Inc.; U.S. *v.* (D.C.S.D.N.Y. 1964)	Not reported	7 S. & D. 1448.
Timken Roller Bearing Co., The, *v.* F.T.C. (C.A. 6 1962)	299 F. 2d 839	7 S. & D. 362.
Certiorari denied (1962)	371 U.S. 861	
Tinley, Wilmer L., et al.; R.H. Macy & Co., Inc. *v.* (D.C.D.C. 1965)	249 F. Supp. 778	7 S. & D. 1430.
Tobacco Institute, The, *v.* F.T.C. (D.C.D.C. 1968)	Not reported	8 S. & D. 749.
Todd, Inc., J.E. *v.* F.T.C. (C.A.D.C. 1944)	145 F. 2d 858	4 S. & D. 291.
Toledo Pipe-Threading Machine Co. *v.* F.T.C. (C.A. 6 1925)	6 F. 2d 876	1 S. & D. 432.
(C.A. 6 1926)	11 F. 2d 337	1 S. & D. 479.
Topps Chewing Gum, Inc. *v.* Herman Tocker et al. (D.C.D.C. 1963)	Not reported	7 S. & D. 809.
Tornek, Allen V. (t/a Allen V. Tornek Co.) *v.* F.T.C. (C.A.D.C. 1960)	276 F. 2d 513	6 S. & D. 726.
Certiorari denied (1960)	364 U.S. 829	
Tractor Training Service et al. *v.* F.T.C. (C.A. 9 1955)	227 F. 2d 420	5 S. & D. 741.
Certiorari denied (1956)	350 U.S. 1005	
Trade Union Courier Publishing Corp. et al. *v.* F.T.C. (C.A. 3 1956)	232 F. 2d 636	6 S. & D. 14.
Trade Union Courier Publishing Corp. et al.; *In re* (C.A. 3 1960)	Not reported	6 S. & D. 750.
Travelers Health Assn. *v.* F.T.C. (C.A. 8 1959)	262 F. 2d 241	6 S. & D. 492.
Travelers Health Assn.; F.T.C. *v.* (Sup. Ct. 1960)	362 U.S. 293	6 S. & D. 763.
Travelers Health Assn. *v.* F.T.C. (C.A. 8 1962)	298 F. 2d 820	7 S. & D. 311.
Triangle Conduit & Cable Co., Inc. (Clayton Mark & Co. et al.) *v.* F.T.C. (C.A. 7 1948)	168 F. 2d 175	4 S. & D. 741.
(Sup. Ct. 1949)	336 U.S. 956	5 S. & D. 102.
Tri Valley Growers (formerly known as Tri-Valley Packing Association) *v.* F.T.C. (C.A. 9 1969)	411 F. 2d 985	8 S. & D. 915.
Certiorari denied (1969)	396 U.S. 929.	
Tri-Valley Packing Assn.; F.T.C. *v.* (D.C. N.D. Calif. 1959)	Not reported	6 S. & D. 664.
Tri-Valley Packing Association (now known as Tri Valley Growers) *v.* F.T.C. (C.A. 9 1964)	329 F. 2d 694	7 S. & D. 859.
(C.A. 9 1969)	411 F. 2d 985	8 S. & D. 915.
Certiorari denied (1969)	396 U.S. 929	
Tru-Health Garments Corp.; U.S. *v.* (D.C. S.D.N.Y. 1956)	Not reported	6 S. & D. 911.
Tubular Rivet & Stud Co. *v.* F.T.C. (D.C. D.C. 1941)	Not reported	3 S. & D. 423.
Turner, Glenn W. *v.* Lewis A. Engman, et al. (D.C.D.C. 1973)	Not reported	9 S. & D. 767.
Tuseck Enterprises, Inc., et al. *v.* F.T.C. (C.A. 6 1961)	Not reported	7 S. & D. 282.
Tuttle, W.W.; F.T.C. *v.* (D.C.S.D.N.Y. 1956)	Not reported	6 S. & D. 27.
(C.A. 2 1957)	244 F. 2d 605	6 S. & D. 230.
Certiorari denied (1957)	354 U.S. 925	
Tysons Corner Regional Shopping Center *v.* F.T.C. (D.C.D.C. 1972)	Not reported	9 S. & D. 308.
Ultra-Violet Products Co., Inc. *v.* F.T.C. (C.A. 9 1944)	143 F. 2d 814	4 S. & D. 219.
Union Bag-Camp Paper Corp. *v.* F.T.C. (D.C.S.D.N.Y. 1964)	233 F. Supp. 660	7 S. & D. 991.
Union Bag-Camp Paper Corp.; U.S. *v.* (D.C.		

Name of Case	Reference	Reported in—
S.D.N.Y. 1965)	Not reported	7 S. & D. 1117, 1449.
Union Carbide Corp. *v.* F.T.C. (C.A. 3 1964)	Not reported	7 S. & D. 843.
Union Circulation Co. et al.; U.S. *v.* (D.C. N.D. Ga. 1970)	311 F. Supp. 576	8 S. & D. 1113, 1310.
Union Circulation Co., Inc., et al. *v.* F.T.C. (C.A. 2 1957)	241 F. 2d 652	6 S. & D. 185.
Union News Co., The, and American News Co. et al. *v.* F.T.C. (C.A. 2 1962)	300 F. 2d 104	7 S. & D. 346.
Certiorari denied (1962)	371 U.S. 824	
United Biscuit Co. of America *v.* F.T.C. (C.A. 7 1965)	350 F. 2d 615	7 S. & D. 1313.
Certiorari denied (1966)	383 U.S. 926	
United Brands Company and Chiquita Brands, Inc. *v.* F.T.C. (C.A. 5 1974)	499 F. 2d 395	9 S. & D. 1090.
United Corporation et al. *v.* F.T.C. (C.A. 4 1940)	110 F. 2d 473	3 S. & D. 209.
United Diathermy, Inc.; F.T.C. *v.* (D.C. S.D.N.Y. 1940)	Not reported	3 S. & D. 709.
United Diathermy, Inc.; U.S. *v.* (D.C.S.D. N.Y. 1955)	Not reported	5 S. & D. 797.
United Film Service, Inc. *v.* F.T.C. (C.A. 8 1953)	204 F. 2d 694	5 S. & D. 528.
United States Association of Credit Bureaus, Inc., et al. *v.* F.T.C. (C.A. 7 1962)	299 F. 2d 220	7 S. & D. 358.
United States Maltsters Assn., et al. *v.* F.T.C. (C.A. 7 1945)	152 F. 2d 161	4 S. & D. 428.
United States Navy Weekly, Inc., et al. *v.* F.T.C. (C.A.D.C. 1953)	207 F. 2d 17	5 S. & D. 549.
United States Pipe and Foundry Co.; F.T.C. *v.* (D.C.D.C. 1969)	304 F. Supp. 1254	8 S. & D. 1021.
United States Retail Credit Assn., Inc., et al. *v.* F.T.C. (C.A. 4 1962)	300 F. 2d 212	7 S. & D. 366.
United States Rubber Co.; F.T.C. *v.* (C.A. D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
United States Steel Corp. and Lukens Steel Co.; F.T.C. *v.* (D.C.D.C. 1975)	Not reported	9 S. & D. 1317.
United States Steel Corp. et al. *v.* F.T.C. (C.A. 3 1945)	Not reported	4 S. & D. 367.
(C.A. 3 1948)	Not reported	4 S. & D. 789.
United States Steel Corp. *v.* F.T.C. (C.A. 6 1970)	426 F. 2d 592	8 S. & D. 1154.
(C.A. 6 1971)	Not reported	9 S. & D. 68.
United Surveys (James H. Christie d/b/a); U.S. *v.* (D.C.E.D. Wash. 1955)	Not reported	5 S. & D. 813.
Universal Educational Guild Inc., et al. (Abe Halperin); U.S. *v.* (D.C.E.D.N.Y. 1966)	Not reported	8 S. & D. 1306.
Universal-Rundle Corp. *v.* F.T.C. (C.A. 7 1965)	352 F. 2d 831	7 S. & D. 1380.
(C.A. 7 1967)	382 F. 2d 285	8 S. & D. 540.
Universal-Rundle Corp.; F.T.C. *v.* (Sup. Ct. 1967)	387 U.S. 244	8 S. & D. 498.
Universal Wool Batting Corp. et al.; U.S. *v.* (D.C.S.D.N.Y. 1961)	Not reported	7 S. & D. 283
Universe Co. (Heinz W. Kirchner d/b/a) *v.* F.T.C. (C.A. 9 1964)	337 F. 2d 751	7 S. & D. 1018.
Upjohn Co., The. *v.* F.T.C. (C.A. 6 1966)	363 F. 2d 757	8 S. & D. 248.
U.S. Drug & Sales Co., etc (Edwin L. Leisenring		

Name of Case	Reference	Reported in—
et al t/a) F.T.C. *v.* (D.C.D. Colo. 1940)	Not reported	3 S. & D. 666.
U.S. ex rel. Cubberley *v.* F.T.C. (D.C.D.C. 1933)	Not reported	2 S. & D. 240.
U.S. Industries, Inc. *v.* F.T.C. (C.A. 5 1956)	Not reported	6 S. & D. 5.
U.S. Printing & Novelty Co., Inc., et al. *v.* F.T.C. (C.A.D.C. 1953)	204 F. 2d 737	5 S. & D. 529.
Certiorari denied (1953)	346 U.S. 830	
U.S. Printing & Novelty Co., Inc., et al.; U.S. *v.* (D.C.S.D.N.Y. 1962)	Not reported	7 S. & D. 1442.
U.S. *v.* ABC Consolidated Corp. et al. (D.C. E.D.N.Y. 1970)	Not reported	8 S. & D. 1309.
U.S. *v.* Abe Halperin (Universal Educational Guild, Inc., et al.) (D.C.E.D.N.Y. 1966)	Not reported	8 S. & D. 1306.
U.S. *v.* Abraham Feder (D.C.S.D.N.Y. 1972)	Not reported	9 S. & D. 1554.
U.S. *v.* Aimcee Wholesale Corp. (D.C.S.D. N.Y. 1966)	256 F. Supp. 318	8 S. & D. 338.
U.S. *v.* Air Conditioning Training Corp. et al. (Morris A. Gluck) (D.C.S.D. Calif. 1956)	Not reported	6 S. & D. 912.
U.S. *v.* Aluminum Exterior Designers, Inc. (D.C.S.D. Ind. 1973)	Not reported	9 S. & D. 1555.
U.S. *v.* Alvin B. Wolf et al. (D.C.N.D. Ill. E.D. 1948)	Not reported	4 S. & D. 824.
U.S. *v.* Alvin O. Langdon (D.C.E.D. Tenn. 1975)	Not reported	9 S. & D. 1557.
U.S. *v.* American Albums, Inc., et al. (D.C. N.D. Ohio 1964)	Not reported	7 S. & D. 1446.
U.S. *v.* American Candle Co., Inc. (D.C.E.D. N.Y. 1965)	Not reported	7 S. & D. 1449.
U.S. *v.* American Greetings Corp. (D.C.N.D. Ohio 1958)	168 F. Supp. 45	6 S. & D. 457.
(D.C.N.D. Ohio 1958)	Not reported	6 S. & D. 916.
(D.C.N.D. Ohio 1959)	Not reported	6 S. & D. 520.
U.S.; American Greetings Corp. *v.* (C.A. 6 1959)	272 F. 2d 945	6 S. & D. 714.
U.S. *v.* American Rug & Carpet Co., Inc. (D.C. S.D.N.Y. 1967)	Not reported	8 S. & D. 1307.
U.S. *v.* American Seal-Kap Corp. et al. (D.C. N.D.N.Y. 1958)	Not reported	6 S. & D. 915.
U.S. *v.* American Steel & Wire Co. of New Jersey (D.C.S.D.N.Y. 1947)	Not reported	4 S. & D. 822.
U.S. *v.* American Television Institute, Inc. (D.C.N.D. Ill. 1943)	Not reported	3 S. & D. 735.
U.S. *v.* American Corp. et al. (D.C.D. Md. 1960)	Not reported	6 S. & D. 919.
(D.C.D. Md. 1965)	Not reported	7 S. & D. 1449.
U.S. *v.* AMF Incorporated (D.C. Colo. 1972)	Not reported	9 S. & D. 1554.
U.S. *v.* Amstar Corporation (D.C.S.D.N.Y. 1975)	Not reported	9 S. & D. 1558.
U.S. *v.* Ancorp National Services, Inc. (D.C.S.D.N.Y. 1973)	367 F. Supp. 1221	9 S. & D. 808.
(C.A. 2 1975)	Not reported	9 S. & D. 1312.
U.S. *v.* Annis Stanton Co. et al. (D.C.C.D. Calif. 1970)	Not reported	8 S. & D. 1309.
U.S. *v.* Approved Photographers Assn. (D.C. S.D. Ohio 1963)	Not reported	7 S. & D. 1443.
U.S. *v.* Arlen Realty & Development Corp., et al. (D.C. Md. 1975)	Not reported	9 S. & D. 1558.
U.S. *v.* Artnell Co. (C.A. 7 1964)	Not reported	7 S. & D. 1016.
U.S. *v.* Asheville Textiles, Inc. (D.C.S.D. N.Y. 1968)	Not reported	8 S. & D. 1308.

Name of Case	Reference	Reported in—
U.S. *v.* Associated Merchandising Corp. et al.		
(D.C.S.D.N.Y. 1966)	256 F. Supp. 318	8 S. & D. 338.
(D.C.S.D.N.Y. 1966)	261 F. Supp. 553	8 S. & D. 382.
U.S. *v.* Associated Trade Press Inc., et al. (D.C. N.D. Ill. 1969)	Not reported	8 S. & D. 1308.
U.S. *v.* Atlantic Coast Oil Co. of New York, Inc. (D.C.E.D.N.Y. 1950)	Not reported	5 S. & D. 798.
U.S. *v.* Atlantic School, Inc. (D.C. Kan. 1973)	Not reported	9 S. & D. 1555.
U.S. *v.* Atlas Mfg. & Sales Corp., The, et al. (Roland S. Jenkins) (D.C.N.D. Ohio 1966)	Not reported	8 S. & D. 1306.
U.S. *v.* Auerbach, Shay (t/a Belvedere Wool Co.) (D.C.E.D.N.Y. 1961)	Not reported	7 S. & D. 1439.
U.S. *v.* Automation Machine Training Center, Inc. (D.C.W.D. Mo. 1975)	Not reported	9 S. & D. 1557.
U.S. *v.* Barber, Hiram E. (t/a Motor Equipment Specialty Co.) (D.C. Nebr. 1943)	Not reported	3 S. & D. 734.
U.S. *v.* Basic Products Co. (D.C.W.D. Pa. 1919)	260 Fed. 472	1 S. & D. 876.
U.S. *v.* Baskin, Ned R. (D.C.N.D. Ill. 1957)	Not reported	6 S. & D. 913.
U.S. *v.* Beatrice Foods, Co.		
(D.C. Minn. 1972)	344 F. Supp. 104	9 S. & D. 437.
(C.A. 5 1974)	493 F. 2d 1259	9 S. & D. 867.
U.S. *v.* Belvedere Wool Co. (Shay Auerbach t/a) (D.C.E.D.N.Y. 1961)	Not reported	7 S. & D. 1439.
U.S. *v.* Benjamin D. Kalin (D.C.N.D.W.D. Ia. 1971)	Not reported	9 S. & D. 1553.
U.S. *v.* Bennett, William P. and Charles C. (D.C.N.D. Tex. 1965)	Not reported	7 S. & D. 1449.
U.S. *v.* Benson, John T. (Renor Co., Inc., et al.) (D.C.N.D. Ill. 1960)	Not reported	6 S. & D. 918.
U.S. *v.* Better Rhinestone Jewelry Corp. et al. (D.C.S.D.N.Y. 1970)	Not reported	8 S. & D. 1309.
U.S. *v.* B.F. Goodrich Co., The (D.C.N.D. Ohio 1957)	Not reported	6 S. & D. 914.
U.S. *v.* Bogolub, William (doing business as Fabricon Co.) (D.C.N.D. Ill. 1967)	Not reported	8 S. & D. 1308.
U.S. *v.* Bostwick Laboratories, Inc. (D.C.D. Conn. 1957)	Not reported	6 S. & D. 913.
U.S. *v.* Broadmore Fashions, Inc., et al. (D.C. S.D.N.Y. 1955)	Not reported	5 S. & D. 809.
U.S. *v.* Burch, Harry A. (t/a Washington Institute of Practical Nursing, etc.) (D.C.W.D. Wash. 1959)	Not reported	6 S. & D. 916.
U.S. *v.* Busse, Robert G. (D.C.S.D. Ill. 1964)	Not reported	7 S. & D. 1446.
U.S. *v.* Buttenfield, Charles C. (D.C.W.D. Pa. 1925)	Not reported	1 S. & D. 1064.
U.S. *v.* B-X Laboratories (John Petrie t/a) (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 723.
U.S. *v.* Canadian Ace Brewing Co. (D.C.N.D. Ill. 1949)	Not reported	5 S. & D. 797.
U.S.; Cannan *v.* (C.A. 5, 1927)	19 F. 2d 823	1 S. & D. 1106.
U.S. *v.* Capitol Service, Inc., The, et al. (D.C. E.D. Mich. 1957)	Not reported	6 S. & D. 913.
U.S. *v.* Carnerie, Don N. (d/b/a Civil Preparation Service, etc.) (D.C.W.D. Wash. 1955)	Not reported	5 S. & D. 811.
U.S. *v.* Carnerie, Don N. (D.C. Colo. 1969)	Not reported	8 S. & D. 1308.
U.S. *v.* Carpentier, Dr. Emile (D.C.N.J. 1944)	Not reported	4 S. & D. 816.
U.S. *v.* Caulk Co., L.D., The, and The Dentists' Supply Co. of New York (D.C.E.D.		

Name of Case	Reference	Reported in—
Pa. 1964)	Not reported	7 S. & D. 1446.
U.S. *v.* Century Metalcraft Corp. (D.C.S.D. Calif. 1955)	Not reported	5 S. & D. 812.
U.S. *v.* Certane Co. et al (D.C.S.D. Calif. 1943)	Not reported	3 S. & D. 737.
U.S. *v.* Charles C., and William P. Bennett (D.C.N.D. Tex. 1965)	Not reported	7 S. & D. 1449.
U.S. *v.* Charles R. Johnson (D.C.E.D. Md. 1975)	Not reported	9 S. & D. 1558.
U.S. *v.* Charlotte Novelty Co. (Jack Salup) (D.C.D. Md. 1958)	Not reported	6 S. & D. 915.
U.S. *v.* Chesapeake Distilling & Distributing Co. (D.C.D. Md. 1941)	Not reported	3 S. & D. 727.
U.S. *v.* Chicago Technical College (D.C.N.D. Ill. 1972)	Not reported	9 S. & D. 1554.
U.S. *v.* Christie, James H. (d/b/a United Surveys) (D.C.E.D. Wash. 1955)	Not reported	5 S. & D. 813.
U.S. *v.* Chun King Sales, Inc. (D.C.S.D. Calif. 1965)	Not reported	7 S. & D. 1449.
U.S. *v.* Civil Preparation Service, et al. (D.C. W.D. Wash. 1955)	Not reported	5 S. & D. 811.
U.S. *v.* Commercial Distributors of America (Gene J. Davidson) (D.C.E.D. Pa. 1964)	Not reported	7 S. & D. 1448.
U.S. *v.* Coradio, Inc. (D.C.D.N.J. 1956)	Not reported	6 S. & D. 911.
U.S. *v.* Cornelius P. Van Schaack, Jr. (The Ink Co. of America, etc.) (D.C.N.D. Ill. 1943)	Not reported	3 S. & D. 732.
U.S. *v.* Coty, Inc. (D.C. Del. 1963)	Not reported	7 S. & D. 1444.
U.S. *v.* Crown Manufacturing Co., Inc., et al. (D.C.E.D. Pa. 1960)	Not reported	6 S. & D. 919.
U.S. *v.* Curtis Brothers, Inc. (D.C.D.C. 1973)	Not reported	9 S. & D. 1556.
U.S. *v.* C.W.F. Corporation (D.C. Md. 1973)	Not reported	9 S. & D. 1556.
U.S. *v.* Dalton et al., Mick (D.C. Nebr. 1965)	Not reported	7 S. & D. 1449.
U.S. *v.* Davidson, Gene J. (Commercial Distributors of America) (D.C.E.D. Pa. 1964)	Not reported	7 S. & D. 1448.
U.S. *v.* Deeter, Larry M. (Educational Surveys) (D.C.E.D. Wash. 1959)	Not reported	6 S. & D. 916.
U.S. *v.* Del L. Young (D.C. N.D. Ill. 1975)	Not reported	9 S. & D. 1558.
U.S. *v.* Delco Novelty Co. and DeLuxe Products Co. (Alvin B. Wolf t/a) (D.C.N.D. Ill. 1948)	Not reported	4 S. & D. 824.
U.S. *v.* Dentists' Supply Co. of New York, The, and The L.D. Caulk Co. (D.C.E.D. Pa. 1964)	Not reported	7 S. & D. 1446.
U.S. *v.* Deran Confectionery Co. (D.C.D. Mass. 1940)	Not reported	3 S. & D. 724.
U.S. *v.* Distinctive Emblem & Uniform Corp., et al. (Seymour S. Hindman) (D.C.D.N.J. 1960)	179 F. Supp. 926	6 S. & D. 715.
(D.C.D.N.J. 1960)	Not reported	6 S. & D. 918.
U.S. *v.* Domestic Diathermy Co. (D.C.S.D. N.Y. 1952)	Not reported	5 S. & D. 803.
U.S. *v.* Don N. Carnerie (Civil Preparation Service, etc.) (D.C.W.D. Wash. 1955)	Not reported	5 S. & D. 811.
U.S. *v.* Don N. Carnerie (D.C. Colo. 1969)	Not reported	8 S. & D. 1308.
U.S. *v.* Dooley, Inc., Paul R., et al. (D.C.S.D. Calif. 1958)	Not reported	6 S. & D. 915.
U.S. *v.* Drew Corp., The Irving (D.C.S.D. Ohio 1956)	Not reported	6 S. & D. 911.

Name of Case	Reference	Reported in—
U.S. *v.* Dr. Emile Carpentier (D.C.D.N.J. 1944)	Not reported	4 S. & D. 816.
U.S. *v.* Dr. Hiss Shoes, Inc. (D.C.S.D. Ohio 1956)	Not reported	6 S. & D. 912.
U.S. *v.* Duon, Inc., et al. (D.C.S.D. Fla. 1959, 1960)	Not reported	6 S. & D. 917.
U.S. *v.* Durlacher and Co., Inc. (D.C.S.D.N.Y. 1973)	Not reported	9 S. & D. 1555.
U.S. *v.* Educational Surveys (Larry M. Deeter) (D.C.E.D. Wash. 1959)	Not reported	6 S. & D. 916.
U.S. *v.* Einiger Mills, Inc., et al. (D.C.D. Mass. 1966)	Not reported	8 S. & D. 1305.
U.S. *v.* Elliot Knitwear, Inc., et al. (D.C.S.D. N.Y. 1966)	Not reported	8 S. & D. 366.
(D.C.S.D.N.Y. 1969)	Not reported	8 S. & D. 1309.
U.S. *v.* Elmer Candy Co. (D.C.E.D. La. 1940)	Not reported	3 S. & D. 725.
U.S. *v.* Empire Press, Inc., et al. (D.C.N.D. Ill. 1961)	Not reported	7 S. & D. 1440.
U.S. *v.* Epstein, Murray, et al. (D.C.S.D. N.Y. 1964)	Not reported	7 S. & D. 1447.
U.S. *v.* E.R. Page Co., Inc., The (D.C.E.D. Mich. 1943)	Not reported	3 S. & D. 734.
U.S. *v.* Fabricon Co. (William Bogolub doing business as) (D.C.N.D. Ill. 1967)	Not reported	8 S. & D. 1308.
U.S. *v.* Family Record Plan, Inc., et al. (D.C. C.D. Calif. 1970)	Not reported	8 S. & D. 1309.
U.S. *v.* Federated Department Stores, Inc. (D.C.S.D.N.Y. 1966)	256 F. Supp. 318	8 S. & D. 338.
U.S. *v.* Fire Safety Services, Inc., et al. (D.C. Md. 1962)	Not reported	7 S. & D. 1442.
U.S. *v.* Fluidless Non-Tack Lenses, Inc., et al. (D.C.E.D. Mich. 1963)	Not reported	7 S. & D. 1444.
U.S. *v.* Fong Poy, et al. (D.C.N.D. Calif. 1962)	Not reported	7 S. & D. 1441.
U.S. *v.* Fox, I.J., Inc., et al. (D.C.N.D. Ohio 1963)	Not reported	7 S. & D. 1444.
U.S. *v.* Freeman, Joseph (Gift Products, Inc., et al.) (D.C.N.D. Ill. 1960)	Not reported	6 S. & D. 786.
U.S. *v.* Fried Woolen Corp., Joe, et al. (D.C.S. D.N.Y. 1960)	Not reported	6 S. & D. 917.
U.S. *v.* Frito-Lay, Inc., and PepsiCo, Inc. (D.C.S.D.N.Y. 1970)	Not reported	8 S. & D. 1310.
U.S. *v.* Fruchtman, Irwin (C.A. 6 1970)	421 F. 2d 1019	8 S. & D. 1103.
Certiorari denied (1970)	400 U.S. 849	
U.S. *v.* G. Fred Davis (D.C.N.D. Texas 1972)	Not reported	9 S. & D. 1554.
U.S. *v.* Garofalo, C. James (Masterkraft Guild Weavers, Inc.) (D.C.D.N.J. 1956)	Not reported	6 S. & D. 912.
U.S. *v.* Gartner, Robert J. (Charles F. Gomez et al.) (D.C. Nebr. 1967)	Not reported	8 S. & D. 1307.
U.S. *v.* Gellman Brothers (D.C.D. Minn. 1943)	Not reported	3 S. & D. 737.
U.S. *v.* General Products Corp. (Ray S. Kalwajtys et al. d/b/a) (D.C.N.D. Ill. 1959)	Not reported	6 S. & D. 917.
U.S. *v.* George's Radio and Television Co., Inc., et al. (D.C.D.C. 1962)	Not reported	7 S. & D. 1440.
U.S. *v.* Gerald A. Rice, et al. (D.C.W.D. Wash. 1952)	Not reported	5 S. & D. 804.
U.S. *v.* Gift Products, Inc., et al. (Joseph Freeman) (D.C.N.D. Ill. 1960)	Not reported	6 S. & D. 786.
U.S. *v.* G. Leach & Co. (D.C.E.D. Pa. 1944)	Not reported	4 S. & D. 819.
U.S. *v.* Gluck, Morris A. (Air Conditioning Training Corp., et al.) (D.C.S.D. Calif. 1956)	Not reported	6 S. & D. 912.

Name of Case	Reference	Reported in—
U.S. *v.* Goldfine, Bernard, et al. (Northfield Mills, Inc.) (D.C.D. Vt. 1960)	Not reported	6 S. & D. 919.
U.S. *v.* Gomez, Charles F., et al. (Robert J. Gartner) (D.C. Nebr. 1967)	Not reported	8 S. & D. 1307.
U.S. *v.* Goodrich Co., The B. F. (D.C.N.D. Ohio 1957)	Not reported	6 S. & D. 914.
U.S. *v.* Gramer, Walter W. (D.C.D. Minn. 1956)	Not reported	6 S. & D. 911.
U.S. *v.* Great Minneapolis Surplus Store, Inc., The, et al. (D.C. Minn. 1963)	Not reported	7 S. & D. 1443.
U.S. *v.* Greater Kansas City Gas Furnace & Air Conditioning Company (D.C.W.D. Mo. 1975)	Not reported	9 S. & D. 1557.
U.S. *v.* Gynex Corp. (Bureau of Hygiene) (D.C.S.D.N.Y. 1942)	Not reported	3 S. & D. 731.
U.S. *v.* Hall Clothes, Inc., Robert, et al. (D.C. S.D.N.Y. 1957)	Not reported	6 S. & D. 913.
U.S. *v.* Hargo Woolen Mills, Inc., et al. (D.C. D.N.H. 1966)	Not reported	8 S. & D. 1305.
U.S. *v.* Hauptman, Jacob (D.C.E.D. Pa. 1964)	Not reported	7 S. & D. 1445.
U.S. *v.* Hauptman Feather Co., Inc., et al. (D.C.E.D.N.Y. 1957)	Not reported	6 S. & D. 914.
U.S. *v.* Hearst Corp. (D.C.S.D.N.Y. 1963)	Not reported	7 S. & D. 1444.
U.S. *v.* Helene Curtis Industries, Inc. (D.C.N.D. Ill. 1974)	Not reported	9 S. & D. 1556.
U.S. *v.* Herbal Medicine Co., et al. (D.C.D. Md. 1940)	Not reported	3 S. & D. 726.
(D.C.D. Md. 1944)	Not reported	4 S. & D. 817.
U.S. *v.* Herbold Laboratory, Inc., et al. (D.C. C.D. Calif. 1967)	267 F. Supp. 53	8 S. & D. 485.
(D.C.C.D. Calif. 1967)	Not reported	8 S. & D. 1307.
U.S.; Herbold Laboratory, Inc., et al. *v.* (C.A. 9 1969)	413 F. 2d 342	8 S. & D. 977.
U.S. *v.* Hindman, Seymour S. (Distinctive Emblem & Uniform Corp., et al.) (D.C.D.N.J. 1960)	179 F. Supp. 926	6 S. & D. 715.
(D.C.D.N.J. 1960)	Not reported	6 S. & D. 918.
U.S. *v.* Hiss Shoes, Inc., Dr. (D.C.S.D. Ohio 1956)	Not reported	6 S. & D. 912.
U.S. *v.* H.M. Prince Textiles, Inc., et al. (D.C. S.D.N.Y. 1966)	262 F. Supp. 383	8 S. & D. 1305.
U.S. *v.* Hoffman Aircraft Co. et al. (D.C. Kans. 1967)	Not reported	8 S. & D. 1307.
U.S. *v.* Holst Publishing Co., et al. (D.C.S.D. Iowa 1940)	Not reported	3 S. & D. 724.
U.S. *v.* Home Diathermy Co., Inc. (D.C.S.D. N.Y. 1959)	Not reported	6 S. & D. 683.
(D.C.S.D.N.Y. 1959)	Not reported	6 S. & D. 917.
U.S. *v.* Huttner, Daniel (Sanitary Feather Co.) (D.C.N.D. Ill. 1958)	Not reported	6 S. & D. 914.
U.S. *v.* I.J. Fox, Inc., et al. (D.C.N.D. Ohio 1963)	Not reported	7 S. & D. 1444.
U.S. *v.* International Association of Photographers et al. (D.C.S.D. Calif. 1965)	Not reported	7 S. & D. 1449.
U.S. *v.* International Salt Co. (D.C.N.D. Ill. E.D. 1949)	80 F. Supp. 419	4 S. & D. 779.
(C.A. 7 1949)	174 F. 2d 703	5 S. & D. 125.
(Sup. Ct. 1950)	338 U.S. 632	5 S. & D. 167.
(D.C.N.D. Ill. 1951)	Not reported	5 S. & D. 800.
U.S. *v.* Irving Drew Corp., The (D.C.S.D. Ohio 1956)	Not reported	6 S. & D. 911.
U.S. *v.* Irving Rifkin		

Name of Case	Reference	Reported in—
(D.C.S.D.N.Y. 1974)	Not reported	9 S. & D. 1556.
U.S. *v.* Irving Roy Jacobson, et al. (D.C.W.D. Wis. 1944)	Not reported	4 S. & D. 817.
U.S. *v.* ITT Continental Baking Company		
(C.A. 10 1972)	462 F. 2d 1104	9 S. & D. 306.
(C.A. 10 1973)	485 F. 2d 16	9 S. & D. 775.
Certiorari granted (1974)	416 U.S. 968	
(Sup. Ct. 1975)	420 U.S. 223	9 S. & D. 1189.
	95 S. Ct. 926.	
U.S. *v.* J.B. Williams Company, Inc., et al.		
(D.C.S.D.N.Y. 1973)	354 F. Supp. 521	9 S. & D. 483.
(C.A. 2 1974)	498 F. 2d 414	9 S. & D. 938.
U.S. *v.* Jacobson, Irving Roy, et al. (D.C.W.D. Wis. 1944)	Not reported	4 S. & D. 817.
U.S. *v.* James H. Christie (United Surveys) (D.C.E.D. Wash. 1955)	Not reported	5 S. & D. 813.
U.S. *v.* Joe Fried Woolen Corp. et al. (D.C. S.D.N.Y. 1960)	Not reported	6 S. & D. 817.
U.S. *v.* K & S. Sales Co., et al (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 723.
U.S. *v.* Kalwajtys, Ray S. et al. (d/b/a General Products Corp.) (D.C.N.D. Ill. 1959)	Not reported	6 S. & D. 917.
U.S. *v.* Karns, Saul J. (D.C.S.D.N.Y. 1964)	Not reported	7 S. & D. 1445.
U.S. *v.* Klimate-Pruf Manufacturing Co. (D.C.M.D.N.C. 1940)	Not reported	3 S. & D. 725.
U.S. *v.* Koch, Carl E., et al. (D.C.N.D. Ill. 1942)	Not reported	3 S. & D. 730.
U.S. *v.* Kongo Chemical Co., Inc. (D.C.S.D. N.Y. 1944)	Not reported	4 S. & D. 818.
U.S. *v.* Koscot Interplanetary, Inc.		
(D.C.M.D. Fla. 1973)	Not reported	9 S. & D. 791.
(D.C.M.D. Fla. 1973)	Not reported	9 S. & D. 805.
U.S. *v.* Koster-Pearl Furs, Inc., et al. (D.C. S.D.N.Y. 1962)	Not reported	7 S. & D. 1443.
U.S. *v.* Lady Carole Coats Inc., et al. (D.C. S.D.N.Y. 1954)	Not reported	5 S. & D. 807.
U.S. *v.* Lafayette Iron Works, Inc. (D.C.D. N.J. 1964)	Not reported	7 S. & D. 917.
U.S. *v.* Lanteen Laboratories, Inc., et al. (D.C. N.D. Ill. 1945)	Not reported	4 S. & D. 821.
U.S. *v.* Lawrence Blanket Company, et al. (D.C. Mass. 1965)	Not reported	7 S. & D. 1449.
U.S. *v.* Leach & Co., G. (D.C.E.D. Pa. 1944)	Not reported	4 S. & D. 819.
U.S. *v.* Lee et al. (Sherwin et al.) (D.C.N.D. Tex. 1923)	290 Fed. 517	1 S. & D. 1006.
U.S.; Lee et al. *v.* (Sherwin et al.) (C.A. 5 1924)	297 Fed. 704	1 S. & D. 1046.
U.S. *v.* Lehrman Furs, Inc., et al. (D.C.S.D. N.Y. 1961)	Not reported	7 S. & D. 1439.
U.S. *v.* Lenco Spring Co. (Maurice J. Lenett et al.) (D.C. Mass. 1962)	Not reported	7 S. & D. 1442.
U.S. *v.* Lenett, Maurice J., et al. (Lenco Spring Co.) (D.C. Mass. 1962)	Not reported	7 S. & D. 1442.
U.S. *v.* Levore Co. et al. (D.C.N.D. Ill. 1941)	Not reported	3 S. & D. 728.
U.S. *v.* Litchfield Woolen Mills Co., et al. (D.C. Minn. 1964)	Not reported	7 S. & D. 1447.
U.S. *v.* Litton Industries		
(C.A. 9 1972)	462 F. 2d 14	9 S. & D. 299.
U.S. *v.* Livingston, Jules (t/a Maryland Distributors etc.) (D.C.D. Md. 1957)	Not reported	6 S. & D. 914.
U.S. *v.* L.M. Clothing Co., et al. (D.C.S.D. N.Y. 1961)	Not reported	7 S. & D. 1439.

Name of Case	Reference	Reported in—
U.S. *v.* Loesch, William T. (D.C.S.D. Tex. 1963)	Not reported	7 S. & D. 1443.
U.S. *v.* Lowenthal, Edward (t/a Thomas Webster, etc.) (D.C.N.D. Ill. 1956)	Not reported	6 S. & D. 912.
(C.A. 7 1957)	248 F. 2d 397	6 S. & D. 365.
(D.C.D. Ariz. 1959)	Not reported	6 S. & D. 916.
U.S. *v.* MacFadden Publications, Inc., et al. (D.C.S.D.N.Y. 1965)	Not reported	7 S. & D. 1449.
U.S. *v.* Madway Main Line Homes, Inc., et al. (Main Line Lumber & Millwork Co., et al.) (D.C.E.D. Pa. 1966)	Not reported	8 S. & D. 1305.
U.S. *v.* Magic Weave, Inc., et al. (D.C. Mass. 1962)	Not reported	7 S. & D. 1442.
U.S. *v.* Magnecoil Co., Inc. (D.C.D. Utah 1945)	Not reported	4 S. & D. 822.
U.S. *v.* Main Line Lumber & Millwork Co., et al. (Madway Main Line Homes, Inc., et al.) (D.C.E.D. Pa. 1966)	Not reported	8 S. & D. 1305.
U.S. *v.* Marvin Accessories, Inc. (D.C.S.D.N.Y. 1969)	Not reported	8 S. & D. 1308.
U.S. *v.* Marx Baking Co. (D.C. Colo. 1970)	Not reported	8 S. & D. 1097.
U.S. *v.* Maryland Distributors, etc. (Jules Livingston t/a) (D.C.D. Md. 1957)	Not reported	6 S. & D. 914.
U.S. *v.* Masterkraft Guild Weavers, Inc. (C. James Garofalo) (D.C.D.N.J. 1956)	Not reported	6 S. & D. 912.
U.S. *v.* McKewen, George Earl, et al. (t/a Herbal Medicine Co.) (D.C.D. Md. 1940)	Not reported	3 S. & D. 726.
(D.C.D. Md. 1944)	Not reported	4 S. & D. 817.
U.S. *v.* Melley, Leonard (National Educators, Inc. et al.) (D.C.D.C. 1962)	Not reported	7 S. & D. 1441.
U.S. *v.* Mells Manufacturing Co. (D.C.E.D. N.Y. 1941)	Not reported	3 S. & D. 726.
U.S. *v.* Melster Candy Co. (D.C.W.D. Wis. 1943)	Not reported	3 S. & D. 734.
U.S. *v.* Mick Dalton, et al. (D.C. Nebr. 1965)	Not reported	7 S. & D. 1449.
U.S. *v.* Mid-West Bottle Cap Co. (D.C.N.D. Ill. 1958)	Not reported	6 S. & D. 915.
U.S. *v.* Mid-West Portrait Service, etc. (D.C. N.D. Ill. 1943)	Not reported	3 S. & D. 732.
U.S. *v.* Mid-West Sales Syndicate, etc.	Not reported	3 S. & D. 732.
U.S. *v.* Midwest Studios, Inc. (D.C.D. Oreg. 1942)	Not reported	3 S. & D. 729.
(D.C.D. Oreg. 1952)	Not reported	5 S. & D. 805.
U.S. *v.* Milwaukee Boiler Mfg. Co. (D.C.E.D. Wis. 1970)	Not reported	8 S. & D. 1110.
U.S. *v.* Modell, Henry, et al. (D.C.S.D.N.Y. 1960)	Not reported	6 S. & D. 918.
U.S. *v.* Modern Rug Co., Inc., et al. (D.C.S.D. N.Y. 1961)	Not reported	7 S. & D. 1440.
U.S. *v.* Montebello Distillers, Inc. (D.C.D. Md. 1941)	Not reported	3 S. & D. 726.
U.S. *v.* Moore & Co., William C. (D.C.W.D. Wash. 1961)	Not reported	7 S. & D. 1439.
U.S. *v.* Moore Products Corp., et al. (D.C.S.D. N.Y. 1963)	Not reported	7 S. & D. 1445.
U.S. *v.* Morton Salt Co. (D.C.N.D. Ill. 1949)	80 F. Supp. 419	4 S. & D. 779.
(C.A. 7 1949)	174 F. 2d 703	5 S. & D. 125.
(Sup. Ct. 1950)	338 U.S. 632	5 S. & D. 167.
(D.C.N.D. Ill. 1951)	Not reported	5 S. & D. 800.
U.S. *v.* Motor Equipment Specialty Co. (Hiram Barber t/a) (D.C.D. Nebr. 1943)	Not reported	3 S. & D. 734.
U.S. *v.* Moye, E.T. (Moye Photographers)		

Name of Case	Reference	Reported in—
(D.C.D.C. 1959)	Not reported	6 S. & D. 917.
U.S.; Mueller, Sidney J. (Mueller Hair Experts) *v.* (C.A. 5 1958)	262 F. 2d 443	6 S. & D. 470.
U.S. *v.* Mueller, Sidney J. (Mueller Hair Experts) (D.C.S.D. Tex. 1958)	Not reported	6 S. & D. 915.
U.S. *v.* Mutual Printing Co. (t/a Mutual Sales Promotion Service) (D.C.N.D. Ill. 1941)	Not reported	3 S. & D. 728.
U.S. *v.* National Bakers Services, Inc. (D.C.S.D. Fla. 1971)	Not reported	9 S. & D. 1553.
U.S. *v.* N & W Enterprises, Inc., et al (Janet L. Winters) (D.C.M.D. Fla. 1967)	Not reported	8 S. & D. 1306.
U.S. *v.* National Biscuit Co. (D.C.S.D.N.Y. 1938)	25 F. Supp. 329	2 S. & D. 477.
U.S. *v.* National Educators, Inc., et al. (Leonard Melley (D.C.D.C. 1962)	Not reported	7 S. & D. 1441.
U.S. *v.* National Laboratories of St. Louis (Oliver L. Rohlfing trading as) (D.C.E.D. Mo. 1967)	Not reported	8 S. & D. 1307.
U.S. *v.* National Outdoor Display, Inc. (D.C.W.D. Tenn. 1973)	Not reported	9 S. & D. 1555.
U.S. *v.* National Titanium Co. (D.C.S.D. Calif. 1954)	Not reported	5 S. & D. 808.
U.S. *v.* National Toilet Co. (D.C.W.D. Tenn. 1961)	Not reported	7 S. & D. 1440.
U.S. *v.* National Training Service, Inc., et al. (D.C. Conn. 1963)	Not reported	7 S. & D. 1443.
U.S. *v.* Nationwide Clothiers, Inc., et al. (D.C.E.D.N.Y. 1964)	Not reported	7 S. & D. 1445.
U.S. *v.* New York Feather Co., Inc., et al. (D.C.E.D.N.Y. 1960)	Not reported	6 S. & D. 918.
U.S. *v.* Northfield Mills, Inc. (Bernard Goldfine et al.) (D.C.D. Vt. 1960)	Not reported	6 S. & D. 919.
U.S. *v.* Ogle, Kenneth R., et al. (t/a Approved Photographers Assn.) (D.C.S.D. Ohio 1963)	Not reported	7 S. & D. 1443.
U.S. *v.* Ohio Art Co. (D.C.N.D. Ohio 1964)	Not reported	7 S. & D. 1445.
U.S. *v.* Oland D. Redd (Woelfel Studio, et al.) (D.C.W.D.N.Y. 1950)	Not reported	5 S. & D. 798.
U.S. *v.* Olson Rug Co. (D.C.N.D. Ill. 1960)	Not reported	6 S. & D. 918.
U.S. *v.* Oppenheim, Collins & Co. Inc. (D.C.S. D.N.Y. 1941)	Not reported	3 S. & D. 729.
U.S. *v.* Page Co. Inc., The E.R. (D.C.E.D. Mich. 1943)	Not reported	3 S. & D. 734.
U.S. *v.* Papercraft Corporation		
(D.C.W.D. Penn. 1975)	393 F. Supp. 408	9 S. & D. 1262.
(D.C.W.D. Penn. 1975)	393 F. Supp. 415	9 S. & D. 1329.
(D.C.W.D. Penn. 1975)	Not reported	9 S. & D. 1557.
U.S. *v.* Parfumerie Lido, Inc., et al. (D.C.E. D.N.Y. 1964)	Not reported	7 S. & D. 1447.
U.S. *v.* Parfums Corday, Inc. (D.C.S.D.N.Y. 1962)	Not reported	7 S. & D. 1441.
U.S. *v.* Paul B. Elder Co. (D.C. Del. 1974)	Not reported	9 S. & D. 1097.
U.S. *v.* Paul R. Dooley, Inc., et al. (D.C.S.D. Calif. 1958)	Not reported	6 S. & D. 915.
U.S. *v.* PepsiCo, Inc., and Frito-Lay, Inc. (D.C.S.D.N.Y. 1970)	Not reported	8 S. & D. 1310.
U.S. *v.* Personal Drug Co. (Doris Savitch, et al.) (D.C.E.D.N.Y. 1961)	Not reported	7 S. & D. 1440.
U.S. *v.* Petrie, John (t/a B-X Laboratories, etc.) (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 723.
U.S. *v.* Philip T. Berkley (D.C.S.D. Calif. 1972)	Not reported	9 S. & D. 1554.

Name of Case	Reference	Reported in—
U.S. *v.* Pioneer Advertising Co. etc. (Cornelius P. Van. Schaack, Jr., t/a) (D.C.N.D. Ill. 1943)	Not reported	3 S. & D. 732.
U.S. *v.* Piuma, Joseph A. (D.C.S.D. Calif. 1941)	40 F. Supp. 119	3 S. & D. 412
U.S. Piuma, Joseph A. *v.* (C.A. 9 1942)	126 F. 2d 601	3 S. & D. 468.
Certiorari denied (1942)	317 U.S. 637	
U.S. *v.* Plantation Chocolate Co., Inc. (D.C. E.D. Pa. 1941)	Not reported	3 S. & D. 727.
U.S. *v.* Post Graduate Hospital School of Nursing, Inc., et al. (D.C.N.D. Ill. 1963, 1965)	Not reported	7 S. & D. 793
U.S. *v.* Poy, Fong, et al. (D.C.N.D. Calif. 1962)	Not reported	7 S. & D. 1441.
U.S. *v.* Pruvo Pharmacal Co., et al. (D.C.E.D. Wis. 1966)	Not reported	8 S. & D. 1306.
U.S. *v.* Purofied Down Products Corp. et al. (D.C.E.D.N.Y. 1956)	Not reported	6 S. & D. 912.
U.S. *v.* Pyramid Books (D.C.S.D.N.Y. 1963)	Not reported	7 S. & D. 1443.
U.S. *v.* Radio Training Assn. of America, et al. (D.C.S.D. Calif. 1963)	Not reported	7 S. & D. 1444.
U.S. *v.* Radley Furs, Inc., et al. (D.C.S.D. N.Y. 1965)	Not reported	7 S. & D. 1450.
U.S. *v.* Rango Tablet Co., et al. (D.C.S.D. Calif. 1945)	Not reported	4 S. & D. 819.
U.S. *v.* Raymond Anderson (D.C.S.D. Ohio 1975)	Not reported	9 S. & D. 1557.
U.S. *v.* Raymond's, Inc., et al. (D.C.D. Mass. 1966)	Not reported	8 S. & D. 1305.
U.S. *v.* Redd, Oland D. (Woelfel Studio, et al.) (D.C.W.D.N.Y. 1950)	Not reported	5 S. & D. 798.
U.S. *v.* Regal Accessories, Inc., et al. (D.C.E. D.N.Y. 1967)	Not reported	8 S. & D. 1306.
U.S. *v.* Renor Co., Inc., et al. (John T. Benson) (D.C.N.D. Ill. 1960)	Not reported	6 S. & D. 918.
U.S. *v.* Retail Service Bureau, etc. (Edward Lowenthal t/a) (D.C.N.D. Ill. 1956)	Not reported	6 S. & D. 912.
U.S. *v.* Retonga Medicine Co. (D.C.N.D. Ga. 1944)	Not reported	4 S. & D. 815.
U.S. *v.* Rettinger, David and Israel (D.C.E. D.N.Y. 1964)	Not reported	7 S. & D. 1447.
U.S. *v.* Rhodes Pharmacal Co., Inc. (D.C.E.D. Pa. 1951)	Not reported	5 S. & D. 801.
(D.C.N.D. Ill. 1964)	Not reported	7 S. & D. 1445.
U.S. *v.* Rice, Gerald A., et al. (D.C.W.D. Wash. 1952)	Not reported	5 S. & D. 804.
U.S. *v.* Robert Hall Clothes, Inc., et al. (D.C. S.D.N.Y. 1957)	Not reported	6 S. & D. 913.
U.S. *v.* Rogers Redemption Bureau, etc. (D.C. D. Minn. 1945)	Not reported	4 S. & D. 820.
U.S. *v.* Rohlfing, Oliver L. (trading as National Laboratories of St. Louis) (D.C.E.D. Mo. 1967)	Not reported	8 S. & D. 1307.
U.S. *v.* Rose, Stanley L. (Sew-Ezy Machine Co.) (D.C.D. Md. 1958)	Not reported	6 S. & D. 915.
U.S. *v.* Royce George Hoffmann (D.C. Kan. 1971)	Not reported	9 S. & D. 1553.
U.S. *v.* R.T. Vanderbilt, Co., Inc., et al. (D.C. S.D.N.Y. 1944)	Not reported	4 S. & D. 815.
U.S. *v.* Safeway Stores, Inc. (D.C.N.D. Tex. 1970)	Not reported	8 S. & D. 1210.

Name of Case	Reference	Reported in—
U.S. *v.* Salup, Jack (Charlotte Novelty Co.) (D.C.D. Md. 1958)	Not reported	6 S. & D. 915.
U.S. *v.* Sanitary Feather Co. (Daniel Huttner) (D.C.N.D. Ill. 1958)	Not reported	6 S. & D. 914.
U.S. *v.* San Juan Lumber Co., Inc. (D.C.D. Colo. 1969)	313 F. Supp. 703	8 S. & D. 1061, 1309.
U.S. *v.* Saunders Company, et al., W.B. (D.C. E.D. Pa. 1965)	Not reported	7 S. & D. 1448.
U.S. *v.* Sav-Cote Chemical Laboratories, Inc., et al.		
(D.C.N.J. 1969)	Not reported	8 S. & D. 1308.
(D.C.N.J. 1971)	Not reported	9 S. & D. 1553.
U.S. *v.* Savitch, Doris, et al. (t/a Personal Drug Co.) (D.C.E.D.N.Y. 1961)	Not reported	7 S. & D. 1440.
U.S. *v.* Schiff, Harold, et al. (Sun Vacuum Cleaner Co.) (D.C. Md. 1962)	Not reported	7 S. & D. 1441.
U.S. *v.* Sears, Roebuck & Co. (D.C.N.D. Ill. 1957)	Not reported	6 S. & D. 913.
U.S. *v.* Select Magazines, Inc., and Time, Inc. (D.C.S.D.N.Y. 1964)	Not reported	7 S. & D. 1448.
U.S. *v.* Sew-Ezy Machine Co. (Stanley L. Rose) (D.C.D. Md. 1958)	Not reported	6 S. & D. 915.
U.S. *v.* Seydel Chemical Co., et al. (D.C.D. N.J. 1958)	Not reported	6 S. & D. 914.
U.S. *v.* Sgro, Leonard (D.C.N.D. Ohio 1964)	Not reported	7 S. & D. 1447.
U.S. *v.* Shapiro Felt Rug Co., et al. (D.C.D. N.J. 1953)	Not reported	5 S. & D. 807.
U.S. *v.* Shelbrooke Coats, et al. (D.C.S.D.N.Y. 1954)	Not reported	5 S. & D. 807.
U.S. *v.* Sherwin, Charles, et al. (Lee, et al.) (D.C.N.D. Tex. 1923)	290 Fed. 517	1 S. & D. 1006.
U.S.; Sherwin, Charles, et al. (Lee, et al.) (C.A. 5 1924)	297 Fed. 704	1 S. & D. 1046.
(Sup. Ct. 1925)	268 U.S. 369	1 S. & D. 1065.
U.S. *v.* Silver Star Chinchilla, Inc. (D.C. Minn. 1972)	Not reported	9 S. & D. 338.
U.S. *v.* Smith Fencer Corp., et al. (D.C.E.D. Mich. 1971)	Not reported	9 S. & D. 1553.
U.S. *v.* S.M.S.A. Corp., et al. (Stamina Industries) (D.C.S.D.N.Y. 1963)	Not reported	7 S. & D. 1445.
U.S. *v.* Snappy Fashions, Inc. (D.C.E.D.N.Y. 1959)	Not reported	6 S. & D. 916.
U.S. *v.* S. Reiffe & Sons, Inc., et al. (D.C.S.D. N.Y. 1955)	Not reported	5 S. & D. 797.
U.S. *v.* Standard Distributors, Inc., et al. (D.C. N.D. Ill. 1967)	267 F. Supp. 7	8 S. & D. 479.
(D.C.N.D. Ill. 1968)	Not reported	8 S. & D. 1308.
U.S. *v.* Standard Education Society, et al. (D.C.N.D. Ill. 1943)	55 F. Supp. 189	3 S. & D. 603.
(D.C.N.D. Ill. 1955)	Not reported	5 S. & D. 810.
U.S. *v.* Stanley Furs, Inc. (D.C.S.D. Colo. 1973)	Not reported	9 S. & D. 1555.
U.S. *v.* Steelco Stainless Steel, Inc., et al. (D.C.N.D. Ill. 1956)	Not reported	6 S. & D. 911.
U.S. *v.* Steffy, William C., et al. (D.C.N.D. Ill. 1943)	Not reported	3 S. & D. 735.
U.S. *v.* Sterling Materials Co., Inc., et al. (D.C. E.D.N.Y. 1962)	Not reported	7 S. & D. 1441.
U.S. *v.* Stern & Stern Textiles, Inc. (D.C.S. D.N.Y. 1966)	Not reported	8 S. & D. 1306.
U.S. *v.* St. Regis Paper Co. (D.C.S.D.N.Y.		

Name of Case	Reference	Reported in—
1960)	181 F. Supp. 862	6 S. & D. 754.
(C.A. 2 1960)	285 F. 2d 607	6 S. & D. 863.
(D.C.S.D.N.Y. 1962)	Not reported	7 S. & D. 1441.
(C.A. 2 1966)	355 F. 2d 688	8 S. & D. 23.
U.S.; St. Regis Paper Co. *v.* (Sup. Ct. 1961)	368 U.S. 208	7 S. & D. 284.
U.S. *v.* St. Regis Paper Co. (D.C.S.D.N.Y. 1965)	240 F. Supp. 36	7 S. & D. 1145.
U.S. *v.* Stuart & Co., Inc., C.H., et al. (D.C. W.D. Wash. 1961)	Not reported	7 S. & D. 1439.
U.S. *v.* Sun Vacuum Cleaner Co. (Harold Schiff, et al.) (D.C. Md. 1962)	Not reported	7 S. & D. 1441.
U.S. *v.* Superior Wool Batting, Inc. (D.C.E.D. N.Y. 1962)	Not reported	7 S. & D. 1442.
U.S. *v.* Sweet Candy Co. (D.C.D. Utah 1942)	Not reported	3 S. & D. 731.
U.S. *v.* Sweets Co. of America, Inc. (D.C.D. N.J. 1942)	Not reported	3 S. & D. 732.
U.S. *v.* Swingline, Inc.		
(D.C.E.D.N.Y. 1973)	Not reported	9 S. & D. 585.
(D.C.E.D.N.Y. 1974)	371 F. Supp. 37	9 S. & D. 827.
(D.C.E.D.N.Y. 1974)	Not reported	9 S. & D. 1556.
U.S. *v.* Techbestos, Inc. (D.C.N.J. 1972)	Not reported	9 S. & D. 1554.
U.S. *v.* Thomas Management Corp., et al. (D.C.N.D. Ill. 1952)	Not reported	5 S. & D. 802.
U.S. *v.* Time, Inc. and Select Magazines, Inc. (D.C.S.D.N.Y. 1964)	Not reported	7 S. & D. 1448,
U.S. *v.* Tru-Health Garments Corp. (D.C.S. D.N.Y. 1956)	Not reported	6 S. & D. 911.
U.S. *v.* Union Bag-Camp Paper Corp. (D.C. S.D.N.Y. 1965)	Not reported	7 S. & D. 1117
U.S. *v.* Union Circulation Co., et al. (D.C.N.D. Ga. 1970)	311 F. Supp. 576	8 S. & D. 1113
U.S. *v.* United Industrial Syndicate, Inc. (D.C.E.D. Wisc. 1974)	Not reported	9 S. & D. 1556.
U.S. *v.* United Surveys (James H. Christie d/b/a) (D.C.E.D. Wash. 1955)	Not reported	5 S. & D. 813.
U.S. *v.* Universal Educational Guild, Inc., et al. (Abe Halperin) (D.C.E.D.N.Y. 1966)	Not reported	8 S. & D. 1306.
U.S. *v.* Universal Training Service, et al. (D.C.E.D. La. 1974)	Not reported	9 S. & D. 1556.
U.S. *v.* Universal Wool Batting Corp., et al. (D.C.S.D.N.Y. 1961)	Not reported	7 S. & D. 283
U.S. *v.* U.S. Printing & Novelty Co., Inc., et al. (D.C.S.D.N.Y. 1962)	Not reported	7 S. & D. 1442.
U.S. *v.* Valley Steel Products Co. (D.C.E.D. Mo. 1963)	Not reported	7 S. & D. 1444.
U.S. *v.* Van Raalte Co., Inc., et al.		
(D.C.S.D.N.Y. 1971)	328 F. Supp. 827	9 S. & D. 70.
(D.C.S.D.N.Y. 1972)	Not reported	9 S. & D. 1554.
U.S. *v.* Vanderbilt Co., Inc., R.T., et al. (D.C.S. D.N.Y. 1944)	Not reported	4 S. & D. 815.
U.S. *v.* Van Schaack, Jr., Cornelius P. (t/a Pioneer Advertising Co., etc.) (D.C.N.D. Ill. 1943)	Not reported	3 S. & D. 732.
U.S. *v.* Velox Service, Inc., et al. (D.C.S.D. N.Y. 1964)	Not reported	7 S. & D. 1448.
U.S. *v.* Vitasafe Corp. (D.C.S.D.N.Y. 1962)	212 F. Supp. 397	7 S. & D. 607.
(D.C.S.D.N.Y. 1964)	234 F. Supp. 710	7 S. & D. 981.

Name of Case	Reference	Reported in—
(D.C.S.D.N.Y. 1964)	Not reported	7 S. & D. 1017.
(D.C.S.D.N.Y. 1964)	Not reported	7 S. & D. 1448.
(C.A. 2 1965)	352 F. 2d 62	7 S. & D. 1363.
U.S. *v.* Vulcanized Rubber & Plastics Co. (D.C. E.D. Pa. 1959)	178 F. Supp. 723	6 S. & D. 703.
(D.C.E.D. Pa. 1960)	Not reported	6 S. & D. 918.
(C.A. 3 1961)	288 F. 2d 257	7 S. & D. 73
Certiorari denied (1961)	368 U.S. 821	
U.S. *v.* Walker Manufacturing Co. (D.C.E.D. Wis. 1954)	Not reported	5 S. & D. 675.
U.S. *v.* Washington Institute of Practical Nursing, etc. (Harry A. Burch t/a) (D.C.W.D. Wash. 1959)	Not reported	6 S. & D. 916.
U.S. *v.* Waterville Woolen Mills, Inc. (D.C. Maine 1967)	Not reported	8 S. & D. 1307.
U.S. *v.* W.B. Saunders Company, et al. (D.C. E.D. Pa. 1965)	Not reported	7 S. & D. 1448.
U.S. *v.* Webster, Thomas, etc. (Edward Lowenthal t/a) (D.C.N.D. Ill. 1965)	Not reported	6 S. & D. 912.
(C.A. 7 1957)	248 F. 2d 397	6 S. & D. 365.
(D.C.D. Ariz. 1959)	Not reported	6 S. & D. 916.
U.S. *v.* Western Auto Supply Co. (D.C.W.D. Mo. 1957)	Not reported	6 S. & D. 913.
U.S. *v.* Westville Oil and Manufacturing, Inc. (D.C.N.D. Ind. 1953)	Not reported	5 S. & D. 806.
U.S. *v.* Willard Tablet Co. (C.A. 7 1944)	141 F. 2d 141	4 S. & D. 145.
U.S. *v.* William C. Moore & Co. (D.C.W.D. Wash. 1961)	Not reported	7 S. & D. 1439.
U.S. *v.* William C. Steffy, et al. (D.C.N.D. Ill. 1943)	Not reported	3 S. & D. 735.
U.S. *v.* William N. Bostic (D.C.D. So. Car. 1972)	336 F. 2d 1312	9 S. & D. 185.
Certiorari denied (1973)	411 U.S. 966	
(D.C.D. So. Car. 1972)	473 F. 2d 1388	9 S. & D. 1553.
U.S. *v.* William P. and Charles C. Bennett (D.C.N.D. Tex. 1965)	Not reported	7 S. & D. 1449.
U.S. *v.* William R. Clark (D.C. Md. 1975)	Not reported	9 S. & D. 1557.
U.S. *v.* William Smarz (D.C.S.D.N.Y. 1972)	Not reported	9 S. & D. 1553.
U.S. *v.* Wilson Chemical Co., Inc. (D.C.M.D. Penn. 1943)	Not reported	3 S. & D. 732.
(D.C.W.D. Penn. 1962)	Not reported	7 S. & D. 538.
(D.C.W.D. Penn. 1962)	Not reported	7 S. & D. 1442.
(C.A. 3 1963)	319 F. 2d 133	7 S. & D. 1444.
U.S. *v.* Woonsocket Spinning Co., et al. (D.C.S.D.N.Y. 1972)	Not reported	9 S. & D. 1554.
U.S. *v.* Wilson Chemical Co., Inc. (D.C.M.D. Pa. 1943)	Not reported	3 S. & D. 732.
(D.C.W.D. Pa. 1962)	Not reported	7 S. & D. 538
(C.A. 3 1963)	319 F. 2d 133	7 S. & D. 1444.
U.S. *v.* W.T. Grant Company (D.C.S.D.N.Y. 1975)	Not reported	9 S. & D. 1557.
U.S. *v.* Winters, Janet L. (N & W Enterprises, Inc., et al.) (D.C.M.D. Fla. 1967)	Not reported	8 S. & D. 1306.
U.S. *v.* Woelfel Studio, et al. (Oland D. Redd) (D.C.W.D.N.Y. 1950)	Not reported	5 S. & D. 798.
U.S. *v.* Wolf, Alvin B. (D.C.N.D. Ill. 1948)	Not reported	4 S. & D. 824.
U.S. *v.* Woody Fashions, Inc., et al. (D.C.S. D.N.Y. 1964)	190 F. Supp. 709	7 S. & D. 13.
(D.C.S.D.N.Y. 1964)	Not reported	7 S. & D. 1446.

Name of Case	Reference	Reported in—
U.S. *v.* Worthmore Sales Promotion Service, Inc. (D.C.N.D. Ill. 1949)	Not reported	5 S. & D. 797.
Utah-Idaho Sugar Co.; *v.* F.T.C. (C.A. 8 1927)	22 F. 2d 122	1 S. & D. 638.
Vacu-Matic Carburetor Co. *v.* F.T.C. (C.A. 7 1946)	157 F. 2d 711	4 S. & D. 576.
Certiorari denied (1947)	331 U.S. 806	
Valley Steel Products Co.; U.S. *v.* (D.C.E.D. Mo. 1963)	Not reported	7 S. & D. 1444.
Valve Manufacturers Assn. (George A. Cooper); F.T.C. *v.* (D.C.S.D.N.Y. 1962)	Not reported	7 S. & D. 477.
Van Camp, Inc., Stokely, et al. *v.* F.T.C. (C.A. 7 1957)	246 F. 2d 458	6 S. & D. 355.
Van der Linde, Victor, et al., *In re* Dolcin Corp. and: (C.A.D.C. 1956)	247 F. 2d 524	6 S. & D. 123.
Certiorari denied (1957)	353 U.S. 988	
Van Raalte Co., Inc., et al.; U.S. *v.* (D.C.S.D.N.Y. 1971)	328 F. Supp. 827	9 S. & D. 70.
(D.C.S.D.N.Y. 1972)	Not reported	9 S. & D. 1554.
Vanderbilt Co., Inc., R.T., et al.; U.S. *v.* (D.C. S.D.N.Y. 1944)	Not reported	4 S. & D. 815.
Vanity Fair Paper Mills, Inc. *v.* F.T.C. (C.A. 2 1962)	311 F. 2d 480	7 S. & D. 583.
Van Schaack, Jr., Cornelius P. (t/a The Ink Co. of America, etc.); U.S. *v.* (D.C.N.D. Ill. 1943)	Not reported	3 S. & D. 732.
Velox Service, Inc., et al.; U.S. *v.* (D.C.S.D. N.Y. 1964)	Not reported	7 S. & D. 1448.
Venus Foods *v.* F.T.C. (C.A. 9 1961)	Not reported	7 S. & D. 183.
Virginia Excelsior Mills, Inc., et al. *v.* F.T.C. (C.A. 4 1958)	256 F. 2d 538	6 S. & D. 424.
Vitasafe Corp.; U.S. *v.* (D.C.S.D.N.Y. 1962)	212 F. Supp. 397	7 S. & D. 607.
(D.C.S.D.N.Y. 1964)	234 F. Supp. 710	7 S. & D. 981.
(D.C.S.D.N.Y. 1964)	Not reported	7 S. & D. 1017.
(D.C.S.D.N.Y. 1964)	Not reported	7 S. & D. 1448.
(C.A. 2 1965)	352 F. 2d 62	7 S. & D. 1363.
Vivaudou, Inc., V. *v.* F.T.C. (C.A. 2 1931)	54 F. 2d 273	2 S. & D. 146.
Viviano Macaroni Co. *v.* F.T.C. (C.A. 3 1969)	411 F. 2d 255	8 S. & D. 926.
Von Schrader Manufacturing Co., et al. *v.* F.T.C. (C.A. 7 1941)	Not reported	3 S. & D. 425.
Voss Hair Experts of Georgia (George M. Voss t/a) *v.* F.T.C. (C.A. 5 1960)	275 F. 2d 24	6 S. & D. 718.
Vulcanized Rubber & Plastics Co. *v.* F.T.C. (C.A.D.C. 1958)	258 F. 2d 684	6 S. & D. 423.
Vulcanized Rubber & Plastics Co.; U.S. *v.* (D.C.E.D. Pa. 1959)	178 F. Supp. 723	6 S. & D. 703.
(D.C.E.D. Pa. 1960)	Not reported	6 S. & D. 918.
(C.A. 3 1961)	288 F. 2d 257	7 S. & D. 73
Certiorari denied (1961)	368 U.S. 821	
Walker, James, et al. (t/a Merit Health Appliance Co.); F.T.C. *v.* (D.C.S.D. Calif. 1941)	Not reported	3 S. & D. 715.
Walker Manufacturing Co.; U.S. *v.* (D.C.E.D. Wis. 1954)	Not reported	5 S. & D. 675.
Walker's New River Mining Co.; F.T.C. *v.* (C.A. 4 1935)	79 F. 2d 457	2 S. & D. 320.
Wallace, E.J.; F.T.C. *v.* (C.A. 8 1935)	75 F. 2d 733	2 S. & D. 280.
Walter Dlutz *v.* F.T.C. (C.A. 3 1969)	406 F. 2d 277	8 S. & D. 880.
Certiorari denied (1969)	395 U.S. 936	
Rehearing denied (1969)	396 U.S. 869	
Walter E. Crowther, et al; F.T.C. *v.* (D.C.D.C. 1969)	Not reported	8 S. & D. 1070.

Name of Case	Reference	Reported in—
Walter E. Crowther; F.T.C. *v.* (C.A.D.C. 1970)	430 F. 2d 510	8 S. & D. 1212.
Walter H. Johnson Candy Co. *v.* F.T.C. (C.A. 7 1935)	78 F. 2d 717	2 S. & D. 303.
Waltham Precision Instrument Co., Inc., et al. (formerly Waltham Watch Co., et al.) *v.* F.T.C. (C.A. 7 1964)	327 F. 2d 427	7 S. & D. 844.
Certiorari denied (1964)	377 U.S. 992	
Waltham Watch Co.; F.T.C. *v.* (D.C.S.D.N.Y. 1959)	169 F. Supp. 614	6 S. & D. 498.
Waltham Watch Co., et al. *v.* F.T.C. (C.A. 7 1963)	318 F. 2d 28	7 S. & D. 705.
Certiorari denied (1963)	375 U.S. 944	
Rehearing denied (1964)	375 U.S. 998	
(C.A.D.C. 1965)	Not reported	7 S. & D. 1111.
Certiorari denied (1965)	382 U.S. 813	
Rehearing denied (1965)	382 U.S. 922	
Wanderer, Eugene T., *v.* Wayne E. Kaplan, et al. (D.C.D.C. 1962)	Not reported	7 S. & D. 523.
Wanderer, Eugene T. (Midwest Warehouse Distributors, Inc.) *v.* Wayne E. Kaplan, et al. (D.C.D.C. 1962)	Not reported	7 S. & D. 599.
Wantz, Albert T., et al., *In re* Dolcin Corp. (C.A.D.C. 1956)	247 F. 2d 524	6 S. & D. 123.
Certiorari denied (1957)	353 U.S. 988	
Ward Baking Co. *v.* F.T.C. (C.A. 2 1920)	264 Fed. 330	1 S. & D. 49.
Ward Laboratories, Inc., et al. *v.* F.T.C. (C.A. 2 1960)	276 F. 2d 952	6 S. & D. 787.
Certiorari denied (1960)	364 U.S. 827	
Warner-Lambert Co. *v.* F.T.C., et al. (D.C.D.C. 1971)	Not reported	9 S. & D. 99.
(D.C.D.C. 1973)	361 F. Supp. 948	9 S. & D. 694.
Warner's Renowned Remedies Co. *v.* F.T.C. (C.A.D.C. 1944)	140 F. 2d 18	4 S. & D. 106.
Certiorari denied (1944)	322 U.S. 754	
Washington Fish & Oyster Co., Inc.; F.T.C. *v.* (C.A. 9 1959)	271 F. 2d 39	6 S. & D. 666.
(C.A. 9 1960)	282 F. 2d 595	6 S. & D. 831.
Washington Institute of Practical Nursing, etc. (Harry A. Burch t/a); U.S. *v.* (D.C.W. D. Wash. 1959)	Not reported	6 S. & D. 916.
Waterville Woolen Mills, Inc.; U.S. *v.* (D.C. Maine 1967)	Not reported	8 S. & D. 1307.
Wax Bros. & Rosenberg Dress Co., Inc., *v.* F.T.C. (C.A. 2 1952)	194 F. 2d 504	5 S. & D. 374.
W.B. Caldwell, Inc., Dr., *v.* F.T.C. (C.A. 7 1940)	111 F. 2d 889	3 S. & D. 218.
W.B. Saunders Company, et al,; U.S. *v.* (D.C. E.D. Pa. 1965)	Not reported	7 S. & D. 1448.
Weavers Guild (Abel Allan Goodman t/a) *v.* F.T.C. (C.A. 9 1957)	244 F. 2d 584	6 S. & D. 284.
Webb-Crawford Co., et al. *v.* F.T.C. (C.A. 5 1940)	109 F. 2d 268	3 S. & D. 184.
Certiorari denied (1940)	310 U.S. 638	
Webster, Thomas, etc. (Edward Lowenthal t/a); U.S. *v.* (D.C.N.D. Ill. 1956)	Not reported	6 S. & D. 912.
(C.A. 7 1957)	248 F. 2d 397	6 S. & D. 365.
(D.C.D. Ariz. 1959)	Not reported	6 S. & D. 916.
Weiler, Alexander, et al. (d/b/a New York Premium Novelty Co.) *v.* F.T.C. (C.A. 2 1941)	Not reported	3 S. & D. 426.
Weinberger, Caspar N.; Sydney N. Floersheim *v.* (D.C.D.C. 1972)	346 F. Supp. 950	9 S. & D. 220.
Weingarten, Inc., J., *v.* F.T.C. (D.C.E.D. Tex.		

Name of Case	Reference	Reported in—
1963)	Not reported	7 S. & D. 736.
Weingarten, Inc., J.; F.T.C. *v.* (C.A. 5 1964)	336 F. 2d 687	7 S. & D. 1000.
Certiorari denied (1965)	380 U.S. 908	
Weinstock, I. Ralph (t/a Thyrole Products Co.); F.T.C. *v.* (D.C.E.D. Pa. 1940)	Not reported	3 S. & D. 684.
Weiss, David M.; F.T.C. *v.* (C.A. 2 1945)	Not reported	4 S. & D. 410.
(C.A. 2 1946)	Not reported	4 S. & D. 583.
Weller Co., J., et al. *v.* F.T.C. (C.A. 7 1957)	246 F. 2d 458	6 S. & D. 355.
Wellworth Sales Co. (Isidore Halperin, et al. t/a) *v.* F.T.C. (C.A. 2 1942)	Not reported	3 S. & D. 472.
Western Auto Supply Co.; F.T.C. *v.* (C.A.D.C. 1957)	242 F. 2d 31	6 S. & D. 220.
Western Auto Supply Co.; U.S. *v.* (D.C.W.D. Mo. 1957)	Not reported	6 S. & D. 913.
Western Chemicals, Inc., et al.; F.T.C. *v.* (D.C. W.D. Wash. 1939)	Not reported	3 S. & D. 632.
Western Fruit Growers Sales Co. *v.* F.T.C. (C.A. 9 1963)	322 F. 2d 67	7 S. & D. 781.
Certiorari denied (1964)	376 U.S. 907	
Western Meat Co. *v.* F.T.C. (C.A. 9 1924)	1 F. 2d 95	1 S. & D. 365.
(C.A. 9 1925)	4 F. 2d 223	1 S. & D. 399.
Western Meat Co.; F.T.C. *v.* (Sup. Ct. 1926)	272 U.S. 554	1 S. & D. 575.
Western Meat Co. *v.* F.T.C. (C.A. 9 1929)	33 F. 2d 824	1 S. & D. 705.
Certiorari dismissed (1930)	281 U.S. 771	
Western Radio Corp. et al. *v.* F.T.C. (C.A. 7 1964)	339 F. 2d 937	7 S. & D. 1030.
Certiorari denied (1965)	381 U.S. 938	
Western Sugar Refinery Co., et al. *v.* F.T.C. (C.A. 9 1921)	275 Fed. 725	1 S. & D. 149.
Westinghouse Electric Corp. (Grand Jury Proc.) (C.A. 3 1962)	309 F. 2d 440	7 S. & D. 567.
Westville Oil and Manufacturing, Inc,; U.S. *v.* (D.C.N.D. Ind. 1953)	Not reported	5 S. & D. 806.
W.H. Brady & Co., et al. *v.* F.T.C. (C.A.D.C. 1952)	Not reported	5 S. & D. 387.
Wheeler Mfg. Co., C.H. (Grand Jury Proc.) (C.A. 3 1962)	309 F. 2d 440	7 S. & D. 567.
Whitaker Cable Corp. *v.* F.T.C. (C.A. 7 1956)	239 F. 2d 253	6 S. & D. 107.
Certiorari denied (1957)	353 U.S. 938	
Whitmore, Inc., Ken, et al.; F.T.C. *v.* (D.C.D. Mass. 1953)	Not reported	5 S. & D. 784.
Whitney & Co., et al.; F.T.C. *v.* (C.A. 8 1951)	192 F. 2d 746	5 S. & D. 340.
(C.A. 9 1955)	Not reported	5 S. & D. 729.
Whitney & Co., *In re* (C.A. 9 1959)	273 F. 2d 211	6 S. & D. 691.
Wholesale Dry Goods Institute, Inc., et al. *v.* F.T.C. (C.A. 2 1943)	139 F. 2d 230	3 S. & D. 615.
Certiorari denied (1944)	321 U.S. 770	
Wholesale Grocers' Assn. of El Paso, Tex., et al. *v.* F.T.C. (C.A. 5 1922)	277 Fed. 657	1 S. & D. 181.
Willard Tablet Co.; U.S. *v.* (C.A. 7 1944)	141 F. 2d 141	4 S. & D. 145.
William C. Moore & Co.; U.S. *v.* (D.C.W.D. Wash. N.D. 1961)	Not reported	7 S. & D. 1439.
William H. Rodgers, Jr. *v.* F.T.C. (C.A. 9 1974)	492 F. 2d 228	9 S. & D. 846.
Certiorari denied (1974)	419 U.S. 834	
William H. Rorer, Inc. *v.* F.T.C. (C.A. 2 1967)	374 F. 2d 622	8 S. & D. 432.
William J. Bramman, Jr., (Missouri Portland Cement Company); F.T.C. *v.* (D.C.W.D. Mo. 1973)	Not reported	9 S. & D. 572.
Williams L. Lucas; F.T.C. *v.* (C.A.D.C. 1970)	430 F. 2d 510	8 S. & D. 1212.
William N. Bostic; U.S. *v.* (D.C.D. So. Car. 1972)	336 F. 2d 1312	9 S. & D. 185.

Name of Case	Reference	Reported in—
Certiorari denied (1973)	411 U.S. 966	
William P. and Charles C. Bennett; U.S. *v.* (D.C.N.D. Tex. 1965)	Not reported	7 S. & D. 1449.
William R. Clark; U.S. *v.* (D.C. Md. 1975)	Not reported	9 S. & D. 1557.
William W. Morison and Foremost-McKesson, Inc.; F.T.C. *v.* (D.C.N.D. Calif. 1970)	Not reported	8 S. & D. 1231.
Williams, J.B. Co., Inc., The, and Parkson Advertising Agency, Inc. *v.* F.T.C. (C.A. 6 1967)	381 F. 2d 884	8 S. & D. 524.
Williams, J.B., Company, Inc., et al.; U.S. *v.* (D.C.S.D.N.Y. 1973)	354 F. Supp. 521	9 S. & D. 483.
(C.A. 2 1974)	498 F. 2d 414	9 S. & D. 938.
Wilmer L. Tinley, et al.; R.H. Macy & Co., Inc. *v.* (D.C.D.C. 1965)	249 F. Supp. 778	7 S. & D. 1430.
Wilson Chemical Co., Inc.; U.S. *v.* (D.C.M.D. Pa. 1943)	Not reported	3 S. & D. 732.
(D.C.W.D. Pa. 1962)	Not reported	7 S. & D. 538.
(D.C.W.D. Pa. 1962)	Not reported	7 S. & D. 1442.
(C.A. 3 1963)	319 F. 2d 133	7 S. & D. 1444.
Windsor Distributing Co. *v.* F.T.C. (C.A. 3 1971)	437 F. 2d 443	9 S. & D. 1.
Winn-Dixie Stores, Inc. *v.* F.T.C. (D.C.M.D. Fla. 1974)	377 F. Supp. 733	9 S. & D. 1016.
Winorr Canning Co. et al. *v.* F.T.C. (C.A. 7 1957)	246 F. 2d 458	6 S. & D. 355.
Winship Corp., et al.; F.T.C. *v.* (D.C.S.D. Iowa 1940)	Not reported	3 S. & D. 663.
Winslow, D.A., et al. *v.* F.T.C. (C.A. 4 1921)	277 Fed. 206	1 S. & D. 166.
Winsted Hosiery Co. *v.* F.T.C. (C.A. 2 1921)	272 Fed. 957	1 S. & D. 125.
Winsted Hosiery Co.; F.T.C. *v.* (Sup. Ct. 1922)	258 U.S. 483	1 S. & D. 198.
Winston Co., John C., *v.* F.T.C. (C.A. 3 1925)	3 F. 2d 961	1 S. & D. 401.
Certiorari denied (1925)	269 U.S. 555	
Winters, Janet L. (N & W Enterprises, Inc., et al.); U.S. *v.* (D.C.M.D. Fla. 1967)	Not reported	8 S. & D. 1306.
Wire Rope and Strand Mfrs. Assn., Inc., The, *v.* F.T.C. (C.A. 4 1943)	Not reported	3 S. & D. 574.
Wise Co., Inc., Wm. H., et al. *v.* F.T.C. (C.A. D.C. 1957)	246 F. 2d 702	6 S. & D. 334.
Certiorari denied (1957)	355 U.S. 856	
Witkower Press, Inc., et al. *v.* F.T.C. (C.A.D.C. 1960)	Not reported	6 S. & D. 844.
Wm. H. Wise Co., Inc., et al. *v.* F.T.C. (C.A. D.C. 1957)	246 F. 2d 702	6 S. & D. 334.
Certiorari denied (1957)	355 U.S. 856	
W.M.R. Watch Case Corp., et al. *v.* F.T.C. (C.A.D.C. 1965)	343 F. 2d 302	7 S. & D. 1098.
Certiorari denied (1965)	381 U.S. 936	
Rehearing denied (1965)	382 U.S. 873	
Woelfel Studio, et al. (Oland D. Redd); U.S. *v.* (D.C.W.D.N.Y. 1950)	Not reported	5 S. & D. 798.
Wolf, Alvin B., et al.; U.S. *v.* (D.C.N.D. Ill. 1948)	Not reported	4 S. & D. 824.
Wolf, Alvin B., et al. (d/b/a DeLuxe Products Co., etc.) *v.* F.T.C. (C.A. 7 1943)	135 F. 2d 564	3 S. & D. 564.
Woodle, Inc., Eugene I., et al.; F.T.C. *v.* (D.C.D. Mass. 1959)	Not reported	6 S. & D. 656.
Woody Fashions, Inc., et al.; U.S. *v.* (D.C.S. D.N.Y. 1961)	190 F. Supp. 709	7 S. & D. 13.
(D.C.S.D.N.Y. 1964)	Not reported	7 S. & D. 1446.
Woolley, E.R., *v.* F.T.C. (C.A. 8 1927)	22 F. 2d 122	1 S. & D. 638.
Woonsocket Spinning Co., et al.; U.S. *v.*		

Name of Case	Reference	Reported in—
(D.C.S.D.N.Y. 1972)	Not reported	9 S. & D. 1554.
World Leisure Time, Inc.; F.T.C. *v.* (D.C.C.D. Calif. 1975)	Not reported	9 S. & D. 1260.
World Syndicate Publishing Co., The, et al. *v.* F.T.C. (C.A. 2 1952)	Not reported	5 S. & D. 386.
World Wide Television Corp., et al. *v.* F.T.C. (C.A. 3 1965)	352 F. 2d 303	7 S. & D. 1341.
Certiorari denied (1966)	384 U.S. 928	
Worthington Corp., et al. (Grand Jury Proc.) (C.A. 3 1962)	309 F. 2d 440	7 S. & D. 567.
Worth Loomis; F.T.C. *v.* (C.A.D.C. 1970)	430 F. 2d 510	8 S. & D. 1212.
Worthmore Sales Promotion Service, Inc.; U.S. *v.* (D.C.N.D. Ill. 1949)	Not reported	5 S. & D. 797.
Wren Sales Co., Inc., et al. *v.* F.T.C. (C.A. 7 1961)	296 F. 2d 456	7 S. & D. 257.
Wrisley Co., Allen B., et al. *v.* F.T.C. (C.A. 7 1940)	113 F. 2d 437	3 S. & D. 250.
W.T. Grant Company; U.S. *v.* (D.C.S.D.N.Y. 1975)	Not reported	9 S. & D. 1557.
Wybrant System Products Corp., et al. *v.* F.T.C. (C.A. 2 1959)	266 F. 2d 571	6 S. & D. 565.
Certiorari denied (1959)	361 U.S. 883	
Yardley of London, Inc. *v.* F.T.C. (C.A. 2 1940)	Not reported	3 S. & D. 297.
Zale Corporation, et al. *v.* F.T.C. (C.A. 5 1973)	473 F. 2d 1317	9 S. & D. 550.
Zelle Co., The (Leland F. Benham t/a); F.T.C. *v.* (D.C.N.D. Ill. 1939)	Not reported	3 S. & D. 644.
Zenith Radio Corp. *v.* F.T.C. (C.A. 7 1944)	143 F. 2d 29	4 S. & D. 194.
Ziegler Co., George; F.T.C. *v.* (C.A. 7 1937)	90 F. 2d 1007	2 S. & D. 397.
Zitserman, Ester (t/a J.M. Howard Co.) *v.* F.T.C. (C.A. 8 1952)	200 F. 2d 519	5 S. & D. 457.
Zurla, Patrick, et al. (t/a Chicago Board Co.) *v.* F.T.C. (C.A. 7 1958)	253 F. 2d 78	6 S. & D. 385.
Certiorari denied (1958)	358 U.S. 821	
Rehearing denied (1958)	358 U.S. 896	

DECISIONS OF THE COURTS

IN CASES INSTITUTED AGAINST OR BY THE COMMISSION

WINDSOR DISTRIBUTING CO., ET AL. v. FEDERAL TRADE COMMISSION*

No. 18897—F.T.C. Docket 8773

(Court of Appeals, Third Circuit, Jan. 7, 1971)

ORDER PROHIBITING SELLING PRACTICES OF VENDING MACHINE MANUFACTURER HELD NOT TOO BROAD FOR COMPLIANCE

Order of Federal Trade Commission to cease and desist certain selling practices on complaint alleging that sellers had engaged in unfair methods of competition and unfair and deceptive acts and practices in interstate sale of vending machines and vending machine supplies was not so broad or vague as to render compliance impossible and was within area of Commission discretion in framing relief appropriate to termination of unfair practices found to exist.

(The syllabus, with substituted caption, is taken from 437 F.2d 443.)

On appeal Court held that order prohibiting unfair sales practices by seller of vending machines and vending machine supplies was not so broad as to render compliance impossible.

Sanford A. Middleman, Middleman & Dixon, Pittsburgh, Pa., for petitioners.

Harold D. Rhynedance, Jr., Asst. Gen. Counsel, F.T.C., Washington, D.C., (*J. B. Truly, Gerald Harwood*, Attys., F.T.C., Washington, D.C., on the brief) for respondent.

Before HASTIE, *Chief Judge*, and FREEDMAN and GIBBONS, *Circuit Judges*.

PER CURIAM:

Petitioners seek review of an order of the Federal Trade Commission to cease and desist certain selling practices. The order was issued at the conclusion of an administrative proceeding upon a complaint alleging that petitioners had engaged in unfair methods of competition and unfair and deceptive acts and practices in the interstate sale of vending machines and vending machine supplies, in violation of Section 5 of the Federal Trade Commission Act. 15 U.S.C. § 45(a)(1)(1964). The Commission adopted the initial decision of the hearing examiner as its final order. Petitioners do not contend that the hearing examiner's conclusions with respect to violations of Section 5 are erroneous. They complain only that the cease and desist order is so broad and vague as to render compliance impossible, and goes beyond the relief appropriate in the circumstances. We have reviewed the transcript of proceedings before the hearing examiner and we conclude that the order is well within the area of Commission discretion in framing relief appropriate to termination of the unfair practices found to exist. *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 428 (1957); *Viviano Macaroni Co. v. Federal Trade Commission*, 411 F.2d 255, 260 (3 Cir. 1969); *The Regina Corp. v. Federal Trade Commission*, 322 F.2d 765, 769 (3 Cir. 1963); *Arrow Metal Products Corp. v. Federal Trade Commission*, 249 F.2d 83, 85 (3 Cir. 1957).

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*Reported in 437 F.2d 443 (1971). For case before the Commission, see 77 F.T.C. 204.

The order of the Commission will be affirmed and enforced.

UNITED STATES v. BEATRICE FOODS CO.*

No. 4-70 Civ. 459—F.T.C. Docket 6653

(United States District Court, D. Minnesota, Fourth Division
Jan. 11, 1971)

1. PRETRIAL MOTION OF RESPONDENT TO STAY PENALTY PROVISIONS OF F.T.C. ACT FROM DATE OF LITIGATION FORWARD WAS PREMATURE

   Pretrial motion of defendant alleged to have violated order of Federal Trade Commission for order staying penalty provisions of Federal Trade Commission Act from date of institution of litigation forward was premature.

2. FAILURE OF RESPONDENT TO SEEK ORDER STAYING PENALTY PROVISIONS OF F.T.C. ACT WOULD NOT PLACE RESPONDENT IN JEOPARDY DURING LITIGATION

   Failure of a defendant charged with violating order of Federal Trade Commission to seek, upon commencement of litigation, an order staying penalty provisions of Federal Trade Commission Act would not cause defendant to be in jeopardy during litigation.

(The syllabus, with substituted captions, is taken from 322 F. Supp. 139)

On pre-trial motion to stay penalty provisions of F.T.C. Act from date of litigation forward held that motion was premature.

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*Reported in 322 F. Supp. 139. For case before the Commission see 68 F.T.C. 1003; modified 71 F.T.C. 797.

Robert G. Renner, U.S. Atty., *J. Earl Cudd*, Asst. U.S. Atty., *Henry Banta*, Federal Trade Commission, Washington, D.C., for plaintiff.

Cant, Haverstock, Gray, Plant & Mooty, Edward J. Callahan, Minneapolis, Minn., *Winston, Strawn, Smith & Patterson*, by *Ronald Butler*, Chicago, Ill., for defendant.

NEVILLE, *District Judge:*

This is a suit in which the government in Count I of its civil complaint alleges a violation by the defendant of certain sections of the Federal Trade Commission Act. Defendant is alleged to be one of the largest manufacturers, processors and distributors of dairy products in the United States. As the result of a Federal Trade Commission proceeding and a subsequent appeal, a modified order dated June 7, 1967 was entered providing for certain divestitures by defendant and requiring defendant to cease for a period of ten years "from acquiring, directly or indirectly any interest in any firm, corporate or noncorporate engaged principally * * * in the business of manufacturing, processing or distributing at wholesale or on retail milk routes * * *" certain dairy products. The government alleges that on or about September 1, 1968 defendant violated this above injunction by acquiring an interest in Maple Island Dairies, Inc. a Minnesota corporation. The government prays judgment in the amount of $5,000 per day from September 1, 1968 until the date of the filing of the complaint in this lawsuit on October 23, 1970. The statute involved, 15 U.S.C. § 45(*l*) provides that one who violates an order of the Federal Trade Commission:

> * * * shall forfeit and pay to the United States a civil penalty of *not more than $5,000* for each violation [and] * * * each day of continuance of such failure or neglect shall be deemed a separate offense. [Emphasis added]

The defendant, promptly after service of the summons and complaint herein, moved the court for an order staying the penalty provisions of the above quoted statute from the date of the institution of the litigation forward. It asserts that its activities do not constitute a violation of the Commission's order and that in good faith it intends to defend the lawsuit and ultimately to demonstrate to the trier of fact that its conduct in connection with the alleged acquisition of an interest in the aforesaid Minnesota corporation—if in fact any such has been acquired—does not constitute a violation of the Commission's order. Defendant's counsel in effect takes the position that the possible continued running of a penalty amounting to $5,000 a day has a "chilling effect," so to speak, on the defendant's right to litigate its case and to defend its position. If defendant were now to cease and desist from what the government claims to be a violation, at least it would not be incurring any further penalties but if in fact defendant is wrong, and if its counsel is in error in his advice and belief that defendant has a good faith defense, defendant is taking the risk of a daily penalty which can be a very substantial amount before the litigation finally is terminated.

Counsel cites particularly the cases of *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961), and *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U.S. 160, 47 S.Ct. 553, 71 L.Ed. 978 (1927). It also sees some support in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 654, 70 S.Ct. 357, 94 L.Ed. 401 (1950). Defendant seems to contend that the teachings of the *St. Regis Paper* case particularly require such a pretrial motion as is now addressed to the court in order to stay the possible running of penalties during the period of litigation.

[1] The government asserts first that defendant's motion is premature in that the complaint demands penalties only up to the date of the filing thereof and not thereafter and that defendant in effect is attempting to secure a preliminary ruling against the possibility that the government may at some future time file a supplemental complaint under Rule 15(d) of the Federal Rules of Civil Procedure praying additional penalties from the date of filing the complaint forward. Defendant is thus seeking to have the court bind itself now not to assess post complaint penalties should the government at some future time seek such or should the court after hearing the evidence do so on its own motion. Second, the government points out that the penalties referred to in Section 45(*l*) above is for "not more than $5,000" and thus are not at this time certain or determined and the amount thereof, if any, rests in the court's discretion. Both points seem to this court to have merit. First, the motion is premature. The proof of good faith, if such exists, and if such constitutes a defense or mitigating circumstance, can be established on the part of the defendant for consideration by the court as a factor in the amount of penalty, if any, to be assessed up to the time of the filing of the complaint and to be assessed thereafter if the government ever seeks such. Penalties could range all the way from $5,000 a day down to zero or $1.00 a day. The court is granted discretion under the statute. *United States* v. *American Greetings Corp.*, 168 F. Supp. 45 (N.D. Ohio 1958), *aff'd* 272 F.2d 945 (6th Cir. 1959). Obviously until it has heard the evidence and a finding has been made by the trier of fact,

the court cannot determine the merits of the case as to whether defendant actually is in violation of the Commission's order, and if so, whether the violation is merely a technical or inadvertent one or is a bad faith, negligent or other type of violation. Whatever the circumstances, defendant is not prejudiced by denial of its motion at this time. Should the government at some future time seek to recover penalties accruing after the filing of the complaint, the court then will have to determine whether any such should be assessed and if so the amount thereof.

[2] On the government's second point the fact that the amount of the penalty here, if any, is discretionary and not a flat sum per diem distinguishes this case from *St. Regis Paper* and *Claire Furnace Co.* where the penalty—there $100 a day—by statute is automatic and mandatory for each day of violation and is not a discretionary matter with the court. Under the statute when the court in *St. Regis Paper* [1] found a violation, the penalty of $100 a day had continued to run subsequent to the filing of the complaint. The court stated:

> Petitioner's final point is that to impose the forfeitures will deprive it of property without due process of law. This argument is based on the premise that the orders of the Commission were not judicially reviewable except at the risk of paying daily forfeitures accumulating throughout the period of noncompliance, including the period of judicial review. We need not consider this point at length for it appears that petitioner did not try to obtain judicial review prior to the commencement of this action by the Government, *nor did petitioner seek a stay once the litigation had begun.* This inaction was in part based upon petitioner's reliance on *Federal Trade Comm.* v. *Claire Furnace Co.*, 274 U.S. 160, [47 S.Ct. 553, 71 L.Ed. 978] (1927). * * * 368 U.S. at 225, 82 S.Ct. at 299 (Emphasis added)

Defendant apparently takes the reference in the above language that petitioner did not seek a stay once the litigation had begun, as requiring it now to do so in this case for fear that upon failure thereof it is in jeopardy during litigation. The court does not so read 15 U.S.C. § 45(*l*), the statute involved in the case at bar, and does not believe that the *St. Regis Paper* case is controlling here.

A separate order has been entered.

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[1] The *St. Regis Paper Co.* case is further distinguishable from the case at bar in that there petitioner was contesting the validity of the allegedly violated order on constitutional and other grounds whereas here the validity of the modified order is not in question, the same having heretofore been appealed to the Circuit Court and affirmed (as modified) leaving the only matter to be presented to this court the question as to whether the actions, if any, taken by defendant constitute a violation of the terms of an established valid order. Further, *St. Regis Paper Co.* was claimed to involve a period of time during which judicial review was not available until the Federal Trade Commission had taken some affirmative action, a position not apposite to the case at bar.

FEDERAL TRADE COMMISSION v. EMANUEL GLADSTONE PRESIDENT, SOUTHERN CROSS DISCOUNT CO., INC.*

Civ. A. No. 13,903—F.T.C. Docket 8882

(United States District Court, Northern District of Georgia, Atlanta Division. February 24, 1971)

The president of a company, in willfully and intentionally altering records, by removing and destroying certain of those records, constituted criminal contempt of a court order enforcing an FTC investigative subpoena. His explanation that in having the documents destroyed he merely wanted to avoid duplication and bring his files up to date was unbelievable. Evidence indicated beyond a reasonable doubt that the president directed workers to remove and destroy certain documents in the company files. He was given a ten-day prison sentence.

William D. Ruckelshaus, Asst. Atty. Gen., *Harland F. Leathers*, Chief, General Litigation Sec. Civil Div., Dept. of Justice, Washington, D.C., *Julian M. Longley, Jr.*, U.S. Atty., Atlanta, Ga., *Joseph Martin, Jr.*, General Counsel, *Harold D. Rhynedance, Jr.*, Asst. General Counsel and *Charles C. Moore, Jr.*, F.T.C., Washington, D.C. for plaintiff.

Lipshutz, Macey, Zusmann & Sikes, Atlanta, Ga., and *Bryan, Carter, Ansley & Smith*, Atlanta, Ga., for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

EDENFIELD, *District Judge:*

This matter having come before the Court on December 3, 1970, on the Federal Trade Commission's Motion for Show Cause Hearing for Contempt Citation and the Court having considered the exhibits and testimony presented at the trial on December 3, 1970, including the testimony of respondent and others as hereinafter described, and the parties having submitted briefs, the Court hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. In the course of an investigation of the business practices of Southern Cross Discount Co., Inc., the Federal Trade Commission on September 22, 1969, issued a subpoena *duces tecum* to Emanuel Gladstone, president of Southern Cross Discount Co., Inc., requiring him to appear and produce the documents described in fifteen Specifications attached thereto. The Specifications that are particularly pertinent to

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***Reported in Trade Reg. Rep. (1971 Trade Cases) ¶73,507 at p. 90,063, 5th Cir., 1971, reported at ¶73,740 and 450 F. 2d 913. For case before the Commission, see 83 F.T.C. 1126.**

this proceeding are Specifications 8 and 9 which require the production of:

> 8. All files showing all contracts, credit applications, promissory notes, mortgages and other documents on customers who purchased the aluminum siding, swimming pool and carpeting at the advertised prices of Southern Cross Discount Company, Inc. during the period of time from January 1, 1968 to the date upon which return is made to this subpoena.
>
> 9. The originals or, in lieu thereof, copies of all contracts, credit applications, promissory notes and mortgages relating to every residential siding, swimming pool and carpeting job done by or for Southern Cross Discount Company, Inc. during the period of April 1, 1968 to September 30, 1968.

2. On respondent's failure to appear and produce files in accordance with the aforesaid subpoena, the Federal Trade Commission, acting under the authority of Section 9 of the Federal Trade Commission Act, 15 U.S.C. 49, petitioned this Court for an order requiring respondent to comply. Respondent resisted the enforcement petition and filed a motion to dismiss and a brief in support thereof.

3. The matter came up for hearing before the Court on July 31, and August 25, 1970. It was at the second hearing on Tuesday, August 25, 1970, that this Court issued an order requiring respondent to produce and turn over to the Federal Trade Commission the documents described in the aforesaid subpoena *duces tecum* by the following Friday, August 28, 1970.

4. The testimony of respondent Gladstone himself and the testimony of Messrs. Robert White, Jerry Coleman and Rowland Campbell establishes beyond a reasonable doubt that on August 25 (the day this Court's order was entered), August 26, August 27 and August 28, 1970 (the day respondent produced his files), at respondent's direction, workers were hired from Manpower, Inc., to remove material from respondent's files. Those files consisted of jackets or envelopes, each of which, prior to the aforesaid alteration, contained all of respondent's records with regard to a specific transaction and customer. At respondent's direction, three items were taped to a wall: (1) a credit application, (2) a contract, and (3) a work order sheet and the workers were instructed to remove and destroy any item contained in the files other than those similar to the three taped on the wall. During the aforementioned period of time, the employees from Manpower, Inc., worked 111 man-hours removing documents from the files and respondent himself and other permanent employees also participated in such removal and destruction.

5. By his own voluntary testimony, respondent Gladstone admitted that he did not know what documents the various employees, acting under his instructions, had actually removed from the files. His explanation, that he merely wanted to avoid duplication and bring his files up to date, is unbelievable.

CONCLUSIONS OF LAW

1. Specification 8 of the Commission's subpoena *duces tecum* and this Court's order enforcing that Specification required respondent to produce *all files containing* credit applications, promissory notes, mortgages and other documents on customers who purchased respondent's products at the advertised price since January 1, 1968. The evidence shows beyond a reasonable doubt that respondent willfully and intentionally altered such files by having documents removed therefrom and destroyed. That action constituted a willful criminal contempt of this Court.

2. Specification 9 of the aforesaid subpoena *duces tecum* and this Court's enforcement order required production of contracts, credit applications, promissory notes and mortgages executed during the period April 1, 1968, to September 30, 1968. Respondent's action of having material removed from files involving transactions occurring between those dates without regard to whether any of the specific items mentioned were being discarded also constituted a willful criminal contempt of this Court.

The Court therefore finds respondent Emanuel Gladstone convicted of criminal contempt this 17th day of February 1971.

JUDGMENT AND COMMITMENT

On this 24th day of February 1971, came the attorney for the Government and the respondent appeared in person and by counsel.

It is Adjudged that the respondent has been convicted of criminal contempt of this Court as charged in the Federal Trade Commission's Motion for Show Cause Hearing for Contempt Citation; and the Court having asked the respondent whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court.

It is Adjudged that the respondent is guilty of criminal contempt.

It is Adjudged that the respondent is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten days.

It is Further Ordered that the defendant be allowed to make an appeal bond in the amount of $1,000.00, and that he be allowed to sign his own bond.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the respondent.

THE KROGER CO. v. FEDERAL TRADE COMMISSION*

No. 20233—F.T.C. Docket 8663

(Court of Appeals, Sixth Circuit. Feb. 25, 1971)

1. PARTY CHARGED WITH PRICE DISCRIMINATION MAY SHOW SUCH LOWER PRICE WAS MADE IN GOOD FAITH TO MEET PRICE OF COMPETITOR

   In order for a buyer to be sheltered through exoneration of seller under Clayton Act section providing that upon proof that there has been discrimination in price the burden of rebutting *prima facie* case by showing justification is upon person charged with a violation of the section, but that nothing contained in the statute shall prevent rebutting of *prima facie* case made by showing that such lower price was made in good faith to meet an equally low price of a competitor, prices induced must come within defenses of that section not only from seller's point of view but also from that of buyer's; to hold otherwise would violate the purposes of the Act and frustrate the intent of Congress.

2. SELLER'S SUCCESSFUL DEFENSE DID NOT EXCULPATE PURCHASER SINCE PURCHASER KNEW PRICES WERE NOT WITHIN DEFENSES OF CLAYTON ACT

   Where Federal Trade Commission found that seller of dairy products made a bona fide attempt to meet third-party bid which seller had been told by purchaser was the lower, seller was acting in good faith under Clayton Act, and where purchaser knew that third-party bid was not lower and that the bid of seller was, therefore, not in fact responsive to an actual lower bid, seller's successful defense in Clayton Act prosecution did not exculpate purchaser since purchaser knew that prices offered by seller and received by purchaser were not within defense of Clayton Act section relating to meeting an equally low price of a competitor.

3. COMMISSION MAINTAINED THAT MANAGER HAD MISREPRESENTED THIRD-PARTY BID WHERE SUCH WAS THE THEORY ON WHICH COMMISSION ACTED

   Price-discrimination case was not tried on a different theory before Federal Trade Commission than that pursued before hearing examiner, where release of purchaser by hearing examiner on theory that such was required because of acquittal of buyer was attacked before the Commission and caused more attention to be focused on testimony of division manager of purchaser, but where counsel for the Commission maintained to examiner that manager had misrepresented third-party bid, and where such was the theory on which Commission acted in finding purchaser responsible.

4. PURCHASER NOT PLACED AT HIS PERIL WHEN HE FAILED TO CONVEY INFORMATION ABOUT PRICE LEVELS BEING QUOTED BY OTHERS

   Holding of Federal Trade Commission that purchaser was guilty of price discrimination did not place purchaser at his peril whenever he engaged in price bargaining, where use by Commission of the "hard bargaining" language as well as failure of purchaser to convey any correct information about price levels being quoted by others was but a warning, not a command.

5. PRICE DISCRIMINATION IN ONE AREA IS SUFFICIENT FOR CLAYTON ACT

   Evidence of price discrimination in only one area is sufficient to meet requirements of the Clayton Act.

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*Reported in 438 F. 2d 1372, *cert. denied,* 404 U.S. 871 (1971). For case before the Commission, see 76 F.T.C. 719.

6. Substantial Injury to Competition Milk and Cottage Cheese Properly Inferred Where Price Discriminations Were High

Federal Trade Commission, in price discrimination case involving milk and cottage cheese, properly inferred that there was a reasonable probability of substantial injury to competition since discriminations were as high as 41% in cottage cheese, averaged in one market more than 28%, for other markets 17% and in the most important area more than 12%.

(The syllabus, with substituted captions, is taken from 438 F.2d 1372)

On appeal, Court held that where purchaser knew that prices offered by seller were not within defense of Clayton Act section relating to meeting an equally low price of competitor, respondent violated Clayton Act. Order affirmed and enforced.

Norman Diamond, Washington, D.C. (*Daniel A. Rezneck*, *Patrick J. Macrory*, Washington, D.C., on the brief), for petitioner. *Arnold & Porter*, Washington, D.C., *George A. Leonard*, vice president and general counsel, The Kroger Company, Cincinnati, Ohio, of counsel.

Karl H. Buschmann, Federal Trade Commission, Washington, D.C. (*Joseph Martin, Jr.*, Gen. Counsel, *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, *Miles J. Brown*, Atty., Federal Trade Commission, Washington, D.C., on the brief), for respondent.

Before TOM C. CLARK, *Associate Justice*,* WADE H. MCCREE, Jr., and WILLIAM E. MILLER, *Circuit Judges*.

CLARK, *Associate Justice*:*

The Kroger Company brings this petition for review in which it complains of a cease and desist order of the Federal Trade Commission holding Kroger in violation of section 2(f) of the Clayton Act, 15 U.S.C. Sec. 13(f) [1] for having knowingly induced and received from Beatrice Food Company discriminatory prices on fluid milk and cottage cheese as prohibited by section 2(a) of the Act, 15 U.S.C. Sec. 13(a).[2] In the same order the Commission absolved Beatrice from responsibility under section 2(a) of the Act on the ground that its lower price was offered in good faith to meet an equally low price of a competitor, a defense authorized under section 2(b) of the Act, 15 U.S.C.

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*Associate Justice, Supreme Court of the United States, retired, sitting by designation.

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

[2] "It shall be unlawful * * * to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be * * * to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. * * *"

Sec. 13(b).[3] Kroger seizes upon this circumstance contending that as a matter of law the discharge of Beatrice requires the acquittal of Kroger because there cannot be a violation of section 2(f) without there being one under section 2(a). While ordinarily this may be true—a matter we need not and do not pass upon—it is not true under the peculiar circumstances here, where Kroger was found by the Commission to have given "false price information" to Beatrice as to Broughton's competing bid which induced Beatrice in perfect good faith to meet Broughton's equally low price. Nor do we find substance to the other points raised—all of which we will discuss in more detail—and, therefore, affirm the order of the Commission and direct its enforcement. The portions of the order having to do with Beatrice and other parties who were before the Commission and included in its order are not before us and therefore we express no opinion concerning them.

1. *The course of the proceeding.*

The administrative proceeding began on July 30, 1965, with the filing of a complaint charging Beatrice with discriminating in prices in the sale of fluid milk and other dairy products to the Kroger Company, and other parties, not involved here, in violation of section 2(a) of the Act, as amended. Kroger was charged with knowingly inducing or receiving prices for fluid milk under its own and other private label brands, cottage cheese and other dairy products in its transactions with Beatrice which were discriminatory under section 2(f) of the Act.

It was over two years later that the Hearing Examiner dismissed the complaint because (1) the prosecution under section 2(a) against Beatrice failed since the discrimination charged did not have the effect condemned by section 2(a); (2) the charge against Kroger under section 2(f) must be dismissed because of the failure of the Beatrice prosecution under section 2(a); and (3) as further grounds, that Beatrice had established a good faith meeting of competition defense under section 2(b) and, as to Kroger, that there was no evidence that Kroger knew or had reason to believe that the prices Beatrice offered were not in fact cost justified or were not offered in good faith to meet an equally low price of a competitor.

On appeal to the Commission the dismissal of the complaint by the Hearing Examiner was set aside as to Kroger and a cease and desist order was entered against it based upon a violation of section 2(f); Chairman Dixon with Commissioners Jones and MacIntyre made up the majority, and Commissioners Elman and Nicholson dissented. The charge against Beatrice was dismissed on its section 2(b) defense and no review was sought; the majority consisted of Commissioners Jones, Elman and Nicholson with Chairman Dixon and Commissioner MacIntyre dissenting. It is significant to note that none of the dissenters took issue with the Commission's finding concerning the initial bid that the Broughton dairy made to Kroger which led to the resulting discriminatory pricing by Beatrice.

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[3] "Upon proof being made * * * that there has been discrimination in price * * * the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section * * * *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * *was made in good faith to meet an equally low price of a competitor* * * *."

2. *The background of the parties.*

In 1963 Kroger operated a chain of over 1400 retail grocery stores located in some 19 states and which sold a variety of products. Its national volume of sales ran over $2 billion a year, including its milk and other dairy products. Kroger's competition in its Charleston Division included national chains such as A & P as well as regional chains and independent supermarkets.

Beatrice is the third largest dairy company in the United States, with $569 million annual sales in 1963. In 1962 Beatrice was one of several dairies serving the various areas within Kroger's Charleston Division. Prior to 1962, all dairy products in this area were vendor branded, and the supermarkets generally carried two or more brands in their dairy cases. Most customers generally received the "full service" method of milk distribution, requiring the routeman to deliver and also stock the dairy case. Prices were generally based on wholesale list prices with discounts to large purchasers. This price structure began to erode in 1962 when larger buyers, led by Kroger, began to demand and get formula prices based on the fluctuating cost of raw milk, and then by private branding of dairy products.

3. *The circumstances surrounding the bidding.*

In the fall of 1961, Kroger decided to explore private label sales in the hope that its own label might permit it to compete more profitably and effectively. Mr. Francis Casserly, manager of Kroger's Columbus Division, which was then operating a private label milk program, was designated to negotiate with dairies in the Charleston area. Casserly invited several companies, including Valley Bell, Broughton, Borden and Fairmont, to submit bids for bottling Kroger label milk for the Charleston Division.

The first bid received was from Broughton on January 6, 1962. It was in the form of tabulations covering each Kroger store location, showing the existing retail price, the prevailing wholesale price in the market, and a percentage figure for Kroger's gross profit. The Hearing Examiner found that Broughton offered discounts approximating 20 per cent from its list prices. The Commission found that the average discount amounted to "a little less than 11 per cent." It is uncontested that prices in the bid averaged a discount of 10.9 per cent. (Appendix 646)

In January, 1962, Beatrice officials, who had heard rumors that Kroger was seeking private label milk, contacted Casserly and arranged a meeting on January 12. At that meeting the volume of business and area to be served were discussed. The Beatrice representatives were asked if they had an offer to make, and they said they were thinking in terms of a 15 per cent discount. Casserly replied, "Well, forget it, I have already got one at 20" off the "existing list price." (Appendix 197) It stands undenied in the record that a 20 per cent discount was unheard of in the market area at that time. On January 25th Beatrice quoted 21 cents a pound on cottage cheese and Casserly "just told us right quick we weren't in the ballpark." (Appendix 234)

By letter of January 18, 1962, Casserly had informed the dairy companies that the bidding would be for a sales volume of dairy products in excess of $2 million annually. He indicated that Kroger was interested in some form of reduced service which would cut distribution costs, and requested bid prices based upon the cost of milk rather than discounts from the prevailing price structure.

Beatrice presented its first proposal to Kroger at a meeting with Casserly on February 9, 1962. The proposal included a price of 71 cents for a gallon of homogenized milk, arrived at by applying a discount of 16 to 18 percent for volume to the average price of 85 cents. Casserly told Beatrice representatives that they "might as well go back home" if that was all that they had to offer. (Appendix 207)

Casserly had not received any quotations lower than the Beatrice 71 cents per gallon bid at this time. The gallon jug was "the big item. That was the thing that really controlled this whole situation" (Appendix 206) and as the Hearing Examiner indicated, "the award of the contract might hinge on the gallon-jug price—since the 'gallon-jug was the big volume item.' " (Appendix ID–126) The first Broughton proposal contained prices per gallon ranging from slightly over 73 cents to more than 81 cents per gallon. Beatrice Division manager Stollings testified that Casserly nonetheless "told us of the 20 per cent Broughton price and he said, you don't have to be a very good mathematician to take an 85-cent average jug price and 20 per cent will show you that 71 cents is high." (Appendix 237) The discussion was promptly terminated. The Commission found that Casserly's rejection was not based on "any true appraisal" of the earlier Broughton offer, but that he simply thought he could get a better price. (Appendix O–25)

Other companies submitted bids. Broughton submitted a second proposal in February for $.7224 for a gallon of milk, and in March proposed prices ranging from \$.6586 to \$.6879. Fairmont's first proposal quoted prices ranging from \$.6585 to \$.8168, and later in February quoted prices ranging from \$.6526 to \$.7255. Borden submitted an offer, which varied according to the service and type of delivery.

On March 14, Beatrice representatives again met with Casserly and "quoted a 66 cents price." As Stollings reported it: "We talked about some of the other pricing. That is on a gallon jug * * * We talked about one or two other prices * * * We sat down across * * * the desk from Mr. Casserly and talked about a method of tying this price. That 66 cent price—I first talked about a 68 which was a 20 per cent discount, the Broughton discount from the 85 cent jug. At the time we were talking about this * * * Casserly said that he had received a bid from Fairmont that was better than this, and also mentioned that prices were 'collapsing' in the Charleston market (Appendix 239) * * * we worked out—me on one side and Mr. Casserly on the other—the mechanics—he did the mechanics. He had a calculator over there * * * and between the two of us we worked out a formula." (Appendix 240) Stollings further testified that he talked with Casserly about the 66 cent price, and Casserly replied that "now you are getting—you are in a position of being competitive with some of the other people." (Appendix 239)

Beatrice's representatives made it clear that the 66 cent price would have to be approved by the Chicago office. In early April Stollings reviewed the proposal with Beatrice's house counsel and an accounting specialist. On April 9, 1962, Stollings met with Casserly and delivered a revision of the Beatrice proposal which has been approved by the home office. Prices were based on 66 cents per gallon of milk, and 17.5 cents per pound of cottage cheese. Kroger accepted the proposal and the companies began to operate under it in June, 1962.

4. *The Section 2(f) violation.*

Kroger claims that it cannot be found in violation of the discrimination clause of section 2(f) because Beatrice was absolved from its violation of the anti-discrimination provision of section 2(a) on its defense under section 2(b). It relies on a sentence in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61 (1953), "that a buyer is not liable under Sec. 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification *or not known by him not to be within one of those defenses*" at 74, Emphasis being added. But this was just another way of saying, as the Court did earlier in the opinion, that section 2(f) was "roughly the counterpart, as to buyers, of sections of the Act dealing with discriminations by sellers." At p. 63. That is to say, a buyer may not be prosecuted for inducing discriminatory prices which it knows a seller may offer with impunity under section 2(b). As the Court itself put it:

> the discriminatory price that buyers are forbidden by Sec. 2(f) to induce * * * cannot be read as declaring out of bounds price differentials within one or more of the "defenses" available to sellers, such as that the price differentials reflect cost differences, fluctuating market conditions, or bona fide attempts to meet competition, as those defenses are set out in the provisos of Secs. 2(a) and 2(b). At 70–71.

[1,2] At first blush it might appear that Kroger's claim might have some merit, *i.e.* that a defense absolving its seller under section 2(b) operated *ipso facto* for its own acquittal. However, even granting the validity of such a deduction it would not be available here. *American Canteen* only holds that buyers may avail themselves of discriminatory prices that a seller may lawfully grant or those that are "not known by him [the buyer] not to be within one of these defenses." Id. The Commission found that Beatrice made a bona fide attempt to meet the Broughton bid which it was told by Kroger was the lower one. In so doing Beatrice was in good faith acting within a defense offered by section 2(b). On the other hand, Kroger knew that the Broughton bid was not lower and that the one of Beatrice was, therefore, not in fact responsive to an actual lower bid. In such a factual situation the seller's successful defense under § 2(b) cannot exculpate the buyer since Kroger knew that the prices offered by Beatrice and received by Kroger were not in fact within the defense of section 2(b). To hold otherwise in this case would put a premium on the buyer's artifice and cunning in inducing discriminatory prices. See *Kintner, A Robinson-Patman Primer* 261. 315–331. In order for the buyer to be sheltered through the exoneration of the seller under section 2(b) the prices induced must come within the defenses of that section not only from the seller's point of view but also from that of the buyer. To hold otherwise would violate the purposes of the Act and frustrate the intent of the Congress.

The findings of the Commission with regard to the misrepresentation of the Broughton bid are fully supported by substantial evidence throughout the record. Casserly himself testified that the bid was "an average of 20 per cent * * * a little above on some, a little below on others" (Appendix 299). Hutchinson, one of the Beatrice negotiators, testified that Casserly told him "I have already got one at 20" (Appendix 197). And Stollings (another Beatrice negotiator) testified that Casserly said that "he had 20 per cent off from Broughton on this business" (Appendix 230) The bid actually averaged 10.9 per cent discount off the wholesale list price. (Appendix 646). We find no denial of this fact in the appellant's briefs. It does contend that Commission counsel agreed before the Hearing Examiner that the bid was 20 percent. But Commission Counsel fully explained this. They admitted that in its orignial proposed findings to the Examiner it stated that the Broughton bid was 20 per cent off. But soon thereafter in its reply findings it told the Examiner that this was an error. It said that only four stores "were granted prices as low as .658, .66 and .68" (CX103, B–C, G, Z 5) while all of the others ranged from 73.2 cents to 85.65 cents per gallon. (CX 103 B–Z–8). It further stated that cottage cheese—an important item—was "extremely high" in comparison to the final Beatrice proposal. At the time of the Broughton bid the one of Beatrice was 2 cents below Broughton on forty of the forty four stores and the four lower price stores were comparatively small outlets of Kroger. Moreover, in its appeal brief to the Commission counsel discussed and denounced the bid under the heading: "*Kroger Misled the Dairies Concerning Receipt of a 20% Discount Offer*" (Appendix 560). And at argument before the Commission when Kroger pointed to the proposed finding to the Examiner as an admission that Broughton's bid was 20 percent off the Commission counsel again repudiated this claim and called the attention of the Commission to its prior rejection.

5. *Other Contentions.*

[3] We need not pause long with the remaining claims. The complaint clearly charges Kroger in the exact terms of the Act which, of course, is sufficient. Nor is there substance to the objection that the case was tried on a different theory before the Commission than that pursued before the Hearing Examiner. The release of Kroger by the Hearing Examiner on the theory that it was required because of the acquittal of Beatrice was, of course, attacked before the Commission and caused more attention to be focused on Casserly's testimony. But counsel for the Commission maintained to the Examiner that Casserly had misrepresented the Broughton bid. It necessarily had to give more emphasis to the Casserly testimony in its presentation to the Commission in order to meet the Hearing Examiner's order exculpating Kroger. Indeed, Kroger's strategy before the Hearing Examiner emphasized that its responsibility could not be judged by the acts of Beatrice. Kroger's own counsel repeatedly objected before the Hearing Examiner to the relevance of certain evidence as to Kroger but not to Beatrice on the ground that "independent acts of Party A had nothing to do with the responsibility of Party B." That is exactly the theory on which the Commission acted in finding Kroger responsible.

[4] Moreover, we find no support for the charge that the Commission holding places the buyer at his peril whenever he engages in price bargaining. The use by the Commission of the "hard bargain-

ing" language as well as the failure of Kroger "to convey" any correct information about the price levels being quoted by others is but a warning, not a command. The controlling point here is not the "hard bargaining" nor the "price levels" but the misrepresentation of the Broughton bid.

Finally, Kroger argues that the Commission failed to meet the burden of proving that Kroger knew or should have known that Beatrice's prices were not cost justified and there was no substantial evidence that the differentials on Kroger's private label product injured competition. We find that there is substantial evidence supporting each of the Commission's findings, including these.

As to cost justification, the showing of Beatrice was found by both the Hearing Examiner and the Commission to be entirely inadequate. We agree with this finding. In addition, Kroger was specifically warned by two dairy suppliers of Robinson-Patman Act problems that might result from the lower prices it sought. Still its expert in the purchasing and selling of dairy products, Mr. Casserly, pursued his course. He was a man of extremely wide experience in every line of the dairy industry, including the production, processing and retailing of such products. He knew trade discounts, market conditions and cost accounting. Indeed, Casserly himself built up the cost formula which resulted in discriminations aggregating 39 per cent in some markets and as high as 41 per cent on cottage cheese. In these lights—coupled with the other circumstances surrounding the transaction—it is beyond question that Kroger knew—or should have known—that Beatrice's prices were not cost justified.

[5] Likewise the differentials that Kroger received impaired competition. We start with the proposition that evidence of discrimination in only one area is sufficient to meet the requirements of the Act. *Foremost Dairies, Inc.* v. *Federal Trade Commission*, 348 F. 2d 674, 681 (5 C.A. 1965), *certiorari denied*, 382 U.S. 959. Moreover, "a substantial price advantage can afford a favored buyer a material capital advantage * * * which will give him a substantial advantage over his competition." Therefore, as the Fifth Circuit said in *Foremost, supra:* "It is unnecessary that there be evidence that the favored customer actually undersold his rivals." At 680. See also *National Dairy Products Corp.* v. *Federal Trade Commission*, 395 F. 2d 517, 522 (7 C.A. 1968), *certiorari denied* 393 U.S. 977.

In this case Kroger contends that its purchase of vendor labeled milk from Beatrice should be aggregated with its purchases of private label milk. *Federal Trade Commission* v. *Borden Co.*, 383 U.S. 637 (1966). We think that the Commission correctly rejected the application of this principle since Beatrice labeled milk was only sold in 11 of the 44 stores in the relevant areas (CX 37, 64 F-H, 65 A-H; Appendix 296–

297, 319, 519–527, 631–645). Moreover, the large Charleston and Logan areas received no Beatrice labeled products and the all-important gallon jug was not available under the Beatrice label in any Kroger store. Furthermore, *Borden* recognizes the competitive advantage which results when disadvantaged competitors are denied a label which the favored buyer receives. Kroger reaped this very advantage. It received Kroger labeled milk at cheaper prices than it received Beatrice labeled milk and consequently placed its label in a competitively superior position. It did not reduce the retail price of its private label milk and, thereby, pass on lower prices to the consumer, but reaped higher profits for itself. The result was that it sold enormous quantities of milk at higher profits, as is clearly shown by its own chart in Addendum I to its brief filed in this court.

However, the point that the Commission should have treated the private labeled product and the nationally branded one as "goods of like grade and quality," *Borden, supra*, need not be labored. Beyond any question in the three market areas where both labels were sold the discrimination ran from 9.7 to 30.8 percent and averaged 16 percent (CX 390).

[6] The Commission properly inferred that there was a reasonable probability of substantial injury to competition since the discriminations were as high as 41 per cent (in cottage cheese); averaged in one market more than 28 per cent for other markets 17 per cent, and in Charleston, the most important area, more than 12 per cent. See chart, page 34, Commission's brief. The discrimination here is among the highest in a litigated case under the Clayton Act.[4] The record shows that in the retail food business "competition is keen and profit margins are low" *Foremost Dairies, Inc., supra*, at 681; *National Dairy Products Corp., supra*, at 522; *Federal Trade Commission* v. *Fred Meyer, Inc., supra*, at 367. In addition it is uncontested that dairy products are often used as "leaders" to attract customers. It follows that the injury found to be present involving a secondary-line here permits wide inferences of adverse competitive effects based on the existence of substantial price differentials. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 46–47 (1948); *American Motors Corporation* v. *F.T.C.*, 384 F. 2d 247, 250–251 (6 C.A. 1967) *cert. denied* 390 U.S. 1012; *Foremost Dairies, Inc.* v. *F.T.C., supra*, at 679–680; *National Dairy Products, Inc.* v. *F.T.C., supra*, at 522, *United Biscuit Co.* v.

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[4] Examples of discounts in secondary-line injury cases may be found in *United States* v. *Borden Co.*, 370 U.S. 460, 463–464 (11%); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 41 (5% to 10%); *National Dairy Products Corp.* v. *Federal Trade Commission*, 395 F. 2d 517, 521 (7th Cir. 1968), *cert. denied*, 393 U.S. 977 (12%); *Foremost Dairies, Inc.* v. *Federal Trade Commission*, 348 F. 2d 674, 675 (5th Cir. 1965), *cert. denied*, 382 U.S. 959 (5%); *Dean Milk Co.* v. *Federal Trade Commission*, 395 F. 2d 696, 708 (2% to 10%); and *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d 351, 364 (9th Cir. 1966), *rev'd* on other grounds, 390 U.S. 341, 358 (33%).

F.T.C., 350 F. 2d 615, 622 (7 C.A. 1965) *cert. denied* 383 U.S. 926. Indeed, in wholesale fluid milk sales discounts from 5 per cent to 12 per cent have been held to have the required competitive effect on the secondary-line level, *Foremost Dairies, Inc.* v. *F.T.C.*, *supra*, at 679; *Dean Milk Co.* v. *F.T.C.*, 395 F. 2d 696, 708–709 (7 C.A. 1968); *National Dairy Products Corp.* v. *F.T.C.*, *supra*, at 522.

We follow the teaching of *Automatic Canteen*, *supra*, where the court emphasized:

> [T]he buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices. Enforcement of the provisions of Sec. 2(f) against such a buyer should not be difficult. At 79.

The order of the Federal Trade Commission is affirmed and enforced.

UNITED STATES v. BEATRICE FOODS CO.[*]

No. 4–70 Civ. No. 459—F.T.C. Docket 6653

(U.S. District Court, District of Minnesota, Fourth Division, March 12, 1971)

In a civil penalty suit against a national dairy company for allegedly violating an FTC merger consent order, 8 S & D 495, dated May 23, 1967, an interrogatory requiring the government to identify "the name and address of each person who negotiated the terms of the contract which constitutes the settlement decree referred to in the complaint" was not objectionable as it may be relevant on the issue of damages. The government also requests protective order against respondent's request that Commission "state with particularly" any "interest" which respondent has acquired in Maple Island Dairies, Inc. Because the government failed to sustain objections to the interrogatories No. 2 and No. 3 is denied. However, the dairy company was not entitled to the disclosure of certain FTC legal memoranda, because these documents were protected under the doctrine of "executive privilege."

ORDER ON OBJECTIONS TO INTERROGATORIES

NEVILLE, *District Judge:*

The plaintiff, United States of America, has objected to certain interrogatories directed to it by defendant Beatrice Foods Company (Beatrice) and moves for protective orders in connection therewith. The motions were argued before the court on January 14, 1971 in Minneapolis, Minnesota and extensive and exhaustive briefs have been submitted on the issues raised. Robert G. Renner, United States Attorney, by Neal J. Shapiro, Esq., Assistant United States Attorney, together with H. Robert Field and James E. Corky, Esqs., Federal Trade Commission, Washington, D.C. appeared for the plaintiff; Cant, Haverstock, Gray, Plant and Mooty, Minneapolis, Minnesota, by Robert E. Bowen, Esq. and Winston, Strawn, Smith & Patterson, Chicago, Illinois, by Ronald Butler, Esq. appeared for the defendant.

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[*] Reported in Trade Reg. Rep. (1971 Trade Cases) ¶73,556 at p. 90,313. For Commission case see 68 F.T.C. 1003.

A brief summary of the case is necessary to an understanding of the government's objections. Pursuant to a complaint filed by the Federal Trade Commission (FTC) attorneys in 1956, an FTC Trial Examiner after voluminous hearings entered a decision in 1964 finding Beatrice in violation of 15 U. S. C. § 45 and requiring divestiture of certain interests and holdings and prohibiting acquisition of similar interests without FTC approval. This decision was sustained by a final order of the Commission on December 10, 1965, and Beatrice filed a petition for review with the Court of Appeals for the Ninth Circuit. During the pendency of that appeal, the parties arrived at a negotiated agreement modifying the original order to some extent, and by joint motion sought its adoption by formal decree of the Ninth Circuit. On May 23, 1967, the court entered a final order [1967 TRADE CASES ¶ 72,124] affirming this negotiated agreement as filed by the parties.[1] The FTC's subsequent modified Order, issued June 7, 1967, in accordance with the Ninth Circuit's decree, is the binding Order upon which this enforcement action is brought.

Shortly before the negotiation of the Beatrice agreement, the FTC apparently reached similar agreements with at least three other major dairy companies, which agreements forbade the acquisition of "the whole or any part of the stock, share capital, or assets" of any milk or milk products firm. The FTC's original Order in the Beatrice proceedings and the settlement decree ultimately negotiated and approved by the Ninth Circuit, however, prohibited (at Paragraph III therein) the acquisition of "any interest" in such firms.

This Section 45(1) enforcement action alleges, *inter alia*, at Paragraph 7 of the complaint, that defendant Beatrice "acquired an interest" in Maple Island Dairies, Inc., a corporation operating in Minnesota on or about September 1, 1968, in violation of the Order. Such allegation obviously draws into question the scope and effect of the Order's prohibition of acquiring an "interest" in such firms.

Beatrice apparently takes the position that the word "interest" in the 1967 Order must be construed as substantively equivalent to the language "stock, share capital, or assets" which appears in the consent decrees entered between the FTC and the other dairy products companies prior to the negotiation of the final Beatrice Order, and that the meaning of "interest" is thus governed by the subsequent judicial and administrative decisions, if any, and the "practical construction" given the language used in those other decrees. It seeks to establish the equivalence of these terms by reconstructing the negotiations between Beatrice and the FTC to demonstrate the intentions behind the modification of the original Order. Evidence of such negotiations, it contends, will be relevant under the exception to the parol evidence rule to establish the intentions of the contracting parties as to ambiguous contractual language.

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[1] The negotiated settlement without any court order would have enjoyed the full force and effect of law, and would thus be a basis for subsequent enforcement actions under 15 U.S.C. § 45(1), without the approval or acquiescence of the Court of Appeals for the Ninth Circuit. The parties apparently sought the imprimatur of the court perhaps to permit recourse to contempt proceedings if for no other reason than as an alternative enforcement mechanism in the event of an alleged violation.

It is against this background that the following motions must be considered:

[*Identity of FTC Negotiators*]

I. The Government has moved for a protective order which would entitle it to ignore Interrogatory #1, which reads:

> State the name and address of each person who negotiated the terms of the contract which constitutes the settlement decree referred to in the complaint.

The Government objects to this interrogatory on the ground that its answer would not conceivably lead to the discovery of facts relevant to the issues in the case. It contends that the order by definition expresses the intention of the approving court, and that evidence of the intentions of the parties is irrelevant to the issue of the meaning of the word "interest". The parties have briefed the court *in extensio* on the question whether evidence as to the negotiations which underlie the 1967 final order is admissible in the trial of the case.[2] The court deems it unnecessary and inappropriate to resolve that issue at this stage of the litigation.

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[2] The parties seem to agree that the character of the order will determine the admissibility of evidence surrounding its negotiation and tending to explain the intended meaning of any ambiguous terms. The only decision precisely in point in *Leona Amusement Corp. v. Loew's Inc.* [1953 TRADE CASES ¶ 67,419], 13 F. R. D. 438 (S. D. N. Y. 1952), which permitted discovery of information about such negotiations without ruling on the eventual evidentiary question. If the order in this case can be characterized as a *contractual* undertaking, the parol evidence rule and its exceptions would presumably apply.

30 C. J. S. *Equity*, § 681 ("Consent Decree"), p. 858 states: "being in the nature of a contract . . . a consent decree should be construed as a contract is construed." See *Hart Schaffner & Marx v. Alexander's Dept. Stores, Inc.*, 341 F.2d 101 (2d Cir. 1965); *Artvale, Inc. v. Rugby Fabrics Corp.*, 303 F.2d 283 (2d Cir. 1962); *United Steelworkers of America v. Copperweld Steel Co.*, 230 F.Supp. 383 (W. D. Pa. 1964); *Butler v. Denton*, 57 F. Supp. 656 (E. D. Okla. 1944), *aff'd* 150 F.2d 687 (10th Cir. 1945); *United States v. Hartford-Empire Co.*, 1 F. R. D. 424 (N. D. Ohio 1940).

On the other hand, there is authority for the proposition that the Order is a *Judicial* act expressive of the court's intent, so that evidence as to the intentions of the parties is irrelevant in the construction. *Gila Valley Irrigation District v. United States*, 118 F.2d 507, 510 (9th Cir. 1941). *Cf. United States v. Swift & Co.* [1932-1939] TRADE CASES ¶ 55,005], 286 U.S. 106, 115 (1932); *Siebring v. Hanson*, 346 F.2d 474, 477 (8th Cir. 1965), *cert. denied* 382 U.S. 943 (1965); The government is particularly insistent upon the application of that rule in this case, where the Ninth Circuit acted on a fully developed administrative record. Its act of approving the negotiated order, it is argued, can be readily distinguished from the usual approved "consent decree" entered before the dispute reaches the hearing stage for adjudication at the administrative level.

The statute under which this action is brought, 15 U. S. C. § 45(1), provides for a penalty "of not more than $5,000 for each violation" of the FTC's order, and "each day of continuance of such failure or neglect to obey such order shall be deemed a separate offense." While good faith is not a defense to such an action, it is clearly relevant to the court's discretionary determination of the extent of civil penalties to be assessed under that provision. *United States v. H. M. Prince Textiles, Inc.* [1967 TRADE CASES ¶ 72,039], 262 F.Supp. 383 388–89 (S. D. N. Y. 1966); *United States v. Vitasafe Corp.* [1962 TRADE CASES ¶ 70,591], 212 F.Supp. 397 (S. D. N. Y. 1962), *aff'd* 352 F.2d 62 (2d Cir. 1965). Thus, evidence tending to establish that the defendant's allegedly violative conduct was consistent with its reasonable understanding of the scope of the governing order may well be relevant on the issue of damages. The court thus overrules the government's objection to Interrogatory No. 1 and hereby orders it to answer the same.

The court recognizes that its inquiry on this motion is not as to the ultimate admissibility of any evidence garnered as a result of the government's answer to Interrogatory No. 1. As indicated above, the court does not now decide whether the language of the order is ambiguous or whether the exception to the parol evidence rule applies to the construction of such order. This ruling should govern objections on the same theory which might be lodged by the government if and when counsel for Beatrice attempt to depose under the discovery rules those individuals whose identities are disclosed pursuant to Interrogatory No. 1.

[*"Interest" Allegedly Acquired*]

II. The government also requests protective orders with respect to defendant's Interrogatories No. 2 and No. 3, which read:

> No. 2. Referring to Paragraph 7 of Count I of the complaint, state with particularity any "interest" in Maple Island Dairies, Inc. owned by the defendant.
>
> No. 3. Referring to Paragraph 7 of Count I of the complaint, state with particularity any "interest" in Maple Island Dairies, Inc. in which the defendant has any "direct or indirect" ownership.

The government objects first to the terminology of the Interrogatories, specifically to the characterization of the action as involving only "ownership" of Maple Island Dairies, Inc. The complaint unequivocally alleges acquisition of an "interest" in Maple Island, which language conforms to the term used in the order as discussed hereinabove. Certainly the government cannot be bound by any gloss applied to the language of its complaint by the defendant, and resolution of the question whether "interest" means something other than "ownership" will not be influenced by the defendant's choice of words in discovery proceedings. Therefore, such is not a valid ground for issuance of a protective order or sustaining an objection to Interrogatories No. 2 and No. 3. The government in its answers to interrogatories No. 2 and No. 3 regarding "ownership" should deal with *all* alleged acquisitions of "interest" in Maple Island Dairies and not omit certain transactions which it intends to demonstrate constitute acquisitions of "interests," within the prohibition of the order, which somehow fall short of "ownership" as that term is understood in the context of this case. To fail to do so just invites further interrogatories and creates delay. The government also objects to Interrogatories No. 2 and No. 3 as calling for a full exposure of "each segment of its legal theory as involving transactions which were engineered, refined and consummated by the defendant itself." [3] It contends that the information sought by such Interrogatories is within Beatrice's present possession inasmuch as the complaint charges violations of the order by virtue of the Beatrice relationship with Maple Island. As such, it is argued, requiring response would place a heavy burden on the government with no countervailing benefit to Beatrice.

Beatrice, on the other hand, argues that its purpose is "to find out what the government's contentions are when it charges a violation of the agreed order so it can prepare a defense to them." [4] A further purpose, not argued by Beatrice, would be to discover information relevant to the claimed acquisitions which might be beyond the information available to Beatrice. If such information exists, it ought to be made available to Beatrice.

The scope of inquiry by Interrogatories under Fed. R. Civ. P. Rule 33 is governed in part by Rule 26 as most recently amended, which reads at 26(b) (1) in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.

As the Supreme Court noted in *Hickman v. Taylor*, 329 U.S. 495 (1946), one of the purposes of discovery under the Federal Rules is to narrow the issues for trial. Thus, courts have consistently held that a party may propound interrogatories calling for the disclosure of the opposing party's specific position as to the facts underlying his claim, notwithstanding that such facts, divorced from their application to the legal principles governing the case, may already be known or accessible to the propounding party. *United States v. Article of Drug*, 43 F. R. D. 181 (D. Del. 1967); *Baim & Blank, Inc. v. Philco Distribututors, Inc.* [1957 TRADE CASES ¶ 68,626], 25 F. R. D. 86 (E. D. N. Y. 1957); Wright,

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[3] Government's Brief of December 8, 1970, at page 6.

[4] Beatrice's Brief of January 11, 1971, at page 21.

Federal Courts (2nd Ed., 1970), § 81, p. 356. Cf. *Leumi Financial Corp. v. Accident & Indemnity Co.*, 295 F.Supp. 539 (S. D. N. Y. 1969); *Diversified Products Corp. v. Sports Center Co.*, 42 F. R. D. 3 (D. Md. 1967). The court in *Baim & Blank*, *supra*, accordingly reasoned:

> The purpose of the deposition-discovery procedure is not only for the ascertainment of facts, but also to determine what the adverse party contends they are, and what purpose they will serve, so that the issues may be narrowed, the trial simplified, and time and expense conserved. It has also been held that inquiry, either by deposition or interrogation, into facts within the discoverer's own knowledge, and of which he already has information, are proper. *Benevanto v. A. & P. Food Stores, Inc.*, D. C. E. D. N. Y., 26 F.Supp. 424; *Nakken Patents Corp. v. Rabinowitz*, D. C. E. D. N. Y., 1 F. R. D. 90; Moore's Federal Practice, 2nd Ed., Secs. 26.21, 33.13.

25 F. R. D. at 87.

Against the foregoing body of case law, the court must consider the following 1970 amendment to Rule 33:

> An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

The Notes of the Advisory Committee responsible for that amendment indicate that it was not intended to constrict the scope of discovery of specific facts and contentions of the parties:

> Rule 33 is amended to provide that an interrogatory is not objectionable merely because it calls for an opinion or contention that relates to fact or the application of law to fact. Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful and the clear trend of the cases is to permit "factual" opinions. As to requests for opinions or contentions that call for the application of law to fact, they can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery.

Under the circumstances, the court concludes that responses to Interrogatories No. 2 and No. 3 may substantially aid in narrowing the issues for trial, and that the government has not demonstrated adequate basis upon which to issue the requested protective order or to sustaining objections to such interrogatories. Therefore, the government's motion with respect to Interrogatories No. 2 and No. 3 is denied.

[*Executive Privilege*]

III. Finally, the government requests a protective order as to certain categories of documents, the existence of which was disclosed pursuant to defendant's Interrogatory No. 4(e). That Interrogatory reads:

> Identify each and every document or memorandum in your possession referring to the matters alleged in the complaint.

The government's brief listed, *inter alia*, the following categories of such documents, as to all of which it claims protection under the doctrines of Work Product and Attorney-Client privilege:

1. Category A—Legal Memorandum from Joseph J. Gercke, Chief, Compliance Division, to the Commission concerning Compliance Reports of Defendant, the issuance of compulsory process under Section 6(b) of the Federal Trade Commission Act (15 U.S.C. 41(b)) and recommendations as to the bringing of the present suit.

2. Category E—Legal Memoranda, and attached exhibits submitted to the Department of Justice outlining the theory of the case and setting forth the facts, evidence and anticipated defenses.

3. Category J—Legal Memoranda from Joseph J. Gercke to the Commission concerning the eventual divestiture of the assets which are the subject matter of Count II.

At the hearing copies of those documents were submitted to the court for its *in camera* inspection. On the basis of the court's perusal of the documents, it concludes that disclosure may be protected under the doctrine of "executive privilege." See Judge Robinson's lengthy discussion in *Carl Zeiss Stiftung v. E. B. Carl Zeiss, Jena*, 40 F. R. D. 318 (D. D. C. 1966), *aff'd per curiam* without opinion 384 F.2d. 979 (D. C. Cir. 1967), *cert. denied* 88 S. Ct. 334 (1967). See also *Detroit Screwmatic Co. v. United States*, 49 F. R. D. 77 (S. D. N.Y. 1970); *Freeman v. Seligson*, 405 F.2d. 1326 (D. C. Cir. 1968); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F.Supp. 939 (Ct. Cl. 1958). Cf. *Timken Roller Bearing Co. v. United States*, 38 F. R. D. 57 (N. D. Ohio 1964).

As the decisions indicate, the existence of the privilege is determined by a balancing of the necessity for invocation of the privilege, on the one hand, against the potential value of the private litigant of the requested production on the other. The balance weighs heavily against Beatrice. It has argued that access to such documents is essential to an understanding of the specific contentions of the government as to particular incidents, transactions or conditions alleged to violate the order, because the government has heretofore refused to disclose such facts and contentions with particularity. That arguable justification for production of these documents no longer obtains in light of the court's ruling that the government must respond to Interrogatories No. 2 and No. 3. And even accepting, arguendo, Beatrice's theory that evidence outside the order itself may be admissible as tending to clarify the intended meaning of its allegedly ambiguous terminology, government memoranda speculating after the fact as to the scope of the order if such they do would be irrelevant. As to the

FTC's interest in protecting this kind of document from disclosure, its counsel stated its position at the hearing as follows:

> The necessity of the agencies involved for frank and open advice and ready access to the staff is of overriding public importance. If these memoranda had to be written with one eye toward their eventual use in court, I think the possibilities of frankness and openness and full discussion of the merits and demerits of the case involved would be very limited.

The court subscribes to this position.

Since the court finds that the documents in Categories A, E, and J are protected from the requested disclosure by the doctrine of executive privilege, it is unnecessary to discuss the applicability of the Work Product rule and the Attorney-Client privilege, though there may well be merit to the contention as to their applicability in this situation.

At the hearing on January 14th (Tr., page 34), the court indicated that it would order and thus it does hereby order that all discovery proceedings by both parties be completed by August 15, 1971. The court hereby sets a date for a pretrial conference for Friday, August 27, 1971 at 9:00 A.M. at Minneapolis to the end that the case may be ready if possible for trial at the September-October term of this court to be held in Minneapolis.

So ordered in accordance with the above memorandum.

L. G. BALFOUR COMPANY, ET AL. v. FEDERAL TRADE COMMISSION*

No. 17236—F.T.C. Docket 8435

(Court of Appeals, Seventh Circuit. April 5, 1971)

1. COMMISSION NEED NOT FOLLOW ANTITRUST STANDARDS AS STRICTLY AS COURTS MUST IN SHERMAN AND CLAYTON ACT CASES

   Federal Trade Commission under provision of Federal Trade Commission Act offering general prohibition against unfair methods of competition is not bound to follow antitrust standards as strictly as courts must in cases under Sherman and Clayton Acts.

2. NATIONAL COLLEGE FRATERNITY INSIGNIA-BEARING GOODS CONSTITUTE A RELEVANT MARKET AND COMMISSION PROPERLY REFUSED TO CONSIDER EACH FRATERNITY A SEPARATE MARKET

   In proceeding asserting that manufacturer and its subsidiary engaged in practices which were alleged to unlawfully restrain, lessen and eliminate competition and create a monopoly to prejudice of public in violation of Federal Trade Commission Act, national college fraternity insignia-bearing goods constituted relevant market and Commission properly refused to con-

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*Reported in 442 F. 2d 1. For case before the Commission, see 74 F.T.C. 345, *modified* 79 F.T.C. 486.

sider each national college fraternity as a separate market or to include suppliers of all emblematic jewelry, rather than fraternity products, in the product market.

3. MONOPOLY POWER SHOWN IN CORPORATION'S SHARE OF MARKET IS ELEMENT OF OFFENSE IN SHERMAN ACT

Proof of a corporation's share of the market is generally used to show monopoly power, an element of offense under provision of Sherman Act making monopolization illegal.

4. SUBSTANTIAL PERCENTAGE SHARE OF MARKET CARRIES MONOPOLISTIC POWERS WHICH ANTITRUST LAWS ARE DESIGNED TO PROHIBIT

A company with substantial percentage share of a market would have power to preclude entry and advancement and set prices without paying heed to those forces which would exist in a healthy and competitive market and such powers are the powers which a monopolist possesses and which antitrust laws are designed to prohibit.

5. EXCLUSIVE DEALING CONTRACTS WITH 90% OF NATIONAL COLLEGE FRATERNITIES SUPPORTS FINDING OF MONOPOLY POWER IN RELEVANT MARKET

Manufacturer's and its subsidiary's exclusive dealing contracts with over 90% of national college fraternities supported finding of monopoly power in relevant market of national college fraternity insignia-bearing goods in proceeding asserting that manufacturer and subsidiary engaged in practices which were alleged to unlawfully restrain, lessen and eliminate competition and create monopoly to prejudice of public in violation of provision of Federal Trade Commission Act.

6. COMPANY WITH MONOPOLISTIC SHARE OF MARKET MUST CONDUCT ITSELF IN A MANNER NOT TO VIOLATE THE UNFAIR METHOD OF COMPETITION PROVISION OF FTC ACT

In proceeding asserting violation of provision of Federal Trade Commission Act offering general prohibition against unfair methods of competition, company with monopolistic share of market must be shown to have conducted its business with goals of building ahead of demand and taking the initiative in dealings wih purchasers, suppliers and competitors but the conduct itself need not amount to an unfair method of competition under the provision of the Federal Trade Commission Act or constitute a violation under Sherman and Clayton Acts.

7. FACT THAT LOCAL CHAPTERS MIGHT BREAK NATIONAL CONTRACT DOES NOT DIMINISH THE ANTICOMPETITIVE EFFECT OF THE UNFAIR MARKET OF COMPETITION

Where manufacturer and its subsidiary were shown to have monopoly power in relevant market of national college fraternity insignia-bearing goods, official jeweler contracts, which admittedly were exclusive dealing contracts, were anticompetitive and constituted an unfair method of competition under Federal Trade Commission Act as monopolization and since overwhelming majority of local chapters of fraternities honored agreements and considered them binding, the anticompetitive effects of the exclusive contracts were not significantly weakened because they might be breached or disregarded by the local chapters.

8. ADVANTAGES OF TRADE PRACTICES ON INDIVIDUAL COMPANIES CANNOT EXCUSE OTHERWISE ILLEGAL BUSINESS PRACTICE

In proceeding for violation of provision of Federal Trade Commission Act offering general prohibition against unfair methods of competition, though it is relevant to consider advantages of trade practice on individual companies in market, advantages cannot excuse an otherwise illegal business practice.

9. ACCUMULATION OF OFFICIAL JEWELER CONTRACTS NOT LAWFUL SIMPLY BECAUSE SOME FRATERNITIES WERE BENEFITED

Where official jeweler contracts in context of proof of manufacturer's monopoly power were anticompetitive and constituted an unfair method of competition under Federal Trade Commission Act as monopolization, accumulation and enforcement of official jeweler contracts were not lawful simply because it benefited some fraternities in relevant market.

10. COMMON LAW AND STATUTORY RIGHTS TO FRATERNITIES' INSIGNIA WILL NOT BE IMMUNIZED FROM ANTITRUST LAWS THE ILLEGAL ACCUMULATION OF THOSE RIGHTS

Even though all fraternities might have full common law and statutory rights in their insignia and exclusive dealing contracts between manufacturer and its subsidiary and each fraternity might be legal assignments of those rights, manufacturer's and subsidiary's illegal accumulation and enforcement of agreements could not, because of that, be immunized from antitrust laws.

11. RULE THAT MERE ACCUMULATION OF PATENTS OR COPYRIGHTS IS NOT UNLAWFUL IS APPLICABLE TO TRADEMARK LAW

Rule that mere accumulation of patents or copyrights does not in itself constitute unlawful monopolization is applicable to trademark law.

12. USE OF MANUFACTURER'S COUNCIL TO POLICE MARKET AND THREATEN COMPETITORS WITH LITIGATION WAS AN UNFAIR TRADE PRACTICE

Where person who had controlling interest in manufacturer and its subsidiary organized council and manufacturer and subsidiary were official jewelers of 137 of the 140 fraternities that were members of council and had monopoly power in relevant market of national college fraternity insignia-bearing goods, manufacturer's and subsidiary's use of council to police market, threaten competitors with litigation, institute litigation and petition Federal Trade Commission to institute proceedings against one of its competitors was an unfair trade practice.

13. WHEN NO NOTICE WAS GIVEN OF ALLEGED VIOLATION OF LANHAM ACT ANY PART OF FINAL ORDER DEPENDING ON THIS WILL BE REVISED

Where manufacturer and its subsidiary which assertedly engaged in practices which were alleged to unlawfully restrain, lessen and eliminate competition and create a monopoly to prejudice of public in violation of Federal Trade Commission Act were given no notice of alleged unfair practice of misrepresenting to fraternities, suppliers and competitors that all or practically all fraternities had their insignia protected by Lanham Act when only a minority had such protection and first time it was mentioned was in Federal Trade Commission counsel's proposed findings to the Commission on that issue and final order insofar as it depended upon that finding alone would be reversed.

14. FTC ACT PUNISHES THOSE STATEMENTS WHICH CREATE A DECEPTIVE IMPRESSION ON PURCHASERS THOUGH THEY MAY BE TECHNICALLY TRUE

Provision of Federal Trade Commission Act offering general prohibition against unfair methods of competition punishes those statements which create a deceptive impression on purchasers even though they may be technically interpreted as true or partially true.

15. STATEMENTS DEROGATING RIGHT OF COMPETITORS TO MAKE SALES TO FRATERNITY MEMBERS AMOUNTED TO VIOLATION OF FTC ACT

Indiscriminate nature of statements by manufacturer of organizations insignia jewelry and its subsidiary, which held monopoly power in relevant market, derogating right of competitors to make sales to fraternity members, quality of their goods, and ethics of their trade practices amounted to violation of Federal Trade Commission Act for disparagement.

16. ALL REFERENCES TO EVENTS PRIOR TO JUNE 16, 1951, BARRED BY CONSENT ORDER AND STRICKEN FROM RECORD

Where consent order was entered in proceedings instituted by manufacturer and subsidiary against Federal Trade Commission in the District Court for the Eastern District of Virginia providing that all oral and documentary evidence relating to events, transactions and business conduct occurring before June 16, 1951 be physically excised from administrative record and that allegations of administrative complaint be limited to ten years prior to June 16, 1961, all references in Commission's findings in proceeding for violation of Federal Trade Commission Act to secret acquisition of subsidiaries which occurred before 1951 were barred by consent order and should be stricken.

17. SECRET OPERATION OF SUBSIDIARIES WHICH PERMITTED MANUFACTURER TO INCREASE ITS MONOPOLIZATION VIOLATED FTC ACT

Secret operation of subsidiaries by manufacturer of organizational insignia jewelry while manufacturer held them out as competitors allowing manufacturer to maintain and increase monopolization of national college fraternity market while maintaining a facade of vigorous competition and permitting manufacturer and one subsidiary to obtain exclusive official jeweler contracts with fraternities that required co-official jewelers violated provision of Federal Trade Commission Act as monopolistic conduct.

18. PURPOSE OF COMPLAINT IS TO GIVE RESPONDENT NOTICE OF CHARGES

There is no requirement that a complaint in an administrative proceeding enumerate precisely every event to which a hearing examiner may finally attach significance, and purpose of administrative complaint is to give responding party notice of charges against him.

19. NO PREJUDICIAL ERROR IN FINDING THAT MANUFACTURER OF INSIGNIA JEWELRY SECRETLY OPERATED SUBSIDIARIES

Where there was no claim that manufacturer of organizational insignia jewelry and subsidiary were misled by complaint before Federal Trade Commission and no evidence in record that they could have been so misled and issue of secret operation of subsidiaries by manufacturer was fully and fairly litigated before hearing examiner and argued before Commission, there was no prejudicial error in finding that manufacturer secretly operated subsidiaries over claim that administrative complaint did not charge manufacturer with secret operation of subsidiaries and that they were deprived of right to be apprised of charges against them.

20. MARKET FORECLOSURE IN RELEVANT MARKET NOT NECESSARY IN AN EXCLUSIVE DEALING CONTRACT CASE

Specific evidence of market foreclosure in a relevant market in which exclusive contracts with suppliers exist is not necessary in an exclusive dealing contract case under provision of Federal Trade Commission Act offering general prohibition against unfair methods of competition.

21. EXCLUSIVE SUPPLY CONTRACTS OF INSIGNIA JEWELRY MANUFACTURER WERE ANTICOMPETITIVE AND VIOLATED FTC ACT

Where manufacturer of organizational insignia jewelry and its subsidiary entered exclusive dealing contracts with suppliers which were being used by competitors and some competitors were unable to find and maintain suppliers, there was sufficient showing that exclusive supply contracts were anticompetitive, and contracts violated provision of Federal Trade Commission Act as monopolistic business practice.

22. USE OF TERM PURCHASE AGREEMENTS IN HIGH SCHOOL CLASS RING SALES SUPPORTS UNFAIR METHOD OF COMPETITION PROHIBITION

Manufacturer's use of term purchase agreements in connection with sales of class rings to high schools that were anticompetitive at schools at which they were in effect supported finding of violation of provision of Federal Trade Commission Act offering general prohibition against unfair methods of competition.

23. CASES ATTACKING EXCLUSIVE DEALING CONTRACTS DO NOT REQUIRE DEFINITION OF A MARKET BUT ONLY LESSENING OF COMPETITION

Under provision of Federal Trade Commission Act which offers general prohibition against unfair methods of competition, cases attacking validity of exclusive dealing contracts do not require definition of a market but rather some showing of a lessening of competition.

24. WHEN MANUFACTURER HAD OPPORTUNITY TO DEFEND THE TERM PURCHASE AGREEMENTS FOR HIGH SCHOOL CLASS RINGS THERE WAS NO LACK OF FAIR HEARING

Where Federal Trade Commission rejected hearing examiner's findings on monopolization in connection with term purchase agreements for high school class rings but held term purchase agreements illegal and issue of legality of agreements was litigated before Commission and manufacturer had opportunity to defend on that issue, manufacturer was aware at hearing level that legality of term purchase agreements was an issue in the litigation and was not deprived of fair hearing.

25. SINCE CHOICE OF REMEDY IS IN DISCRETION OF COMMISSION COURTS WILL NOT REVERSE OR MODIFY COMMISSION'S CHOICE

Choice of remedial order is committed to discretion of Federal Trade Commission; except where remedy selected bears no reasonable relation to unfair practices found to violate provision of Federal Trade Commission Act offering general prohibition against unfair methods of competition, the courts will not reverse or modify Commission's choice.

26. COMMISSION MAY ORDER DIVESTITURE TO RESTORE COMPETITION

Federal Trade Commission in proceeding for violation of provision of

Federal Trade Commission Act offering general prohibition against unfair methods of competition has power to order divestiture to restore competition.

27. ORDER THAT SUBSIDIARY BE DIVESTED WAS PROPER WHERE MANUFACTURER OF INSIGNIA JEWELRY HAD MONOPOLY POWER IN RELEVANT MARKET

Where manufacturer of organizational insignia jewelry and subsidiary in proceeding for violation of Federal Trade Commission Act were found to have monopoly power in relevant market and to have engaged in anticompetitive practices, order that subsidiary be divested from manufacturer was proper.

28. PROHIBITION OF CONTRACTS WITH DIVESTED SUBSIDIARY FOR FIVE YEARS WAS PROPER TO ALLOW RENEWAL OF COMPETITIVE VIGOR

In proceeding charging manufacturer of organizational insignia jewelry and its subsidiary with violation of provision of Federal Trade Commission Act offering general prohibition against unfair methods of competition, where it was ordered that subsidiary be divested from manufacturer, it was also proper for Federal Trade Commission to impose against manufacturer a five years' prohibition against contracts with divested subsidiary's customers in order to allow divested subsidiary of reacquire competitive vigor.

29. COMMISSION MAY NOT PROHIBIT TELLING OF A TRUE STATEMENT EVEN IF IT PERPETUATES THE DOMINANCE OF A MONOPOLIST

In proceeding asserting that manufacturer of organizational insignia jewelry and its subsidiary engaged in practices which were alleged to unlawfully restrain, lessen and eliminate competition and create a monopoly to prejudice of public in violation of Federal Trade Commission Act, Federal Trade Commission could not prohibit telling of a true statement even if representation perpetuated dominance of monopolist and part of order enjoining manufacturer and subsidiary from representing that any competitor had manufactured, distributed or sold any types of fraternity products without permission or authorization of fraternity would be reversed.

30. COMMISSION MAY ENTER ORDER AGAINST ONE FIRM WITH ILLEGAL PRACTICE

Federal Trade Commission has power to enter an order against one firm that is practicing an industry-wide illegal trade practice.

31. COMMISSION ORDERS SOME REMEDIAL NOT PUNITIVE FUNCTION

Federal Trade Commission's orders are to serve a remedial and not a punitive function.

32. COMMISSION ORDERS MAY NOT ARBITRARILY DESTROY ONE OF MANY VIOLATORS IN FIELD

Federal Trade Commission may not issue orders which would arbitrarily destroy one of many violators in the market.

33. IN BANNING USE OF FIRM PURCHASE AGREEMENT IN SALE OF HIGH SCHOOL CLASS RINGS COMMISSION DID NOT ABUSE ITS DISCRETION

In proceeding asserting that manufacturer of organizational insignia jewelry and its subsidiary violated provision of Federal Trade Commission Act offering general prohibition against unfair methods of competition, Federal Trade Commission did not abuse its discretion in ordering manufacturer to cease and desist from use of term purchase agreements in connection with sales of high school class rings though device had been used by all major competitors for past 30 years.

34. ANY ERROR IN ALLEGED DENIAL OF ACCESS TO FIVE WITNESSES' STATEMENTS WAS HARMLESS WHERE NO PART OF COMMISSION OPINION RESTED SOLELY ON TESTIMONY OF FIVE WITNESSES

In proceeding asserting that manufacturer of organizational insignia jewelry and subsidiary violated provision of Federal Trade Commission Act offering general prohibition against unfair methods of competition, any error in alleged denial of access to five witnesses' statements was harmless where proceedings before hearing examiner lasted over five years, resulted in about 6,000 pages of testimony, hundreds of exhibits and 429 detailed findings of fact and not one of findings or any part of Commission's opinion rested solely on testimony of five witnesses in question, witnesses were five of 21 competitors that testified and manufacturer and subsidiary were given expurgated testimony of four of the witnesses.

(The syllabus, with substituted captions, is taken from 442 F.2d 1)

On appeal, Court held that exclusive dealing contracts with over 90% of national college fraternities for insignia-bearing goods constituted an unfair method of competition under FTC Act as monopolization. Enforced in part, reversed in part.

Edward F. Howrey, *A. Duncan Whitaker*, *Gerald Kadish*, *Howrey, Simon, Baker & Murchison*, Washington, D.C., for petitioners.

Thomas M. Clarke, Chicago, Ill., *amicus curiae*.

John V. Buffington, Gen. Counsel, *J. B. Truly*, Asst. Gen. Counsel, *Miles J. Brown*, Atty., Federal Trade Commission, Washington, D.C., for respondent.

Before FAIRCHILD and KERNER, *Circuit Judges*, and STECKLER, *Chief District Judge*.*

KERNER, *Circuit Judge*.

This is a petition for review of an order and opinion issued by the respondent, Federal Trade Commission (Commission), in which it found petitioners, L. G. Balfour Company (Balfour) and Burr, Patterson & Auld Company (BPA), in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45.[1] After lengthy proceedings before a hearing examiner, the Commission concluded that petitioners had used unfair methods of competition in the national college fraternity insignia market and the national high school class ring market, and entered a comprehensive order which attempts to restore competitive conditions in these markets.

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*The Honorable William E. Steckler, Chief Judge of the United States District Court for the Southern District of Indiana, is sitting by designation.

[1] Section 5(a) (1) provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

Section 5(a) (6) provides: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

The complaint, issued by the Commission on June 16, 1961, charged petitioners with Section 5 violations in connection with the manufacturing, processing, sale and distribution of insignia-bearing fraternity products and high school class rings. The complaint alleged that Balfour and BPA had unreasonably foreclosed actual and potential competitors from access to the fratnerity insignia and high school class ring product markets and had monopolized and attempted to monopolize these markets. More specifically, the complaint alleged that the petitioners had entered into exclusive dealing contracts with nearly all national Greek letter social and professional fraternities; had entered into exclusive supply contracts with suppliers of fraternity insignia-bearing goods; had policed and controlled the entry of competitors into the national fraternity insignia goods market through the offices of the Interfraternity Research and Advisory Council (IRAC); had disparaged competitors; had entered into exclusive dealing contracts with representatives of high schools and colleges in the sale of class rings; had acquired three competitors between 1927 and 1952; and had enticed and attempted to entice away employees from competitors. Such practices were alleged to unlawfully restrain, lessen and eliminate competition and create a monopoly to the prejudice of the public in violation of Section 5 of the Federal Trade Commission Act.

Hearings were commenced before an examiner in October, 1961, and completed in June, 1966. In November, 1963, petitioners filed suit in the District Court for the Eastern District of Virginia seeking to limit the evidence before the Commission to the ten-year period prior to the issuance of the administrative complaint. A consent order was reached which provided that "all oral and documentary evidence relating to events, transactions and business conduct occurring before June 16, 1951, be physically excised from the administrative record," except insofar as otherwise agreed upon by counsel, and that "the allegations of the administrative complaint * * * be limited to ten years prior to June 16, 1961."

At the conclusion of the hearings in 1966, the examiner filed his findings and decision. He concluded that the petitioners had monopolized and utilized unfair methods of competition in the national college fraternity insignia goods market. He also found there was insufficient evidence on which to sustain the charge that petitioners monopolized or utilized any other unfair methods of competition in the college and high school class ring market. On appeal to the Commission, the examiner's findings with respect to the national college fraternity insignia goods market were affirmed. The Commission, however, reversed the examiner's dismissal of charges in the class ring market, and held that Balfour's use of term purchase agreements with high schools in this market were exclusive dealing contracts which violated Section 5. Based upon these findings and consequent Section 5 violations, the Commission issued its detailed order from which the petitioners appeal.

Balfour and BPA launch extensive attacks upon the Commission's findings of fact, conclusions of law, and scope and content of its order as well as claims of prejudicial procedural irregularity during the hearing. We are aided in the disposition of this appeal by *amicus curiae* briefs and statements filed on behalf of several national fraternal organizations. We note at the outset that the scope of this review is twofold. We must determine if the Commission applied incorrect legal standards which prejudiced its findings against petitioners. We must also determine whether the administrative decision is supported by substantial evidence in the hearing record before the examiner. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966); *National Dairy Products Corporation* v. *F.T.C.*, 412 F. 2d 605, 620 (7th Cir. 1969).

NATIONAL COLLEGE FRATERNITY PRODUCTS

Balfour, a Massachusetts corporation, is engaged in the manufacturing, distribution and sale of organizational insignia jewelry and other products bearing organizational insignia. Its purchasers include college fraternities, professional, honorary and other social organizations, as well as high schools and colleges. Its total sales in 1960 were $22 million. Of that, approximately $7 million were attributable to the sales of its Fraternity Division. The sales to national college fraternities from that division were $5.3 million in 1960. The Class Ring Division accounted for $11 million in sales to high schools and colleges. The Commercial Division realized $2.6 million for sales of jewelry to commercial organizations and $1.5 million for sales of jewelry to non-college fraternal organizations and clubs. Balfour's subsidiary, BPA, totalled $1.3 million in 1960 for sales of fraternity insignia-bearing products.

The Fraternity Division sells both jewelry products, such as fraternity pins, and other insignia-bearing fraternity products, such as paddles, beer mugs, party favors and pennants. Each buyer fraternity has its own distinctive insignia and crest. The major buyers of Balfour's fraternity division products are national college fraternities, each of which possesses distinctive insignia composed of the two or three Greek letters which comprise its name. Approximately a third of the national college fraternities have registered their insignia under the Lanham Trade-Mark Act, 15 U.S.C. § 1114 *et seq.*, but most have not sought statutory trademark protection.

At least 90% of the fraternity chapters on college campuses are governed by a national organization. Ultimate authority for decisions binding on all local chapters rests in the fraternity convention, held once every year or two years. Between conventions, decisions are made by the national executive committees of the fraternities. All have constitutions or by-laws which are binding on the local chapters. Most of these national college fraternities are members of one of five nationally organized interfraternity conferences.

The five interfraternity organizations are members of the Interfraternity Research and Advisory Council (IRAC). In 1960, 140 national college fraternity organizations were members of the IRAC. The IRAC was organized, financed, and for a period of years, directed by Lloyd Balfour, who has a controlling interest in both Balfour and BPA.

Balfour and BPA sell their fraternity insignia-bearing products under exclusive dealing contracts executed with the various national fraternities. These exclusive dealing contracts, referred to as official jeweler contracts, designate the petitioners as the sole official jeweler, co-official jeweler or official jeweler of the fraternity, and name them as the exclusive supplier of insignia-bearing items of the fraternity. The national fraternities' by-laws or constitutions generally provide that the local chapters buy only from the seller designated as the official jeweler. No other competing seller of insignia goods may send a salesman to the local chapters for solicitation. The contracts also set certain standards for design and quality. They are of indefinite duration, terminable upon either six months or one year's notice.

The IRAC has endorsed these exclusive official jeweler contracts and has frequently warned against unauthorized sales by fraternal insignia goods suppliers. A vast majority of the national college fraternities who are members of the IRAC have official jeweler contracts with either Balfour or BPA. Balfour and BPA had in 1960 official jeweler contracts with 279 of 288 fraternities listed in an authoritative fraternity register.

The Commission found that Balfour and BPA controlled 86.9% of the national college fraternity insignia goods market. The remaining 13.1% sales in this market was shared by approximately 36 competitors. The Commission concluded that the petitioners' monopolistic share of the market enabled them to set prices uncontrolled by the competitive conditions which would exist in a free market and enabled them to exclude actual and potential competitors from the market.

Numerous instances of monopolistic conduct were found by the Commission. The official jeweler contracts were found to be an unfair method of competition, used by the petitioners to perpetuate their enormous share and control of the market. Other activities found violative of Section 5 include the following:

(1) Petitioners falsely represented that almost all national college fraternity insignias were protected by statutory trademark registration.

(2) Petitioners operated the IRAC for their own benefit while cloaking it with the appearance of an impartial and respectable third party.

(3) Petitioners used the IRAC to police the market by informing fraternities and competitor-suppliers that sales to fraternities by suppliers not designated as official jewelers were unauthorized because of the trademark status of the fraternal insignia.

(4) Petitioners disparaged the quality of their competitor's goods and their business practices and referred to them as "pirates."

(5) Petitioners utilized exclusive contracts with those who supplied them with insignia products.

(6) Petitioners hired some of its competitors' employees.

(7) Balfour secretly acquired and operated BPA as its subsidiary while giving the appearance that BPA was a competitor.

These activities by Balfour and BPA were found to be unfair methods of competition rather than the result of inevitable economic factors, and to constitute monopolization within the meaning of Section 5 of the Federal Trade Commission Act.

Section 5 of the Federal Trade Commission Act offers a general prohibition against "unfair methods of competition" and does not, as the Sherman and Clayton Acts do, list the specific acts and practices which would amount to a Section 5 violation. The Commission, however, is empowered to use Section 5 to prohibit practices and remedy conditions in monopolistic or oligopolistic markets which "* * * [run] counter to the public policy declared in the Sherman and Clayton Acts * * *." *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 463, 61 S.Ct. 703, 706, 85 L.Ed. 949 (1941). See *Federal Trade Commission* v. *Motion Picture Adv. Service Co.*, 344 U.S. 392, 394–395, 73 S.Ct. 361, 97 L.Ed. 426 (1952); *F.T.C.* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 453–455, 42 S.Ct. 150, 66 L.Ed. 307 (1922); *Rader* v. *Balfour*, 440 F.2d 469 (7th Cir., Mar. 22, 1971).

With this broad standard in mind, the Commission determined that Balfour's monopolization of the national college fraternity insignia-bearing goods market violated Section 5. Section 2 of the Sherman Act, 15 U.S.C. § 2, makes monopolization illegal. Our review, then, is based on an examination of criteria which constitute an offense under Section 2 of the Sherman Act. We understand that facts amounting to a Section 5 violation of monopolization should be sustained if they contravene the policies of Section 2, though they might not constitute a violation of Section 2 itself. See *Rader* v. *Balfour*, *supra*.

The Supreme Court in *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570–571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966), outlined the elements of Section 2 as:

> (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Petitioners contend that the Commission misapplied the law in defining the relevant market as the national college fraternity insignia-bearing goods market, and that there is insufficient evidence to support the finding that petitioner held a monopolistic share of the market. In addition, petitioners assert that none of their activities in the market—from their use of the official jeweler contracts to their manipulation of the IRAC and Balfour's secret operation of BPA—constitute conduct amounting to monopolization.[2]

1. *The Relevant Market.*

The Commission determined that national college fraternity insignia-bearing goods constituted the relevant market in this case. For this, it relied on the definition of submarkets, as stated in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 82 S. Ct. 1502, 8 L.Ed.2d 510 (1962). The Commission said that "the relevant market for purposes of Section 7 [of the Clayton Act] must be determined by reference to:

> "such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors."

Brown at 325, 82 S. Ct. at 1524.

See *Reynolds Metals Co.* v. *F.T.C.*, 114 U.S. App. D.C. 2, 309 F. 2d 223, 226–229 (1962). The Commission concluded, after an examination of the facts, that the relevant market was national college insignia-bearing goods:

> In the instant case competing jewelers testified that they considered national college fraternity jewelry as a separate and distinct sales market. Entry into this market would require a separate and unique sales and distribution system, additional production facilities and the training of specialized sales personnel. Furthermore, the national college fraternity system constitutes a unique and distinct class of purchasers whose interests are different from other organizations purchasing emblematic jewelry. The existence of several small firms, devoted solely to the sale

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[2] Since we hold that there is substantial evidence that the various practices of petitioners in the national college fraternity goods market constitute monopolization under Section 5, we need not decide whether the acts themselves would violate Section 5 without a showing of monopoly power. See discussion *infra*.

> of insignia products to national college fraternities gives added support to the examiner's market definition. [Petitioners] themselves maintain a separate sales department, known as the Fraternity Division, limited to the sale of fraternity insignia products. This Division has its own organizational structure, sales bulletin and commission schedules and utilizes its own competitive methods which differ from the sales methods employed by [petitioners'] other product sales divisions. [Reference to pages in record omitted.]

We do not agree with petitioners' argument that the geographic market should have included local, as well as national, college fraternities. The Commission based its market analysis on the relationship of the purchaser fraternities to the suppliers and the nature and organization of the fraternities themselves as that affects the suppliers' distribution and sales system. Also relevant to this market definition is the existence of the national organizational structure of the fraternities, inter-fraternities and the IRAC. The fact that the national fraternal organizations imposed the official jeweler contracts on their local chapter adds to the logic of considering the fraternity market a national one.[3]

Petitioners argue that the criteria of submarkets, taken out of context by the Commission from *Brown Shoe,* which involved a merger under Section 7 of the Clayton Act, 15 U.S.C. § 18, is inapplicable to a monopolization case. Rather, they urge that the relevant product market is determined by reference to the test which is stated in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395, 76 S.Ct. 994, 100 L. Ed. 1264 (1956), a monopolization case. In *du Pont*, the Court explained the test to be used in Section 2 monopolization cases: "* * * no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce', monopolization of which may be illegal." *Id.* at 395, 76 S.Ct. at 1007. This test examines the cross-elasticity of demand by the purchasers, *i.e.*, if purchasers can substitute the products of one supplier with the products of other suppliers, then those suppliers constitute a market in a Section 2 monopolization case.

On the basis of this standard, petitioners claim that the delineation of a national fraternity market is erroneous since products bearing the insignia of one fraternity could not be substituted for products bearing the insignia of another fraternity. This is true. If, for example, the price of goods with Sigma Alpha Mu insignia were increased by the seller, a member of that fraternity could not purchase the goods with the insignia of another fraternity no matter how low the price would be. A member of one fraternity has no demand for the insignia-bearing products of another fraternity. Thus, the price of goods for one fraternity would be unaffected by the prices of goods for any other fraternity.

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[3] The hearing examiner found that: * * * in their communications (1) telling retail jewelers that fraternity insignia products are sold only through [petitioners], (2) policing competitors, (3) urging the fraternities to register their insignia as trademarks, (4) urging the fraternities to refuse to buy from [petitioners'] competitors, (5) disparaging competitors, (6) threatening competitors with litigation, (7) urging fraternities to file complaints with the Federal Trade Commission against [petitioners'] competitors, and (8) telling [petitioners'] suppliers that they must sell only to [petitioners], [petitioners] make constant and continual references to the *national* college fraternities, but never to *local* college fraternities.

Yet, this would be true of any market where there is a substantial degree of product differentiation. If the elasticity of demand test were a required standard for market definition in every case, then no market in which there were inelastic demand curves could be delineated. Such a result would preclude analysis of markets with inelastic demand and would deny the realities of the market situation. In this case, the petitioners would have us conclude that each national college fraternity should be considered a separate market, even though the evidence indicates that the sales and distribution systems of the sellers and the organization of the fraternities and interfraternities is on a national level. We believe that if the Commission utilized the elasticity of demand test strictly, there could be no sensible market analysis or market definition. While the use of the cross-elasticity of demand test has been cited with approval in monopoly cases, we believe that the Commission was not in error in rejecting its use in this case.

[1] We believe, moreover, that the propriety of the standards of market definition used by the Commission is controlled by *United States* v. *Grinnell Corp., supra,* 384 U.S. at 572–573, 86 S. Ct. at 1704–1705, in which the Court said: "* * * in § 2 cases under the Sherman Act, as in § 7 cases under the Clayton Act [citing *Brown Shoe*] there may be submarkets that are separate economic entities. * * * We see no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act." [4] See *Columbia Broadcasting System* v. *F.T.C.,* 414 F.2d 974 (7th Cir. 1969). Although the statements in *Grinnell* are dicta, no policies have been proffered by petitioners to show why the submarket analysis of Section 7 should not also be applicable to Section 2 cases. The ultimate objective of the criteria is to delineate markets which conform to areas of effective competition and to the realties of competitive practice. Further, the Commission under Section 5 is not bound to follow antitrust standards as strictly as the courts must in cases under the Sherman and Clayton Acts. See *Fashion Originators' Guild* v. *F.T.C.,* 312 U.S. 457, 61 S.Ct. 703,

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[4] The Commission cited *Grinnell* in a footnote and stated that "[t]he law is clear that similar standards [of submarkets as defined in *Brown Shoe*] are applicable in defining relevant markets in a monopolization case."

85 L.Ed. 949 (1941); see also, *F.T.C.* v. *Brown Shoe Co., Inc.*, 384 U.S. 316, 86 S.Ct. 1501, 16 L.Ed.2d 587 (1966).

Petitioners, in the alternative, assert that the suppliers of all emblematic jewelry, rather than fraternity products, should be included in the product market. They base this claim on the cross-elasticity of supply test which is an examination of the production flexibility of suppliers. As petitioners explain, a college fraternity could, if necessary, buy its goods from a manufacturer of any kind of emblematic jewelry—and not one producing merely insignia-bearing goods—since the manufacturer could easily convert its facilities designed for production of emblematic jewelry to production of insignia-bearing fraternity goods. This alternative source of supply test, however, has been rejected by the courts as the only standard to be used for definition of the market. See *Crown Zellerbach Corp.* v. *F.T.C.*, 296 F. 2d 800 (9th Cir. 1961). The D.C. Circuit in *Reynolds Metals Co.* v. *F.T.C.*, 114 U.S.App.D.C. 2, 309 F.2d 223 (1962), looked to factors other than those dealing with the flexibility of supply. We agree with the court in *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958), that any test "which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful." While these decisions concerned Section 7 of the Clayton Act, the discussion of the limitations of the cross-elasticity of supply test apply in shaping the standards for market definition in this monopoly case.

[2] For the above reasons, we sustain the Commission's determination of the relevant market.

2. *Petitioners' Share of the Market.*

The Commission found that the petitioners had official jeweler-exclusive dealing contracts with over 90% of the national college fraternities, and the petitioners sold 86.9% of the market's goods in 1960. Petitioners accept the 90% figure, but assert that the latter figure, to which the Commission gave weight in holding that the petitioners possessed monopoly power, was not based on substantial evidence. The 86.9% figure was reached by the examiner by adding petitioners' total sales for 1960, $5.3 million, to the sales of their competitors that testified before the Commission, which amounted to $800,000. Total market sales, then, was determined to be $6.1 million, against which petitioners' sales of $5.3 million gave them 86.9%.

Petitioners contend that the Commission neglected to include the sales of twenty-six competitors that did not testify before the Commission. They assert that their market share was no greater than 33⅓% because two of their competitors, called as witnesses for the

Commission, testified that annual sales in the market were between $15 and $18 million.

[3, 4] Proof of a corporation's share of the market is generally used to show monopoly power, an element of the offense under Section 2 of the Sherman Act. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571, 86 S.Ct. 1698, 16 L. Ed.2d 778 (1966). The share, expressed as a percentage, can be based on annual sales. It has been held that the shares probably must be greater than sixty percent. *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945). A company with substantial percentage share of a market would have the power to preclude entry and advancement and set prices without paying heed to those forces which would exist in a healthy and competitive market. *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945). These are the "powers" which a monopolist possesses and which the antitrust laws are designed to prohibit. There is no doubt that the record and findings before the hearing examiner establish that petitioners possessed this power and control in the national college fraternity goods market.

An undisputed and significant fact is that petitioners were the exclusive suppliers of over 90% of the national fraternities in the market. The hearing examiner found that of 288 fraternities listed in an authoritative register, petitioners were the exclusive dealer of 279. He also concluded that BPA was the exclusive jeweler for 14.5% of the fraternities, and 18% of them, including those contracts in which it was co-official jeweler with Balfour. Of 6,205,336 total fraternity members, petitioners had 6,115,440 under contract, or 98.6% of all membership. These figures indicate that petitioners have exclusive dealing contracts not only with substantially all of the national fraternity organizations, but also with nearly all members.

The standard provisions of the official jeweler contract give petitioners the right to supply the goods to the fraternity, and the fraternity agrees to use its "best endeavors" to have all its chapters and members buy from petitioners. And, as the hearing examiner found:

> The fraternities, themselves, look upon these official jeweler contracts as authorizing only [Balfour and BPA] to manufacture, sell and distribute jewelry or other products which bear the fraternity's insignia. This is clear from documents written by the fraternity officials (1) refusing to permit any company to manufacture items for the fraternity and (2) warning or threatening any company or individual which does manufacture or display such items. Numerous such letters are in this record. An example of this type of letter is a letter from Alpha Xi Delta to a manufacturer of women's compacts and cigarette lighters that had requested permission to use the sorority's insignia on such products for sale to Alpha Xi Delta members. The letter stated:
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> "We regret to say that the use of this emblem is restricted by the National Fraternity and use of it in any merchandise such as that described in your letter must be cleared through the official jeweler."

The fraternities regularly advise their chapters that they can only buy from the exclusive jeweler. Exhibits in the record of letters and announcements of the fraternities bear this out. Some fraternities have provisions in their constitutions and by-laws making the official jeweler contract a requirement on the local chapters. Threats of fines and expulsion, the hearing examiner found, "can result from making unauthorized purchases." Both the national fraternities and the petitioners have consistently warned against unauthorized sales not under the exclusive dealing contracts. The IRAC has been especially active in this area in its letters and announcements to local chapters and its encouragement of litigation against unauthorized suppliers.

We find no evidence that any significant number of the official jeweler contracts were not honored by the local chapters. In a letter written in 1960, Mr. Balfour said: "Never in the history of the L. G. Balfour Company have we ever had a contract cancelled. * * *" Because of the tremendous pressure put on the local chapters by the national fraternities, the IRAC and petitioners themselves, few unauthorized sales could take place.

This conclusion is buttressed by the fact that numerous sellers of fraternity goods were not given access to the fraternities and that, frequently, orders by the fraternities with them were cancelled after they were placed. It was extremely difficult for competitors to advertise their fraternity goods in the two publications with national circulation. Salesmen were, in many cases, barred from visiting local chapters. Because of the existence of these numerous official jeweler contracts with petitioners, only one competing firm has entered the fraternity jewelry market in the five years prior to the issuance of the complaint. Many competitors have ceased their attempts to cultivate the fraternity goods market because they believe Balfour has it "tied up."

Thus, the evidence eliminates the possibility that those chapters *not* buying under official jeweler contracts constituted a significant share of the market. The record also indicates that competitors were barred from effective competition because of these contracts. This, we believe, constitutes substantial evidence of monopoly power.

Further, petitioners were able to dictate the prices of goods they sold to their purchaser fraternities. When petitioners announced that they would raise the prices on their goods, "the fraternities," the examiner found, "accepted without question." The evidence shows them as unconcerned about the pricing policies of their competitors and the purchasing power of the fraternities. Representatives of Balfour testified that the determination of prices in the fraternity market is based on a flat figure determined by them, in comparison to its pricing policies in other markets where it depends upon the prices of competitors.

[5] While we believe that it was error for the Commission to conclude that the petitioners controlled 86.9% of the market,[5] without evidence of the sales of all the firms in the market, we hold that petitioners' exclusive dealing contracts with over 90% of the fraternities supports a finding of monopoly power. The most effective proof, we admit, would be a total sales figure which included *all* competitors in the market. Absent this, however, the other evidence which revealed that the petitioners were under exclusive dealing contracts with nearly all of the national fraternities, satisfies us that petitioners possessed illegal monopoly power. The case before us, we repeat, is not a Section 2 monopolization case, but one under Section 5, a flexible and remedial law. See *Radar* v. *Balfour*, 440 F.2d 469 (7th Cir., March 22, 1971).

3. *Petitioners' Monopolistic Practices.*

[6] In addition to its finding of monopoly power, the Commission determined that petitioners engaged in a number of practices which proved their monopolistic intent. A company with a monopolistic share of the market must be shown to have conducted its business with the goals of building ahead of demand and taking the initiative in dealings with purchasers, suppliers and competitors. *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 341 (D.Mass. 1953); *United States* v. *Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). The conduct itself need not amount to an unfair method of competition under Section 5 or constitute a violation under the Sherman and Clayton Acts.

The Commission found a number of practices which it concluded were monopolistic.

A. *Official Jeweler Contracts.*

Petitioners' accumulation and enforcement of official jeweler contracts—admittedly exclusive dealing contracts—were found to be anti-competitive and monopolistic. In its opinion, the Commission stated:

> The record clearly shows that the "official jeweler contracts" as used by [Balfour and BPA] were exclusive and, by [Balfour's and BPA's] own admission, anti-competitive. Without determining whether this type of contract would be illegal in some other context, we are of the opinion that in the present factual situation, with the purpose, intent and competitive effects of these contracts, official jeweler contracts, as accumulated and enforced by [Balfour and BPA], are an unfair method of competition and violate Section 5.

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[5] The testimony of two witnesses that annual sales in the market were between $15 and $18 million was opinion evidence and could be discounted by the Commission. One of these witnesses admittedly had not been involved in this market in recent years, which militates against the accuracy of his testimony.

The official jeweler contracts were found to be exclusive dealing arrangements of long term, indefinite duration, and their accumulation and use were anti-competitive.

Exclusive dealing contracts have been held to be illegal under Section 3 of the Clayton Act and Section 5 of the Federal Trade Commission Act if they have an anti-competitive effect on the market. See *F. T. C.* v. *Brown Shoe Co.*, 384 U.S. 316, 86 S.Ct. 1501, 16 L.Ed.2d 587 (1966); *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949). We do not, nor need we, decide whether the existence of these agreements themselves would violate Section 5 without a showing of monopoly power.

[7] We simply hold that, in the context of proof of monopoly power, these contracts are anti-competitive and constitute an unfair method of competition under Section 5 as monopolization. These contracts are no less anti-competitive because some national fraternities do not make performance of them mandatory on their local chapters or forbid purchases from other local suppliers. The fact is that the overwhelming majority of local chapters honor the agreements and consider them binding. The anti-competitive effects of these exclusive contracts is not significantly weakened because they *may* be breached or disregarded by the local chapters. See our discussion, *infra*. See *Atlantic Rfg. Co.* v. *F. T. C.*, 381 U.S. 357, 85 S. Ct. 1498, 14 L.Ed.2d 443 (1965).

Petitioners interpose several arguments justifying the use of exclusive official jeweler contracts. They assert that the fraternities' insignias are protected by trademark, and that the official jeweler contracts are designed to maintain that protection. Also, they give several reasons showing that such contracts are necessary and advantageous to the fraternities.

There are admitted advantages to the fraternities that use the official jeweler contracts. Maintaining one exclusive jeweler for the national fraternity ensures uniformity in the design of the insignia and workmanship of all the insignia goods sold to the local chapters. Additionally, the fraternities can limit the number of salesmen visiting the local chapters and cut down on the paper work and time that would be necessary when dealing with more than one possible supplier.

[8, 9] Nonetheless, the accumulation and enforcement of official jeweler contracts does not become lawful because it benefits some fraternities. While it is relevant to consider the advantages of a trade practice on individual companies in the market, this cannot excuse an otherwise illegal business practice. *F.T.C.* v. *Motion Picture Adv. Serv. Co., Inc.*, 344 U.S. 392, 73 S.Ct. 361, 97 L.Ed. 426 (1953). Congress has embodied in the antitrust laws the theory that the long run advantage of the economic community depends upon the removal

of restraints upon competition. *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 309, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949).

No business necessity can justify petitioners' use of official jeweler contracts. Assuming that it is necessary for the fraternities' existence for them to maintain a high quality for their jewelry, it is by no means true that exclusive official jeweler contracts are the only means with which to accomplish this goal. Neither does it follow that petitioners must be the official jeweler for substantially all the fraternities. There is no showing that petitioners' competitors could not satisfy these needs of the fraternities.

[10] Approximately 33% of the national college fraternities have obtained statutory protection under the Lanham Act, mostly at the urging of Balfour. The insignia rights of the remaining fraternities, if any, stem from common law rather than registration. We do not here decide whether fraternities have trademark protection, the extent of that protection and the duties necessary to maintain that protection. Even though all fraternities may have full common law and statutory rights in their insignia and that the exclusive dealing contracts between petitioners and each fraternity may be legal assignments of those rights, petitioners' illegal accumulation and enforcement of these agreements cannot, because of that, be immunized from the antitrust laws.

[11] Petitioners contend, however, that their practices fall within the rule that the mere accumulation of patents or copyrights does not in itself constitute unlawful monopolization. See *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 834, 70 S.Ct. 894, 94 L.Ed. 1312 (1950); *Transparent Wrap Machine Corp.* v. *Stokes & Smith Co.*, 329 U.S. 637, 67 S.Ct. 610, 91 L.Ed. 563 (1947); *United States* v. *Winslow*, 227 U.S. 202, 33 S.Ct. 253, 57 L.Ed. 481 (1913). We agree with petitioners that this general principle of patent-copyright law is equally applicable to trademark law. However, none of the cases cited by petitioners stands for the proposition that the accumulation of patents or copyrights may never constitute a violation of the antitrust laws.

The Third Circuit decision in *Lawlor* v. *National Screen Service Corp.*, 270 F.2 d 146 (3d Cir. 1959), *cert. denied* 362 U.S. 922, 80 S.Ct. 676, 4 L.Ed.2d 742 (1960), relied on by petitioners, is distinguishable. In *Lawlor*, eight major motion picture producers each granted an exclusive license under their film copyright to National Screen Service Corp. to manufacture and distribute advertising accessories for films. Plaintiff, a competing distributor, contended that the accumulation of exclusive licenses violated the antitrust laws. The Third Circuit held that since the accessories for each movie under the licenses were non-competitive with those for all other movies, the accumulation of licenses did not amount to an illegal restraint of trade. In *Lawlor*, however, all distributors had an equal opportunity to secure licenses from the motion picture producers. Licenses were not a prerequisite for participation in the movie accessory market. There were alternative sources of supply for accessories, and defendants in no way engaged in any unfair practice either with respect to competition for licenses or for the ultimate sale of accessories. In fact, in concluding its discussion, the court stated: "a careful study of the record convinces us that this accumulation of copyright licenses was not used for improper purposes." *Id.*, 270 F.2d at 154. *Lawlor*, in contrast to this case, did not involve a supplier-licensee with monopoly power.

B. *IRAC.*

[12] The evidence amply supports the Commission's findings that petitioners organized, financed and operated the IRAC for their own benefit while cloaking it with the aura of impartiality. Through the IRAC, petitioners were able to police the market, threaten competitors with litigation, institute litigation, and petition the Federal Trade Commission to institute proceedings against one of its competitors. At the same time, petitioners were the official jewelers of 137 of the 140 fraternities that were members of the IRAC. In view of the history, direction and activities of the IRAC, the evidence precludes any conclusion other than that its use by petitioners was an unfair trade practice.

Lloyd Balfour, who has a controlling interest in petitioners, organized the IRAC and was its first chairman from 1946 to 1954. After serving as administrative secretary-treasurer for two years, and after retiring from the operation of the Balfour Company, he became an advisor for the *IRAC*. Even at this time, the funds of the IRAC were held in Balfour's name and at his office at Attleboro, Massachusetts.[6] IRAC offices were maintained in Attleboro at a personal expense to Mr. Balfour of $35,000 a year. Mr. Balfour was consulted on all IRAC decisions and approved of all IRAC activities which involved the petitioners.

Mr. Balfour used the IRAC as an organization by which to prohibit all unauthorized sales to fraternities by petitioners' competitors. He believed that the fraternities' trademark protection entitled them to maintain its exclusive dealings with petitioners. Actually, there had been no court decision or rule which held that the local chapters could not have dealings with suppliers other than the official jeweler. It was

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[6] It was only when Balfour was involved in litigation against a fraternity goods competitor that he transferred the IRAC funds from Attleboro to IRAC's office in Washington, D.C.

Balfour's belief that such sales were unauthorized that led to the IRAC's vigorous activities in this area. Letters were written on IRAC stationery to petitioners' competitors that their few sales of insignia goods violated the trademark laws and would be considered the basis of a lawsuit instituted by the IRAC. At the same time, the IRAC urged the fraternities to obtain statutory trademark protection. One of the hearing examiner's findings is pertinent:

> On March 11, 1955, Balfour employee Margaret O'Leary released the IRAC Bulletin, * * * This bulletin lists the names of more than 100 national college fraternities which "according to our IRAC files held in Attleboro * * * are registered in Attleboro," The Bulletin then states:
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> "We understand that a comparatively few [national college fraternities] have covered all official insignia including the coat-of-arms as well as your names and Greek letters. * * *
>
> "If you are not registered IRAC *strongly recommends* your giving this subject *careful consideration.* Your registered claim of ownership will prevent duplication of your name and insignia * * * and will further assist you to legally control the manufacture and distribution of all approved items." [Emphasis supplied.]

In addition, the IRAC persuaded two fraternities to institute suit under the trademark laws against petitioners' competitors and promised to finance the litigation.

C. *Misrepresentation of Fraternities' Trademark Protection.*

The Commission found that petitioners had misrepresented to fraternities, suppliers and competitors that "all" or "practically all" fraternities had their insignia protected by the Lanham Act when only a minority had such protection. By this, petitioners discouraged competitors from entering the field. Petitioners do not contest the truth of these statements, but maintain that this charge is not contained in the complaint.

[13] We agree with petitioners that they were given no notice of this unfair practice. The first time it was mentioned was in the Commission counsel's proposed findings to the Commission [see *N.L.R.B.* v. *Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966); *Northeastern Indiana Building & Construction Trade Council* v. *N.L.R.B.*, 122 U.S. App. D.C. 220, 352 F.2d 696, 699 (1965)]. The findings of the Commission on this issue and the final order insofar as it depends upon this finding alone are reversed. The evidence of misrepresentation of the fraternities' trademark protection, however, does add weight to the finding of the more general unlawful use of the IRAC and its role in harassing petitioners' competitors.

D. *Disparagement.*

The hearing examiner made 27 detailed findings which document petitioners' continuous policy of derogating the right of competitors to make sales to fraternity members, the quality of their goods and the ethics of their trade practices. The Commission, briefly mentioning this issue in its opinion, stated:

> [Balfour's and BPA's] contentions that they have not disparaged their competitors are contradicted by the record evidence. * * * They have also stated the competitors' products were of secondary quality, poor workmanship and so forth. They introduced no evidence to support these statements.

Petitioners argue that the Commission has shifted the burden of proof to petitioners in violation of Section 7 of the Administrative Procedure Act, 5 U.S.C. § 556. Yet, in the context of the Commission's opinion and the findings of the hearing examiner, a correct interpretation of the Commission's position is that petitioners offered no rebuttal testimony to the overwhelming case of disparagement made against them.

[14, 15] Similarly, we find no merit in the petitioners' contention that the Commission made no explicit finding of falsity of the alleged disparaging statements. Section 5 punishes those statements which create a deceptive impression on purchasers even though they may be technically interpreted as true or partially true. See *Kalwajtys* v. *F. T. C.*, 237 F.2d 654 (7th Cir. 1956), *cert. denied* 352 U.S. 1025, 77 S.Ct. 591, 1 L.Ed.2d 597 (1957); *P. Lorillard Co.* v. *F. T. C.*, 186 F.2d 52 (4th Cir. 1950). The indiscriminate nature of petitioners' statements about competitors amounts to a Section 5 violation for disparagement. The evidence indicates that the fraternities relied on the statements made by petitioners in attacking the quality of its competitors' goods. Further, petitioners' attacks on the poor workmanship of their competitors' goods is false since, in some instances, both the petitioners and these competitors used the same suppliers, and the goods received were the same.

We sustain the Commission's findings that the use of the word "pirate" constitutes disparagement. "Pirate" may be a term of art in the trademark field, referring to an infringer. See *Oneida Ltd.* v. *National Silver Co.*, 25 N.Y.S.2d 271, 275 (Sup. 1940). However, as used by petitioners to persons unversed in trademark law, without distinguishing authorized or unauthorized transactions, and coupled with petitioners' other disparaging statements, the term "pirate" becomes an instrument of disparagement.

E. *BPA and Edwards Haldeman.*

The findings of the hearing examiner establish that at times relevant to this proceeding Balfour owned BPA and Edwards Haldeman, which is no longer in existence, Balfour operated these subsidiaries secretly, Edwards Haldeman during its existence, and BPA until 1959, when it was announced that Balfour's acquisition of BPA was imminent, although the actual acquisition had occurred some 35 years earlier.

The secret operation of BPA allowed petitioners to maintain and increase their monopolization of the national college fraternity market while maintaining a facade of vigorous competition. Similarly, by operating separately, Balfour and BPA were able to obtain exclusive official jeweler contracts with fraternities that required co-official jewelers.

The Commission held that the secret acquisition and operation of BPA by Balfour constituted monopolization and foreclosed the market. The Commission stated:

> We are unpersuaded by [Balfour's and BPA's] * * * arguments that their acquisition and operation of BPA plus Edwards Haldeman was well known and did not adversely affect competition. The complaint did not charge these acquisitions as violations of Section 7; rather, it clearly alleged that by secretly acquiring and operating these competitors Balfour increased its market control while projecting an image of extant competition. * * * An examination of the facts as found by the examiner requires us to conclude that Balfour covertly purchased and operated BPA and Edwards Haldeman in order to maintain and increase their monopolistic position. As such this action constituted an unfair method of competition.

Petitioners challenge this ruling of the Commission in two respects. They argue that any finding regarding the acquisition of BPA and Edwards Haldeman, which concededly occurred before 1951, violates the consent order entered in proceedings instituted by petitioners against the Commission in the District Court for the Eastern District of Virginia; and further, that there was no allegation in the complaint of *secret* acquisition or secret operation, thereby depriving petitioners of notice of the charges against them.

The provisions of the consent order which are relevant provide:

> 1. That all oral and documentary evidence relating to events, transactions and business conduct occurring prior to June 16, 1951, will be physically excised from the record. * * *
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> 2. Both the initial decision of the hearing examiner * * * and the decision and final order of the defendant commission * * * will be based solely upon the excised administrative record. * * *
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> * * * * * * *
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> 6. The allegations of the administrative complaint in the aforesaid administrative proceeding shall be limited to ten years prior to June 16, 1961.

[16, 17] The import of this consent order is that all conduct occurring before June 16, 1951, should not be considered relevant for purposes of the instant proceeding. The record as excised pursuant to the consent order and the findings of the hearing examiner support the fact that Balfour "covertly purchased * * * BPA and Edwards Haldeman in order to maintain and increase [its] * * * monopolistic position." Although the acquisitions themselves are admitted, there is no direct evidence in the excised record of the manner, motive or effect of the acquisitions. However, any inference from the post-

June 16, 1951, secret operation of BPA and Edwards Haldeman of the manner of acquisition, its motives or effects, violates the terms of the consent order. All references in the Commission's findings to the secret acquisition of BPA and Edwards Haldeman by Balfour is barred by the consent order and should be stricken. We believe, however, that, disregarding the evidence on the acquisition, Balfour's secret operation of BPA and Edwards Haldeman, while it held them out as competitors, violates Section 5 as monopolistic conduct.

The record and findings of the Commission overwhelmingly support the conclusion that Balfour secretly operated BPA until an announcement of impending acquisition was made in 1959, and secretly operated Edwards Haldeman until it went out of existence in 1954. Petitioners contended, however, that since the administrative complaint did not charge Balfour with the *secret* operation (and acquisition) of BPA and Edwards Haldeman, they were deprived of their right to be apprised of the charges against them as guaranteed by the due process clause of the fifth amendment, the Administative Procedure Act, 5 U.S.C. § 554, the Federal Trade Commission Act, 15 U.S.C. § 45(b), the and Commission's Rules of Practice, 16 C.F.R. § 3.11(b).

[18, 19] There is no requirement that a complaint in an administrative proceeding enumerate precisely every event to which a hearing examiner may finally attach significance. The purpose of the administrative complaint is to give the responding party notice of the charges against him. See 1 Davis—on Administrative Law Treatise §§ 8.04–8.05 and cases cited therein. The complaint is adequate if "the one proceeded against be reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was misled." *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied* 347 U.S. 1016, 74 S. Ct. 864, 98 L.Ed. 1138 (1954); *Swift & Co.* v. *United States*, 393 F.2d 247, 252 (7th Cir. 1968). As the Commission case against petitioners unfolded, there was a "reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan* v. *United States*, 304 U.S. 1, 18, 58 S.Ct. 773, 776, 82 L.Ed. 1129 (1938); *Swift & Co.* v. *United States*, *supra*, 393 F.2d at 252. In the instant case, there is no claim that the petitioners were misled by the complaint, nor is there any evidence in the record that they could have been so misled. The issue of the secret operation of BPA and Edwards Haldeman was fully and fairly litigated before the hearing examiner and argued before the Commission. We find no prejudicial error.

F. *Exclusive Supply Contracts.*

The Commission also found that the petitioners' exclusive dealing contracts with their suppliers in which the suppliers agreed not to sell to petitioners' competitors, violated Section 5 as a monopolistic business practice. Evidence indicates that petitioners entered into these contracts with suppliers who were also being used by the competitors. Some competitors were unable to find and maintain suppliers.

[20, 21] Petitioners assert that these exclusive contracts have not been shown to violate Section 5 because there was no evidence of foreclosure of the relevant market. A case under Section 3 of the Clayton Act, 15 U.S.C. § 14, must have specific evidence of market foreclosure in a relevant market in which the exclusive contracts exist. *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 81 S. Ct. 623, 5 L.Ed.2d 580 (1961). But no such proof is necessary in an exclusive dealing contract case under Section 5. *F.T.C.* v. *Brown Shoe Co.*, 384 U.S. 316, 86 S. Ct. 1501, 16 L.Ed.2d 587 (1966). In this case, however, there is substantial evidence that the exclusive supply contracts were anti-competitive. National college fraternity insignia-bearing goods was defined as relevant market. Several suppliers were cited as parties to these exclusive dealing contracts. Competitors testified of their inability to obtain certain suppliers.

HIGH SCHOOL CLASS RINGS

The other phase of the Commission's opinion and order relates to Balfour's activities in the manufacture, distribution and sale of class rings to high schools throughout the country. It is customary for high school students in their junior or senior year to purchase class rings bearing the school's insignia. Annual sales in this market total between $45 and $50 million. Balfour and two of its competitors share about 60% of the market; in 1960, Balfour's sales of $7.7 million constituted 17% of total market sales. Balfour uses term purchase agreements in connection with the sales of high school rings. The contracts, in which the purchaser schools appoint Balfour as their exclusive seller, are usually of three to five years in duration, but are terminable by the schools at any time and, admittedly, are not legally binding. The Commission found, however, that they are usually honored and renewed.

The agreement itself contains a provision in which the high school official indicates his intention to order all of the required rings for the school from Balfour for the term of the agreement if he is satisfied with Balfour's performance. It does not establish specifications as to the exact nature, price or delivery of the rings. A binding contract with more specific terms is made when an order is placed by the high school for a stated number of rings. On some occasions, Balfour and one of its competitors annually rotate as alternate exclusive suppliers.

Balfour explains that these term purchase agreements enable the school to buy at a less expensive price since the cost of production can be amortized by Balfour over the contract's specified life span. By appointing one company as the exclusive supplier, the agreements save the time and bother of the school officials and keep to a minimum the contacts between vying sellers and students. Between 85 to 90% of Balfour's sales in high school class rings are effectuated under these agreements. Its competitors use these agreements for only 30 to 50% of their sales.

The Commission found that Balfour's use of term purchase agreements with high schools constituted exclusive dealing contracts, which foreclose competition, prevent entry of new competitors and serve to stabilize the market in a fixed position in conflict with the policy of Section 3 of the Clayton Act, 15 U.S.C. § 14. For that reason, the Commission concluded that their use in this case was a Section 5 violation.

[22] The record supports the finding that the term purchase agreements were anti-competitive at the schools in which they were in effect. The question petitioners present is whether this mere finding of market foreclosure is sufficient to support a Section 5 violation.

Exclusive dealing contracts are not illegal *per se* under Section 3 of the Clayton Act; it must be shown that they substantially lessen competition or tend to create a monopoly in the relevant market. There must also be proof that the user of the exclusive dealing contract controls a "substantial" share of the market. *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961); *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 ,69 S.Ct. 1051, 93 L.Ed. 1371 (1949).

The Commission, however, need not find all the elements necessary to establish a Section 3 Clayton Act violation in holding exclusive dealing contracts illegal under Section 5. *F.T.C.* v. *Motion Picture Adv. Service Co.*, 344 U.S. 392, 394–395, 73 S.Ct. 361, 97 L.Ed. 426 (1952). See also, *Atlantic Rfg. Co.* v. *F.T.C.*, 381 U.S. 357, 85 S.Ct. 1498, 14 L.Ed.2d 443 (1965); *Fashion Originators' Guild* v. *F.T.C.*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941).

We believe that *F.T.C.* v. *Brown Shoe Co., Inc.*, 384 U.S. 316, 86 S.Ct. 1501, 16 L.Ed.2d 587 (1966), controls. In that case, Brown offered inducements in contracts to retailers to sell Brown's shoes only and none of its competitors. The Commission, without a finding of substantial lessening of competition, held that Brown's exclusive dealing contracts were illegal under Section 5. The Supreme Court, in upholding the Commission decision, stated:

> The Commission has broad powers to declare trade practices unfair. This broad power of the Commission is particularly well established with regard to trade

> practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws. * * * [Brown's] program obviously conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market. Brown nevertheless contends that the Commission had no power to declare the franchise program unfair without proof that its effect "may be to substantially lessen competition or tend to create a monopoly" which of course would have to be proved if the Government were proceeding against Brown under § 3 of the Clayton Act rather than § 5 of the Federal Trade Commission Act. We reject the argument that proof of this § 3 element must be made. *Id.* at 321–322, 86 S.Ct. at 1504.

[23] Further, the petitioners assert that the Commission erroneously failed to define a relevant market. However, the hearing examiner considered evidence which showed that high school class rings was a relevant market when considering whether petitioners monopolized the market. There is additional evidence concerning Balfour's share in that market. See *supra.* We agree with these findings. Besides this, cases under Section 5, in contrast to Section 3 of the Clayton Act, attacking the validity of exclusive dealing contracts do not require the definition of a market, but rather some showing of a lessening of competition. *F.T.C.* v. *Brown Shoe Co., Inc.*, 384 U.S. 316, 86 S.Ct. 1501, 16 L.Ed.2d 587 (1966); *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949).

The evidence demonstrates that these term purchase agreements had an anticompetitive effect on the market. A number of competitors testified that it was difficult to break into markets which utilized these contracts. A smaller company found it difficult to enter the high school market in Southern California: "* * * Most of the schools, upon being contacted, would answer that they were under contract and that the contract had not yet expired." Those who used term purchase agreements said they were valuable because they protected them from open competition and provided for stability and planning.

[24] Finally, petitioners claim that the Commission deprived them of a fair hearing by shifting its theory of the case on appeal. The Commission rejected the hearing examiner's findings on monopolization, but held the term purchase agreements illegal. But, the issue of the legality of these agreements was litigated before the Commission, and the petitioners had an opportunity, to defend on this issue. This is not "an entire abandonment of the very substance of the dispute to which the defendant was summoned, and the substitution of another which he could not have anticipated, and which he had no opportunity to meet." *Armand Co.* v. *F.T.C.*, 84 F. 2d 973, 974–975 (2d Cir. 1936). *Rodale Press, Inc.* v. *F.T.C.*, 132 U.S. App. D.C. 317, 407 F. 2d 1252 (1968), cited by petitioners, holds

that a party would be deprived of no right if he had an opportunity to respond to the new or different charges. We find that the petitioners were aware, at the hearing level, that the legality of the term "purchase agreements" was an issue in the litigation.

THE COMMISSION'S ORDER

The Commission entered a detailed order designed to prohibit those activities found to be violative of Section 5. With respect to that portion of the order remedying the conditions in the national college fraternity insignia market, the Commission stated its broad objectives:

> If competition is to be recreated in this industry, it is essential that the inertia engendered by [Balfour's and BPA's] monopolization be broken. [Balfour's and BPA's] customers must be stimulated to re-examine their purchasing policies, and [Balfour's and BPA's] competitors, actual and potential, must be afforded some opportunity to gain access to the reopened market. The provisions of the * * * order are appropriately designed to breathe new vitality into this field.

The order, in pertinent part, provides:

Part I—Petitioners shall terminate all existing contracts with any fraternity relating to the sale or distribution of fraternity products.

Part II—(1) Petitioners shall not engage in any plan or device, by contract or otherwise, which has the effect of foreclosing competition for the fraternity market;

(2) Shall not enter into or maintain sole official jeweler contracts or any contract which requires fraternities to purchase all of their requirements from petitioners;

(3) Shall not, for a period of 5 years, enter into or maintain any contract with any fraternity of more than one year's duration;

(4) Shall not represent that they are the sole official jewelers of any fraternity;

(5) Shall not participate in any manner, financially or otherwise, in the affairs of any organization composed of more than one fraternity.

Part III—(1) Petitioners shall not represent that any competitor is making unauthorized sales of fraternity products;

(2) Shall not induce fraternities not to deal with competitors;

(3) Shall not acquire for a period of 10 years any company having more than 10% of its total sales in fraternity products without the consent of the Commission;

(4) Shall not enter into exclusive supply contracts with suppliers of fraternity products.

Part IV—Balfour shall divest itself of BPA insofar as BPA is engaged in the fraternity market and shall not deal with those fraternities for 5 years which were under contract to BPA as of June 16, 1961 (date of issuance of the complaint).

Part V—(1) Petitioners shall cease from "[F]alsely imputing to any competitor dishonorable conduct, inability to perform contracts, questionable credit standing, or falsely disparaging any competitor's products, business methods, selling prices, values, credit terms, policies or services;"

(2) Shall cease from enticing employees away from competitors for the purpose of injuring competitors;

(3) Shall cease from entering into any exclusive contract with suppliers of "findings." [7]

The portion of the order relating to the Section 5 violation in the high school class ring market states:

Part VI—Petitioners shall cease from entering into or maintaining any contract with any high school for class rings which:

(1) Fails to set forth all of the terms essential to enable performance of such contract;

(2) Continues for more than one year. Under certain conditions, however, contracts for a 3-year duration are permitted;

* * * * * * *

(4) Is signed "more than sixty days prior to the date upon which the terms of such contract * * * is to begin;"

(5) Allows Balfour to alternate or rotate with any competitor as the exclusive supplier.

[25] It is well settled that the choice of the remedial order is committed to the discretion of the Commission. *F.T.C.* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392–393, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959); *Niresk Industries, Inc.* v. *F.T.C.*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied* 364 U.S. 883, 81 S.Ct. 173, 5 L.Ed.2d 104 (1960). Except where the remedy selected bears no reasonable relation to the unfair practices found to violate Section 5, the courts will not reverse or modify the Commission's choice. *F.T.C.* v. *National Lead Co.*, 352 U.S. 419, 428–429, 77 S.Ct. 502, 1 L.Ed.2d 438 (1957); *National Baker Services, Inc.* v. *F.T.C.*, 329 F.2d 365, 367 (7th Cir. 1964).

We find that the order in this case is reasonably related to the unfair practices and adequately designed to restore competition in both the national college fraternity goods and high school class ring markets.

[26, 27] The Commission has the power to order divestiture to restore competition. *F.T.C.* v. *Dean Foods Co.*, 384 U.S. 597, 606 n. 4, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966); see *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 312–313 nn. 17 and 18, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963). Further, an order of divestiture is no less proper even though it is not used where "other effective

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[7] "Findings" are jewelry which, when delivered to Balfour, do not bear insignia. The insignia is later added by Balfour prior to its distribution to the fraternities.

methods, less harsh, are available." *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 603, 71 S.Ct. 971, 977, 95 L.Ed. 1199 (1951). To this point, the Commission stated:

> [I]t would be a manifestly vain act simply to prohibit [petitioners] from making future acquisitions of their competitors. * * * In order to restore competition it is essential that BPA be divested from Balfour so that it can resume its independence and offer fraternities the competition which—prior to May, 1959—they believed they were getting.

We agree. We also believe that this order of divestiture is not affected by the fact that some evidence barred by the consent order concerning Balfour's acquisition of BPA might have seeped into the record. The divestiture order is based on the other and proper findings in the record which show that Balfour secretly operated BPA as its subsidiary but held it out as a competitor.

[28] It was also proper for the Commission to forbid Balfour from selling fraternity products to any fraternity that an official, co-official or sole official contract with BPA as of June 16, 1961. We cannot accept Balfour's argument that this remedial provision is anti-competitive. Competition cannot be revived instantly in a market which has been dominated by one firm for many years. The five years prohibition against contracts with BPA's customers is reasonable in order to allow BPA to reacquire competitive vigor. Without such a prohibition, the ordered divestiture of BPA might well be a futile gesture. Similarly, the ordered termination of official jeweler contracts with the fraternities and a prohibition against entering into new exclusive dealing contracts are designed to eliminate petitioners' monopoly power. See *United States* v. *International Boxing Club of New York, Inc.*, 171 F.Supp. 841, 842 (S.D. N.Y. 1957), *affirmed*, 358 U.S. 242, 247 79 S.Ct. 245, 3 L.Ed.2d 270 (1959).

[29] Petitioners also attack that part of the order which prohibits them from representing that "any competitor has manufactured, distributed or sold any or all types of fraternity products without permission or authorization of any fraternity or fraternities." Petitioners argue that this prohibits them from telling the truth and is therefore a violation of their First Amendment rights. We agree with this contention. The Commission may, of course, prohibit false statements or true statements which in total effect are misleading. *Murray Space Shoe Corp.* v. *F.T.C.*, 304 F.2d 270, 272 (2d Cir. 1962); *Ward Laboratories* v. *F.T.C.*, 276 F.2d 952, 954, *cert. denied* 364 U.S. 827, 81 S.Ct. 65, 5 L.Ed.2d 55 (1960). But, the Commission may not prohibit the telling of a true statement even if that representation perpetuates the dominance of a monopolist. See *Crosby* v. *Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963), *cert. denied* 373 U.S. 911, 83 S.Ct. 1300, 10 L.Ed.2d 412 (1963); *Scientific Mfg. Co.* v. *F.T.C.*, 124 F.2d

640 (3d Cir. 1941). The order must be modified to prohibit only false statements.

We also find that the Commission's order relating to the exclusive supply contracts and the petitioners' enticing away of employees from competitors to be proper and reasonable.

[30,32] With respect to the order relating to the high school class ring market, petitioners contend that the Commission abused its discretion in ordering Balfour to cease and desist from use of term purchase agreements, when that device has been used by all major competitors for the past thirty years. The law is clear, however, that the Commission has the power to enter an order against one firm that is practicing an industry-wide illegal trade practice. *F.T.C.* v. *Universal Rundel Corp.*, 387 U.S. 244, 87 S.Ct. 1622, 18 L.Ed.2d 749 (1967); *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949); *Moog Industries Inc.* v. *F.T.C.*, 355 U.S. 411, 78 S.Ct. 377, 2 L.Ed.2d 370 (1958). Indeed, there have been no instances where an order has been set aside simply because it was directed against a single violator in the face of industry-wide violations. *Rabiner & Jontow, Inc.* v. *F.T.C.*, 386 F.2d 667, 669 (2d Cir. 1967). However, the Commission's orders are to serve a remedial and not a punitive function. *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470, 72 S.Ct. 800, 96 L.Ed. 1081 (1952); *Niresk Industries, Inc.* v. *F.T.C.*, 278 F.2d 337 (7th Cir. 1960), *cert. denied*, 364 U.S. 883, 81 S.Ct. 173, 5 L.Ed.2d 104 (1960), and the Commission may not issue orders which would arbitrarily destroy one of many violators in the market. *F.T.C.* v. *Universal Rundel Corp.*, 387 U.S. 244, 251, 87 S.Ct. 1622, 18 L.Ed.2d 749 (1967). It is the responsibility of the Commission to perform a "reasonable evaluation" of the competitive situation to ascertain whether a particular order would be contrary to the purpose of the laws sought to be enforced. *Id.* at 251–252, 87 S.Ct. 1622.

[33] The Commission performed this evaluation and entered an order which is neither punitive nor likely to destroy petitioner Balfour. The Commission must be accorded latitude in forming its orders for "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Industries, Inc.*, v. *F.T.C.*, 355 U.S. 411, 413, 78 S.Ct. 377, 379, 2 L.Ed.2d 370 (1958).

PROCEDURE BEFORE THE HEARING EXAMINER

In 1961, counsel for the Commission adduced the testimony of officials from twenty-one competitors of the petitioners. In general, these officials testified about the nature of their businesses, their competition, and the effect of the petitioners' practices on their businesses. At the end of cross-examination, counsel for petitioners moved for discoverery of all correspondence and signed statements of five of the witnesses and moved that certain interview reports be submitted to the hearing examiner for a determination of whether they contained "substantially verbatim recitals" of the witnesses' oral statements. Upon representations of Commission counsel that there were no signed statements other than correspondence and that the interview reports did not contain a "substantially verbatim recital" of the witnesses' statements, the hearing examiner denied the discovery motion and the alternative motion to strike the witnesses' testimony.

In 1965, during its rebuttal case, petitioners once again moved to strike the testimony of the five witnesses on the ground that Commission counsel had failed to produce statements, letters and other writings relating to their testimony. Thereupon, counsel for the Commission produced to the hearing examiner for his inspection materials relating to the testimony of four of these witnesses. The hearing examiner, over objection, turned all of the records over to petitioners. After petitioners' counsel briefly examined these documents in the hearing room, they were returned to the Commission counsel for the purpose of having copies made. Before returning the copies to the petitioners, Commission counsel took an interlocutory appeal to the full Commission which ruled that the hearing examiner erred in turning over the documents. The Commission held that discovery is to be available in F.T.C. proceedings when allowable under the Jencks Act, 18 U.S.C. § 3500(e).

Section (e) limits discovery to statements within the following categories:

(1) "a written statement made by said witness and signed or otherwise adopted or approved by him;" (2) "a stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

On remand to the hearing examiner, he was given the documents to determine whether they fell within these categories. Portions of the materials were furnished to the petitioners.

[34] Petitioners here contend that the *Jencks* case (*Jencks* v. *United States*, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957)) is applicable and that the denial of access to the witnesses' statements

deprived them of due process and constituted reversible error. Since we are convinced that any error of the Commission or hearing examiner in this regard is harmless on this record, we need not reach this issue.[8]

The proceedings before the hearing examiner lasted over five years, and resulted in about 6,000 pages of testimony, hundreds of exhibits and four hundred and twenty-nine detailed findings of fact. Not one of the findings nor any part of the Commission's opinion rests solely on the testimony of the five witnesses in question. These witnesses were five of twenty-one competitors that testified. Besides this, petitioners were given the expurgated testimony of four of the witnesses which conformed to the Jencks Act. After examining these statements, counsel for the petitioners did not recall the witnesses, but entered into a stipulation with respect to the testimony of one witness.

Therefore, we hold that the error, if any, did not prejudice the decision of the Commission and is not reversible.

Accordingly, for the reasons stated, we enforce the order of the Commission and affirm its decision with the following exceptions: (1) We reverse that part of the Commission's order enjoining the petitioners from representing that "any competitor [in the national college fraternity insignia goods market] has manufactured, distributed or sold any or all types of fraternity products without permission or authorization of any fraternity or fraternities." The order is limited to prohibiting only false statements. (2) We reverse the Commission's findings that petitioners misrepresented the extent of the fraternities' trademark protection. (3) We reverse the Commission's findings as to Balfour's secret acquisition and operation of BPA and Edwards Haldeman to the extent that it relied on pre-1951 evidence which was barred by the 1964 consent order. Nonetheless, we enforce the divestiture order since it is based on evidence of post-1951 conduct.

Enforced in part, reversed in part.

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[8] We note that in the context of both criminal and civil proceedings there has been a marked and strong movement of the courts towards full and free discovery of all matters relevant to the case. As the Supreme Court said in *Dennis* v. *United States*, 384 U.S. 855, 870, 86 S.Ct. 1840, 1849, 16 L.Ed.2d 973 (1966):

"These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."

It is clear that the Jencks Act does not bind the Commission. That statute, enacted to restrict the impact of the *Jencks* case, is by its very terms peculiarly concerned with and applicable to criminal judicial proceedings. On the other hand, the rules in the *Jencks* case, based not upon due process but upon the Court's power to prescribe procedures for the administration of criminal justice, have not yet been applied to the F.T.C. although they have been applied to several other agencies. See *Harvey Aluminum, Inc.* v. *N.L.R.B.*, 335 F.2d 749 (9th Cir. 1964), and cases cited therein; 1 Davis on Administrative Law Treatise, § 8.15 (1958) (Supp.).

LEVER BROTHERS CO., ET AL. v. FEDERAL TRADE COMMISSION*

Civil A. No. 12–82—F.T.C. File No. 215–32

(United States District Court, D. Maine, S.D. April 19, 1971)

1. WHERE COMMISSION MERELY PROPOSED RULE FOR LABELING DETERGENT PACKAGES MANUFACTURER'S CLAIM FOR INJUNCTIVE RELIEF IS NOT RIPE FOR ADJUDICATION

Where Federal Trade Commission had merely proposed rule governing labeling of detergent packages which might never be adopted or enforced, detergent manufacturers' claim for injunctive relief against the pending rule-making proceeding was not yet ripe for adjudication.

2. COURT MUST DETERMINE WHETHER ISSUES ARE RIPE FOR DECISION AND TO EVALUATE HARDSHIP TO PARTIES IF CONSIDERATION DENIED

In determining whether challenge to administrative regulation is ripe for judicial resolution, the court must determine whether the issues are fit for judicial decision and must evaluate the hardship to the parties of denying court consideration at the time.

3 RULE SHOULD BE CHALLENGED WHEN AGENCY SEEKS TO ENFORCE IT AGAINST A PLAINTIFF

Proper time to challenge validity of administrative regulation or to seek injunction against its enforcement is when the rule is adopted or at such a time as the administrative agency takes steps to enforce the rule as against a plaintiff.

(The syllabus, with substituted captions, is taken from 325 F.Supp. 371)

On motions to dismiss or for temporary injunction by detergent manufacturers Court held that the rule on labeling was merely proposed and that injunctive relief was not yet ripe for adjudication. Motion to dismiss granted.

Fred C. Scribner, Jr., *Ralph I. Lancaster, Jr.*, *Peter S. Plumb*, Portland, Me., *William Rogers*, *Stuart J. Friedman*, Washington, D.C., *Donald J. Lunghino*, New York City, for Lever Brothers Co.

Herbert H. Sawyer, *Sumner Bernstein*, Portland, Me., *Raymond L. Falls, Jr.*, *Cahill, Gordon, Sonnett, Reindel & Ohl*, *LeRoy H. Hurlbert*, New York City, for Colgate-Palmolive Co. (intervenor).

Roger A. Putnam, Portland, Me., *Daniel M. Gribbon*, *Charles Lister*, *John S. Koch*, *Covington & Burling*, Washington, D.C., *Richard W. Barrett*, Proctor & Gamble Co., Cincinnati, Ohio, for Proctor & Gamble Co. (intervenor).

John G. Marshall, *John B. Beliveau*, Lewiston, Me., *David Machanic*, Washington, D.C., for Soap and Detergent Assn. (intervenor).

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* Reported in 325 F.Supp. 371 [1971].

Peter Mills, U.S. Atty., *John B. Wlodkowski*, Asst. U.S. Atty., Portland, Me., *Joseph Martin, Jr.*, Gen. Counsel, *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, *Gerald Harwood*, Atty., F.T.C., Washington, D.C., for the F.T.C. and others.

MEMORANDUM OF OPINION AND ORDER OF THE COURT

GIGNOUX, *District Judge:*

On January 25, 1971, the Federal Trade Commission issued a "Notice of Public Hearing and Opportunity to Submit Data, Views or Arguments Regarding a Proposed Trade Regulation Rule" (36 Fed. Reg. 1012 (1971)). The Notice states that the Commission has undertaken a trade regulation rule proceeding to consider whether it should promulgate a rule by the terms of which it would become an unfair method of competition and an unfair or deceptive act or practice within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, to sell or distribute any synthetic detergent in commerce without (1) listing on the container all the detergent's ingredients by name, percentage and weight per use; and (2) incorporating in all labeling, and in all advertising of every detergent containing phosphorous, a "warning" that the product contains phosphorous and that phosphorous contributes to water pollution. The Notice (and a subsequent press release) further states that interested persons may participate in the proceeding by submitting written comments on the proposed rule by April 19, 1971 and by presenting oral statements on the proposed rule at hearings to be held on April 26 and 27, 1971.

The present action was filed in this Court on March 31, 1971. Plaintiff and intervenors (hereinafter collectively referred to as plaintiffs) are all detergent manufacturers and an association of detergent manufacturers. They bring this action against the Federal Trade Commission and its individual members seeking declaratory and injunctive relief enjoining the Commission from conducting further proceedings with respect to the proposed trade regulation rule, on the grounds that the Commission's proceedings, with respect to the proposed rule (1) violate the Fair Packaging and Labeling Act, 15 U.S.C. § 1451 *et seq.*, and Section 701 of the Food, Drug and Cosmetic Act, 21 U.S.C. § 371; (2) violate Section 102 of the Environmental Policy Act of 1969, 42 U.S.C. § 4332; and (3) exceed the Commission's authority under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*

Presently before the Court are: (1) plaintiffs' motions for a temporary injunction; (2) defendants' motion to dismiss or, in the alternative, for summary judgment; and (3) plaintiff Proctor and

Gamble Company's cross-motion for summary judgment. The parties have filed extensive supporting papers, affidavits, and briefs and have presented oral argument at a hearing held this date, all of which have been considered by the Court.

Without reaching the merits of the case, the Court is persuaded that defendants' motion to dismiss or for summary judgment (which, since matters outside the pleadings are to be considered, will be treated as a motion for summary judgment, Fed.R.Civ.P. 12(b)) must be granted. It follows that the motions for preliminary injunction and the cross-motion for summary judgment must be denied.

[1] Plaintiffs seek in this action to enjoin the Federal Trade Commission from continuing its pending rule-making proceeding on the ground that the Commission has no statutory authority to promulgate its proposed rule by means of the procedures which the Commission allegedly intends to follow. This Court, however, agrees with the views expressed by the United States Court of Appeals for the District of Columbia, when presented with the substantially identical question in *Bristol-Myers Company* v. *Federal Trade Commission*, 138 U.S.App. D.C. 22, 424 F.2d 935, *cert. denied*, 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970), that plaintiffs' claim for injunctive relief is not yet ripe for adjudication. In this case, as in *Bristol-Myers*, the Commission has merely proposed a rule, which may never be adopted or enforced. We do not know today what type of rule, if any, will eventually be promulgated by the Commission. Nor can we ascertain at this stage the procedures which the Commission may follow before finally adopting any such rule. Here, as in *Bristol-Myers*, the proper time to challenge the Commission's rule-making power or procedures will be when, and if, a rule is adopted.

[2] Plaintiffs argue, however, that their challenge to the pending rule-making proceeding is "ripe" for judicial review under the standards elaborated by the Supreme Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148–156, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), and applied by the Court in that case and in the companion cases of *Toilet Goods Assn.* v. *Gardner*, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d (1967) and *Gardner* v. *Toilet Goods Assn.*, 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967). In *Abbott Laboratories*, the Supreme Court announced that in determining whether a challenge to an administrative regulation is ripe for judicial resolution, a two-fold inquiry must be made: first to determine whether the issues are fit for judicial decision, and second to evaluate the hardship to the parties of denying court consideration at the time. *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 149, 87 S.Ct. 1507; *Toilet Goods Assn.* v. *Gardner*, *supra*, 387 U.S. at 162, 87 S.Ct. 1520. Neither standard is met in this case.

As to the first factor, the Court in *Abbott Laboratories* based its determination that the issue there presented was appropriate for judicial resolution on two grounds: first that the issue presented was a purely legal one, and second that the challenged regulations, which has been formally promulgated and were presently in effect, constituted "final agency action" within the meaning of § 10 of the Administrative Procedure Act, 5 U.S.C. § 704. *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 149–152, 87 S.Ct. 1507. *See also Gardner* v. *Toilet Goods Assn.*, *supra*, 387 U.S. at 170–171, 87 S.Ct. 1526. It may be conceded, *arguendo*, that the issues tendered in the instant case present purely legal questions. But it can hardly be contended that the pending rule-making proceeding constitutes "final agency action" within the meaning of the Administrative Procedure Act. The rule-making process is far from complete. The Commission has served notice only that it *may* promulgate a rule of the type proposed. Certainly, it has as yet made no "considered and formalized determination." *Toilet Goods Assn.* v. *Gardner*, *supra*, 387 U.S. at 162, 87 S.Ct. 1520. At this juncture, there is no assurance as to whether or when a rule will be adopted, the form it will take, or the basis the Commission will give therefor. In this respect the present case follows *a fortiori* from *Toilet Goods Assn.* v. *Gardner*, *supra*, where the Court denied pre-enforcement judicial review of a regulation which, although already in effect, served notice only that the agency *might* impose sanctions upon those failing to comply. *Id.* at 163, 87 S.Ct. 1520. In *Abbott Laboratories* the Supreme Court summarized the reasons for the ripeness doctrine in the following words, which are clearly applicable to this situation:

> [I]t is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. *Abbott Laboratories* v. *Gardner*, *supra*, at 148–149, 87 S.Ct. at 1515.

[3] The second of the factors delineated by the Supreme Court in *Abbott Laboratories* requires evaluation of the *present* effect of challenged administrative action upon those seeking judicial relief. In *Abbott Laboratories* and in *Gardner* v. *Toilet Goods Assn.*, *supra*, the Court found the requisite hardship to the complaining parties where the agency had promulgated a regulation which "requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Abbott Laboratories* v. *Gardner*, *supra* at 153, 87 S.Ct. at 1518. The Court noted that the adoption of the regulations put the plaintiffs in the dilemma of choosing between compliance at substantial expense and disruption of their operations, and noncompliance at the risk of serious criminal and

civil penalties. Accordingly, the Court found "the impact of the regulations upon the [plaintiffs] is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Abbott Laboratories* v. *Gardner, supra* at 152–154, 87 S.Ct. at 1517; *Gardner* v. *Toilet Goods Assn., supra,* 387 U.S. 171–174, 87 S.Ct. 1526. The agency action here challenged, however, is in no way analogous to the regulations involved in *Abbott Laboratories* and *Gardner* v. *Toilet Goods Assn.* The Commission's pending rule-making proceeding requires no "immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance."

As in *Toilet Goods Assn.* v. *Gardner, supra,* where the Court denied pre-enforcement judicial review of a regulation which was not "self-executing," this is not a situation "where the impact of the administrative action could be said to be felt immediately by those subject to it in conducting their day-to-day affairs." *Id.* 387 U.S. at 164, 87 S.Ct. at 1524. And as in that case, "no irremedial adverse consequences flow from requiring a later challenge" to whatever the Commission's final action may be. *Id.* If and when a rule is adopted, the rule can be challenged and a judicial determination of its validity obtained, either immediately (*Compare Abbott Laboratories* v. *Gardner, supra,* and *Gardner* v. *Toilet Goods Assn., supra,* with *Toilet Goods Assn.* v. *Gardner, supra*) or at such time as the Commission takes steps to enforce the rule as against a plaintiff. Federal Trade Commission Act §5(c), 15 U.S.C. §45(c); Administrative Procedure Act §§10(c), 10(e)(B)(3), 5 U.S.C. §§704, 706(2) (C). At this juncture, such a challenge is premature.

The Court will add only one further comment. Plaintiffs cite several cases to support their position that an injunction is appropriate at this stage of the administrative process. *See, e.g., Jewel Companies, Inc.* v. *Federal Trade Commission,* 432 F.2d 1155 (7th Cir. 1970); *Elmo Division of Drive-X Co.* v. *Dixon* 121 U.S.App.D.C. 113, 348 F.2d 342 (1962); *Amos Treat Co.* v. *Security ond Exchange Commission,* 113 U.S.App.D.C. 100, 306 F.2d 260 (1962); *Deering Milliken, Inc.* v. *Johnston,* 295 F.2d 856 (4th Cir. 1961); *Yanish* v. *Wixon,* 81 F.Supp. 499 (N.D.Cal.1948). None of these cases is apposite. First, except for *Jewel Companies,* all arose before the Supreme Court in *Abbott Laboratories* outlined the standards to be applied in determining whether a controversy is ripe for judicial review. Second, in each case adjudicatory proceedings had been commenced against the plaintiff. Finally, a reading of these cases discloses that, with the possible exception of *Amos Treat Co.,* their premise is that, unlike the present situation, the plaintiffs there involved would not have had opportunities to obtain effective judicial review at the conclusion of the administrative proceedings.

Since plaintiffs' claims are not yet "ripe" for judicial resolution, defendants' motion to dismiss is granted, and plaintiffs' motions for preliminary injunction and cross-motion for summary judgment are denied.

It is so ordered.

LEVER BROTHERS COMPANY v. FEDERAL TRADE COMMISSION*

Misc. 466—F.T.C. File 215-32

(United States Court of Appeals, First Circuit, April 20, 1971)

The plaintiffs here having been denied an injunction staying the Commission hearings by the district court below apply to this court on the grounds that plaintiffs will suffer irreparable damage if the injunction is not granted. Plaintiffs assert several hardships they will suffer, such as loss of the right to cross examine, if Commission's hearings are held without determination of several items in advance. The court, however, held that every issue the plaintiffs seek to raise at this stage are all premature and to allow them to be tried piecemeal would delay the main case unduly. Plaintiffs' motion for an injunction pending appeal from the district court's determination that the plaintiff's contentions are not yet ripe for adjudication is denied.

ON MOTION FOR INJUNCTION PENDING APPEAL

MEMORANDUM AND ORDER

COFFIN, *Circuit Judge:*

Plaintiffs, under exceptional time pressure, have applied to me as a single judge under Rule 8(a), F.R.A.P., for an injunction pending appeal from the district court's granting of defendant's motion for summary judgment. The district court determined that plaintiff's application for an injunction staying Commission hearings, which plaintiffs allege are illegal, was not yet ripe for adjudication. In considering plaintiffs' motion for an injunction pending appeal, this court must be convinced that plaintiffs have a probability of prevailing on the merits of their appeal and that plaintiffs will suffer irreparable harm if the injunction is not granted. *Automatic Radio Mfg. Co., Inc.* v. *Ford Motor Co.*, 390 F.2d 113, 115 (1st Cir. 1968), *cert. denied,* 391 U.S. 914 (1968).

In this case the issue on the merits is whether the district court abused its discretion in holding that plaintiffs' claims were not yet "ripe" for judicial resolution. That such a determination is discretionary and not lightly to be overruled is clear. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148 (1967). In *Abbott Laboratories* the Court pointed to two reasons why the issue was fit for adjudication. First, the issue was a purely legal one. 387 U.S. at 149. There is no dispute that the issues here are also purely legal. Second, the regulations in issue were "final agency action" within the meaning of the Administrative Procedure Act. 387 U.S. at 149–150. There is no dispute that no such final regulations are at issue here; the question is the legality of the procedure not the legality of a rule which might result from the procedure. The district court, with some support from another circuit, *Bristol-Myers Co.* v. *Federal Trade Commission*, 424 F.2d 935, 940 (D.C. Cir. 1970), ***cert. denied*, 400 U.S. 824 (1971)**, found that the procedure could not be challenged until a final agency rule was adopted. Plaintiffs argue that no such final rule is required in order for them to challenge agency action at a more preliminary stage so long as a real question of the legality of the agency proceedings is presented. *See, e.g.*, *Jewel Companies, Inc.* v. *Federal Trade Commission*, 432 F.2d 1115 (7th Cir. 1970); *Elmo Division of Drive-X Co.* v. *Dixon*, 348 F.2d 342 (D.C. Cir. 1962); *Amos Treat Co.* v. *Security and Exchange Commission*, 306 F.2d 260 (D.C. Cir. 1962); *Deering Milliken, Inc.* v. *Johnston*, 295 F.2d 856 (4th Cir. 1961); *Yanish* v. *Wixon*, 81 F. Supp. 499 (N.D. Col. 1948). Although all of these cases are lower court opinions and all but one were written before *Abbott Laboratories*, they are still somewhat troublesome.

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*Not otherwise reported.

Whether or not "final agency action" may be required as a predicate to judicial intervention even where the initiation of agency proceedings is attacked is, I conclude, not necessary for me to decide. For *Abbott* also required, in addition to a determination of fitness of the issue for judicial decision, a determination that hardship to the parties stemming from withholding court consideration was such as to justify intervention. As to this issue plaintiffs make two contentions: that no hardship need be shown, other than that of suffering proceedings which are allegedly infected with illegality; and, that, in any event they have alleged sufficient hardship *aliunde*.

Plaintiffs stated in oral argument, in support of the first contention, that, in substance, any party with standing could properly seek to enjoin illegal agency action. *Abbott Laboratories*, however, seems to accept as a necessary spring for judicial intervention "an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance. * * *" 387 U.S. at 153. Moreover, none of the cases relied on by plaintiffs, *supra*, addresses the requirement of a showing of hardship. In the light of such authorities as well as of general principles of judicial restraint with regard to untimely intervention in administrative proceedings, I cannot say that plaintiffs are likely to prevail in their assertion that standing plus an assertion of illegal agency action are enough to justify injunctive relief, without a showing of hardship threatened by judicial abstinence.

Plaintiffs, however, vigorously assert several hardships they will suffer if the Commission hearings are held without a determination of their legality in advance. First, they will lose the procedural safeguards, such as the right to cross-examine, which they say are not a part of the procedure the Commission has chosen but are a part of the procedure the Commission should have chosen. Thus, they say, they will be unable to refute harmful evidence and the Commissioners will be prejudiced on their case even if the Commission is subsequently required to conduct the hearing according to the proper procedure. This alleged hardship presupposes that the evidence that will be introduced at the hearing will be overwhelmingly opposed to plaintiffs' position. But plaintiffs too will introduce evidence on the proposed rule which will also not be filtered through cross-examination. I cannot automatically assume—for the purpose of predicting plaintiffs' likelihood of prevailing on appeal—that the hearing will influence the Commission against plaintiffs; it may influence them in plaintiffs' favor. Nor can I say that plaintiffs are likely to persuade the court of appeals that the Commission would be unable subsequently to grant plaintiffs a fair hearing if they were compelled to grant a second hearing under a different procedure. Adjudicatory bodies, like courts, must often retry an issue a second time, and I cannot now assume that a second hearing would prove less fair.

Plaintiffs' second alleged hardship is that they will not receive a statement from the Commission the environmental impact of the proposed ruling before the hearings. The Commission has stated that it will file such a statement if it decides to adopt the proposed rule, but plaintiffs assert that will be too late. I would thing that plaintiffs are not harmed so long as the statement is filed in time to allow the proposed environmental impact to be analyzed before the rule goes into effect. Plaintiffs, it is true, argue that the pressures of publicity place them in the dilemma of adhering to their present products despite increasing resistance or of using different, untested, and possibly deleterious ingredients. But, since they would hazard the latter course only because of fear of falling sales, this argument is really an aspect of the final hardship alleged.

This is the alleged loss of sales which will result from the hearings, True, so long as the ecological implications of products are not satisfactorily laid to rest, there will be unease and ferment. But plaintiffs are assuming not only that the hearings will be overwhelmingly negative toward their products but also that they will have a convincing and disastrously additive effect on the public. At this juncture, I cannot say that either assumption is sufficiently likely. Plaintiffs may make their case that their products are less harmful than available substitutes. Even if plaintiffs do not convince the public, there is no sufficient assurance that the public will pay such attention that sales will be significantly affected. I therefore conclude that this alleged hardship is not such that plaintiffs have a likelihood of prevailing on the merits before the entire court.

Plaintiffs' showing of hardship fails to convince me that they are likely to prevail on the merits of the appeal. The procedural issue which plaintiffs seek to raise at this premature stage in the process can be raised after the Commission takes final action along with any issues on the merits which may present themselves. Unless plaintiffs make a substantial showing of hardship, the court of appeals is unlikely to risk the piecemeal litigation which may result if plaintiffs are permitted to raise procedural issues now and substantive issues at a later date. Such a policy is essential to prevent litigants from further delaying already attenuated agency procedures.

Plaintiffs' showing of the irreparable harm which will result if this injunction is denied is the same as their showing of hardship. Since I have concluded that the showing of hardship is likely to prove insufficient to convince the court of appeals that this case is ripe for adjudication, it follows that plaintiffs have also made an insufficient showing of irreparable harm.

The motion is denied.

UNITED STATES STEEL CORP. v. FEDERAL TRADE COMMISSION*

No. 19, 423—F.T.C. Docket 8655

(United States Court of Appeals, Sixth Circuit, May 26, 1971)

The remand of an F.T.C. divestiture order in a merger proceeding to enable the parties to determine in applying the failing company doctrine, whether the prospects of the acquired firm emerging from the reorganization as a competitive unit were "dim or non-existent" was not ambiguous when construed in the light of *Citizen Publishing Co.* v. *U.S.*, 394 U.S. 131 (1969). Moreover, any ambiguity which might exist as to the scope of admissibility of evidence with regard to the phrase "prospects of reorganization" may be gleaned from the United States Supreme Court's decision in *F.T.C.* v. *Proctor and Gamble,* 386 U.S. 568 (1967), which provides a framework for determining a "prediction of merger's impact on competition." Accordingly, a motion for clarification of the court's mandate by the acquiring corporation was denied. Motion for clarification dismissed.

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*Reported in Trade Reg. Rep. (1971 Trade Cases) ¶ 73,598 at p. 90,466. Main case at 426 F. 2d 592, 8 S. & D. 1154.

Before: Phillips, *Chief Judge*, Celebrezze, *Circuit Judge*, and O'Sullivan, *Senior Circuit Judge*.

This matter comes before this Court on a motion by the United States Steel Corporation for clarification of the mandate issued by the Court on May 27, 1970. The motion is opposed by the Federal Trade Commission on the grounds that the Commission believes the Court's mandate to be unambiguous and not in need of any clarification. Further, the Commission contends that United States Steel has failed to exhaust its administrative remedies.

This Court has the power to order clarification of an ambiguous mandate. *Regal Knitwear Co.* v. *N.L.R.B.*, 324 U.S. 9, 15, (1945). Our initial remand was compelled by the United States Supreme Court's decision in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969). In *Citizen Publishing Co.*, the United States challenged a stock acquisition which occurred in 1965, twenty-five years after the acquired and acquiring companies had entered into a joint operating agreement with certain unlawful provisions. The District Court determined that at the time the two newspapers first entered into their operating agreement, "Citizen Publishing was not *then* on the verge of going out of business * * * (emphasis added)," 394 U.S. at 137. The Supreme Court affirmed this finding of the District Court. In affirming, the Supreme Court observed:

> Moreover, we know from the broad experience of the business community since 1930, the year when the *International Shoe* case was decided, that companies reorganized through receivership, or through Chapter X or Chapter XI of the Bankruptcy Act often emerged as strong competitive companies. The *prospects* of reogranization of Citizen *in 1940* would have had to be dim or nonexistent to make the failing company doctrine applicable to this case. (Emphasis added) 394 U.S. at 138.

We find that our mandate is not ambiguous when construed—as we have instructed the parties to do—in the light of *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969). Moreover, any ambiguity which might exist as to the scope of admissibility of evidence with regard to the phrase "prospects of reorganization" may be gleaned from the United States Supreme Court's decision in *Federal Trade Commission* v. *Proctor and Gamble*, 386 U.S. 568 (1967) which provides a framework for determining a "prediction of [a] merger's [future] impact on competition." 386 U.S. at 577.

Having found that our prior mandate is not ambiguous, and it further being clear from the record that no final or reviewable agency order is before this Court, it is ORDERED that the instant motion for clarification of our mandate be, and it is hereby, dismissed.

In so holding we do so without prejudice to the United States Steel Corporation's right to duly challenge—pursuant to Rule 15, Rules of Appellate Procedure—the propriety of any Federal Trade Commission ruling or procedure.

UNITED STATES v. VAN RAALTE COMPANY, ET AL.

No. 69 Civ. 306—F.T.C. Docket 6690

(United States District Court, S.D., New York, June 29, 1971)

1. Complaint Need Not State Precise Theory on Which Claim for Relief Is Based

Precise theory on which claim for relief is based need not appear in the complaint; complaint is sufficient if any claim for relief is stated.

2. Complaint Should Not Be Dismissed Unless It Appears Plaintiff Can Prove No Set of Facts Supporting His Claim

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

3. Denuding Assets of Acquired Corporation Which Is Defendant in F.T.C. Suits Does Not Give Acquirer Immunity From Liability as a Transferee

Acquirer's act of denuding assets of acquired corporation which is a defendant in a suit by the United States for violation of a Federal Trade Commission cease and desist order does not give the acquirer immunity from liability, at least as a transferee.

4. Enforcement of F.T.C. Order Against Transferee May Be Applied in Fuller Measure on Public Interest Than if Only Private Interests Involved

Enforcement of Federal Trade Commission cease and desist order against transferee of a business subject to the order may be applied in fuller measure in furtherance of public interest than if only private interests were involved.

5. Both Acquiring and Acquired Corporations Are Subject to F.T.C. Order Against Importing and Selling Highly Flammable Articles of Wearing Apparel

Complaint was sufficient to state claim upon which relief could be granted in action against acquiring corporation and one of its officers to recover civil penalties for alleged violations by both acquiring and acquired corporations to Federal Trade Commission order which directed acquired corporation to cease and desist from importing and selling highly flammable articles of wearing apparel.

6. Acquiring Corporation in De Facto Merger Liable for Civil Penalties of Acquired Corporation for Violation of Flammable Fabrics Act

Defendant corporation which assumed all liabilities and obligations of corporation which it acquired in equivalent of de facto merger would be liable for civil penalties for any violations by acquired corporation of Federal Trade Commission order to cease and desist importing and selling highly flammable articles of wearing apparel.

(The syllabus, with substituted captions, is taken from 328 F. Supp. 827)

On motion to dismiss supplemental complaint that acquired corporation sold highly flammable articles of wearing apparel court held that complaint was sufficient to state claim in which relief would be granted. Motion denied.

Whitney North Seymour, Jr., U.S. Atty. for the Southern District of New York, for plaintiff; by *Peter A. Herbert*, Asst. U.S. Atty., New York City.

Sullivan & Cromwell, New York City, for defendants; by *William E. Willis, William R. Norfolk, Mack M. Braly*, New York City, of counsel.

GURFEIN, *District Judge.*

This is a motion by the defendant Van Raalte Co. Inc. to dismiss the supplemental complaint of the United States pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The supplemental complaint alleges that in 1956 the Federal Trade Commission charged Glensder Textile Company (Glensder) and its President Arthur Klein (Klein) with having violated the Flammable Fabrics Act, 15 U.S.C. Section 1191, *et seq.*, under the Federal Trade Commission Act, 15 U.S.C. Section 45(a), on the ground that Glensder, under the direction of Klein, imported into the United States and sold articles of wearing apparel which were so highly flammable as to be dangerous when worn. In April 1957 an order to cease and desist was entered by the FTC Hearing Examiner ordering Glensder, its officers and other respondents including Klein, individually and as officers of said corporation and respondents, representatives, agents and employees directly or *through any corporate or other device* to cease and desist from importing into the United States or selling the articles aforementioned (emphasis supplied). In July 1957 this order became final and is still in effect. In July 1966 Glensder, a Delaware corporation, became a wholly owned subsidiary of defendant Van Raalte. Klein served as President of Glensder before and after Van Raalte's acquisition of Glensder.

The Government alleges that on or about August 26, 1969 Glensder was dissolved as a corporation and "merged" with its parent company Van Raalte, thereupon becoming Van Raalte's "Glentex Division." Following the 1969 "merger" Klein was retained as Vice President in charge of the Glentex Division. It is alleged that prior to the "merger" with Van Raalte of August 26, 1969 Glensder made 29 illegal sales of the flammable scarves. It is further alleged that subsequent to the "merger" the Glentex Division of Van Raalte made 2 sales in violation of the terms of the order of the Federal Trade Commission previously referred to. The Government further alleges in conclusory fashion that as a result of the "merger" of Glensder with its then parent company defendant Van Raalte, Van Raalte became subject to the mandates of the order aforementioned and liable for any and all violations thereof including any and all violations previously committed by Glensder. For each sale constituting a violation of the order the United States prays that the defendants, pursuant to 15 U.S.C. Section 45(*l*), shall forfeit and pay to the United States $5,000 in civil penalties for a total of $175,000 and that the defendants be enjoined from further violating the order. The total amount claimed with respect to Glensder's violations prior to the commencement of the original action by the Government amounted to $145,000. The total claim in the supplemental complaint of $175,000 is based on six additional violations of the 1957 cease and desist order, four of which were allegedly committed by Glensder subsequent to the commencement of this action and two by Van Raalte's Glentex Division following the August 26, 1969 "merger."

The defendant Van Raalte claims that the supplemental complaint should be dismissed upon the ground that Van Raalte was not a party to the original proceedings in the Federal Trade Commission against Glensder; that Van Raalte had no notice of the 1957 order; and that the mere acquisition of all the assets of Glensder and its dissolution was insufficient to subject Van Raalte to liability.

[1] The motion is misconceived as a short summary of the chronology will indicate. The basis of Van Raalte's motion is, in substance, that it has no primary liability for violations of the 1957 cease and desist order entered against a company with which it had no connection until 10 years later. Van Raalte claims that the Government is not seeking recovery against Van Raalte as one *secondarily* liable for the penalties incurred by its subsidiary prior to the time Van Raalte acquired its assets, but, rather, as a party primarily liable under the 1957 order. Van Raalte in its reply memorandum concedes, moreover, that the motion to dismiss is addressed to the issue of *primary* liability "alone." The concession defeats the motion. For the movant is conceding that the Government does, indeed, claim that Van Raalte is liable for penalties incurred by Glensder in the same manner as any company may be liable for the debts and obligations of a company which it acquires in the circumstances at bar. But Van Raalte argues that the theory of the supplemental complaint is one of the primary liabilities of Van Raalte rather than of its *secondary* liability. The movant goes on to concede that "if it were (a complaint based on a theory of secondary liability), this motion very well might not be before this Court." It is clear, however, that under the modern

Federal practice of notice pleading the precise theory upon which the claim for relief was based need not appear in the complaint. It is sufficient if any claim for relief is stated.

[2] I am required to follow the mandate of the Supreme Court in *Conley* v. *Gibson,* 355 U.S. 41, 45, 78 S.Ct 99, 102, 2 L.Ed. 2d 80 (1957) when it stated:

> In appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[1]

[3–5] Between April 1, 1968 and April 9, 1969 Glensder made 33 sales of wearing apparel allegedly in violation of the order. When Van Raalte acquired the assets of this wholly-owned subsidiary and dissolved it as a corporation on August 26, 1969 the original complaint in this action had already been filed by the Government (on January 27, 1969). It can hardly be supposed that a denuding of the assets of a corporation which is a defendant in a suit by the Government for violation of a cease and desist order can give the acquirer immunity from liability, at least as a transferee. *Walling* v. *James V. Reuter, Inc.,* 321 U.S. 671, 674–675, 64 S.Ct. 826, 88 L.Ed. 1001 (1944). Moreover, the order of April 1957 itself initially enjoined Glensder from violating the order "directly or through any corporate device." Before the 1969 transfer of assets Van Raalte had already (since 1966) owned 100% of the Glensder stock. It was in every sense in control of that corporation when the alleged violations occurred in 1968 and early 1969. And enforcement against the transferee of a business may be applied in fuller measure in furtherance of the public interest than if only private interests were involved. See *Virginian Ry Co.* v. *System Federation* No. 40, 300 U.S. 515, 552, 57 S.Ct. 592, 81 L.Ed. 789, and cases cited therein. *Walling* v. *James V. Reuter, Inc., supra,* 321 U.S. at pp. 674–675, 64 S.Ct. 826.

[6] In the plan of complete liquidation of Glensder in connection with the distribution of all its assets to its sole stockholder, Van Raalte, the latter assumed "all the liabilities and obligations of the company." The obligation of Glensder at that point was very much in being and actual notice had been given to it by virtue of the Government's original complaint of January 27, 1969. Even if Van Raalte had no notice of the actual consent decree of 1957 when it purchased the stock of Glensder that entity passed its existing obligations to Van Raalte at the time Van Raalte assumed its liabilities in 1969. Whether the acquisition of assets and the simultaneous liquidation of

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[1] If the claim of secondary liability was introduced in a post-trial brief for the first time, the result might well be different. See *Jaffee & Co.* v. *Securities and Exchange Commission,* 446 F.2d 387 (2d Cir. June 18, 1971).

a corporation constitute a de facto merger is something on which the parties differ. The Court does not believe that in view of the analysis heretofore made the theory upon which the Government proceeds is the crucial point. For surely there was the equivalent of a de facto merger by the acquisition of all the assets in exchange for the stock held by the acquirer and its assumption of all liabilities and obligations. *Hoche Productions* v. *Jayark Films Corp.*, 256 F. Supp. 291 (S.D.N.Y. 1966). See 15 Fletcher, Cyc. Corps. Section 7122 (1961 Ed.). If the Government can prove its case, Van Raalte standing in the shoes of Glensder would be liable for penalties. Counsel for Van Raalte seemed to have recognized this earlier when they moved to have Van Raalte substituted as *the* corporate party defendant in the place of Glensder and the Government consented.

The question remains as to whether Van Raalte is suable on its own for importations or sales made subsequent to its acquisition of Glensder's business. Van Raalte stoutly maintains that since it was not a party to the original cease and desist order it cannot be bound by it. It cites the recent case of *United States* v. *Armour & Co.* and *Greyhound Corp.*, in 402 U.S. 673, 91 S. Ct. 1752, 29 L.Ed.2d 256. In that case the Supreme Court did hold that the failure of a decree to provide that it shall run not only against the named persons but also "against their successors and assigns" is fatal to the claim that the decree affected the acquiring corporation in that case. Although in the instant case the Federal Trade Commission order does not provide that it be binding upon successors and assigns, the situation may nevertheless be different because of the business activities of Glensder as a wholly-owned subsidiary and then as a division of Van Raalte with defendant Klein serving as the head of operations on behalf of Van Raalte throughout. The *Armour* case did not involve the combination of *related* corporations but was strictly an arms-length transaction between unrelated parties for the acquisition of stock—conduct which was *not* specifically prohibited by the 1920 consent decree. Unlike *Armour*, in the instant case the Government seeks to recover penalties for the *exact* conduct proscribed by the FTC order. Moreover, in *Armour* there was no suggestion that a major purpose of that acquisition of stock might be to defeat the efficacy of the prior consent decree. In the instant case, the defendants cannot be free of that possibility at this stage of the litigation. More exploration of the facts by discovery would be required to set the matter at issue for judicial determination.[2]

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[2] While *Regal Knitwear Co.* v. *N.L.R.B.*, 324 U.S. 9, 65 S.Ct. 478, 89 L.Ed. 661 (1945) may be taken as holding that an order against "persons who act independently and whose rights have not been adjudged according to law" would be too broad, the Court did "not undertake to decide whether or under what circumstances any kind of successor or assign will be liable for violation of a Labor Board order" (324 U.S. at 15, 65 S.Ct. at 481).

The question of whether the Government's prayer for an injunction against Van Raalte will lie had better be left to the conclusion of a trial in view of the corporate transactions mentioned. See *P. F. Collier & Son Corp.* v. *F.T.C.*, 427 F.2d 261 (6th Cir. 1970). It is difficult to predict at this stage what matters may be developed that will have a bearing on the question of relief. The Government may, in the meantime, be well advised to amend its supplemental complaint to state more precisely its alternative claims for relief against Van Raalte.

The motion is in all respects denied.

UNITED STATES v. BEATRICE FOODS CO.[*]

No. 4-70 Civ. 459—F.T.C. Docket 6653

(United States District Court, District of Minnesota, Fourth Division
July 21, 1971)

Memoranda and documents of F.T.C. lawyers containing many opinions, recommendations and conclusions as to how the Commission ought to act or ought not to agree to as to a food chain's offers of divestiture, or the type of consent order that ought to be presented to the Court of Appeals, were privileged. The Attorney client privilege obtains with government lawyers as well as to corporate house counsel. Many of the document's editorial comments that cannot be separated from what the food chain designated as "a mere recital of facts." The government, however, could not obtain an order prohibiting the food chain from destroying or concealing documents. Without a better showing than an inference, in some sort of evidentiary hearing, that the food chain destroyed or concealed documents, no order of prohibition would be proper.

Robert G. Renner, U.S. Atty., *Neal J. Shapiro*, Asst. U.S. Atty., *H. Robert Field* and *James E. Corky*, F.T.C., Washington, D.C. for plaintiff.

Edward J. Callahan, of *Cant, Haverstock, Gray, Plant and Mooty*, Minneapolis, Minn., and *Edward L. Foote* and *Ronald Butler*, of *Winston, Strawn, Smith & Patterson*, Chicago, Ill. for defendant.

NEVILLE, *District Judge:*

MEMORANDUM

At the hearing, counsel for the government handed to the court *in camera* the documents listed below which it admitted were within the description contained in the subpoena served on Charles Tobin, the Secretary of the Federal Trade Commission, but which it claims to be privileged.

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[*] Not reported in Federal Reporter. Reported in Trade Reg. Rep. (1971 Trade Case) ¶ 73,606 at p. 90,904. For Commission case see 68 F.T.C. 1003.

Date	*From*	*To*	*Subject Matter*
7/16/65	Peter K. Bleakley, Attorney	File	Consent Negotiations held on 7/14/65
8/10/65	F. P. Favarella, Peter K. Bleakley, Attorneys	Joseph E. Sheehy Director, Bureau of Restraint of Trade	Counter Proposal for Settlement
8/13/65	Acting Chief, Division of Mergers	Commission	Summary of Settlement Talks
2/9/66	Peter K. Bleakley, Attorney	Joseph E. Sheehy Director, Bureau of Restraint of Trade	*Beatrice Foods Co.*, Docket No. 6653
2/3/67	Mark Haase	Mr. Boyd	Summary of Proposal for settlement
2/14/67	Director, Bureau of Restraint of Trade	Commission	Respondent's New Proposal for Settlement
2/24/67	General Counsel	Commissioner Elman	Proposed Settlement of *Beatrice Foods Co. v. FTC* 9th Cir. No. 20,727
3/21/67	Mark Haase, Attorney	Mr. Sheehy	Settlement Proposal
3/23/67	Director, Bureau of Restraint of Trade	Commission	Respondent's new proposal for settlement
3/23/67	Bureau of Economics	Commission	An alternative proposal for settlement
4/13/67	Joseph E. Sheehy	Commission	James McI. Henderson, General Counsel *Beatrice Foods Co. v. FTC* 9th Cir. No. 20,727
4/21/67	Joseph E. Sheehy	Commission	*Beatrice Foods Co. v. FTC*, 9th Cir. No. 20,727

The court has read all of these documents and frankly cannot see why the government, except as a matter of precedent, objects to their disclosure; nor does the court perceive from its present limited knowledge of the case, that the documents would be of any substantial help or assistance to the theory of the case that defendant apparently is attempting to develop. Be that as it may, the question before the court is one of privilege. It is clear that for the most part the memoranda and documents are authored by lawyers. They contain many opinions, recommendations, and conclusions as to how the Commission ought to act and what it ought or ought not to agree to as to defendant's offers of divestiture, the type of consent order that ought to be presented to the Court of Appeals, and numerous other subjects. There is no question in the court's mind but that these are *Hickman* v. *Taylor*, 329 U.S. 495 (1947), (and its progeny) privileged documents, or cloaked with the attorney-client or the so-called executive privilege. A few of the documents were authored by "Director, Bureau of Restraint of Trade" or "Bureau of Economics" but even these in all but one instance bear a signature of approval by an attorney for the Commission. The attorney-client privilege obtains with government attorneys as well as the typical corporate house counsel and the court is clear that the plaintiff is within its rights in refusing to produce these documents.

Defendant's counsel recognizes that at least an attorney-client privilege obtains, but asserts that insofar as memoranda or communications from a Federal Trade Commission attorney to his superior or to the Commission is concerned, it is not privileged insofar as it merely recites and restates factually what occurred at a conference with defendant and its attorneys. Whether or not this is or should be the rule need not be determined in this instance, for many if not most of the memoranda contain comments and some editorializing and characterization. For instance, in the various communications, the attorneys state: "No particular excuse was given for not * * *" "This is comparable * * *" "No 'business reasons' or 'public considerations' were urged * * *" "No attempt is being made at this time to discuss * * *" "We believe it would be helpful to outline what we consider the basic elements * * *" "This proposal differed materially from any prior * * *" "I thought you would prefer to see this first rough draft * * *" "An attempt was made to reach a satisfactory settlement * * *" "It is recommended that the proposed settlement * * *" "I urge that it be considered in preparation for this morning's Commission meeting * * *." These are but sample excerpts from the various memoranda. In the court's opinion these and many more similar expressions cannot be separated from what counsel would designate as a mere recital of facts; nor is it feasible to attempt to excise parts of the documents.

What has been said above makes it follow as an *a fortiori* that on oral depositions of various employees or former employees of the Federal Trade Commission, inquiry cannot be made concerning said documents or the witnesses' recollection as to the contents thereof. Further, though such witnesses may be asked as to what transpired and what was said at any conferences or meetings they attended, they should not be interrogated as to what they reported to their superiors or conclusions they communicated to the Commission.

Plaintiff's request for an order requiring production of documents is denied. Plaintiff claims that it received a production of documents from defendant but that certain cancelled checks and letters—information concerning which it obtained from third parties—were not included in the production. From this it draws the inference that such were either deliberately destroyed or altered or concealed; that this indicates a propensity on the part of defendant and therefore an order should be entered directing it to stop such practices. Plaintiff knows of no particular documents or writings other than those mentioned that have not been produced, so the court is not asked to direct that a certain specific document or documents be produced; rather the court is asked to make sort of a blanket order prohibiting in the words of the rule any similar future conduct on the part of defendant or its counsel. Plaintiff contends that if it obtained such an order, it would be in a better position if it believed that some untoward activity occurred in the future to seek sanctions under Rule 37 of the Federal Rules of Civil Procedure. If in fact defendant has, or can obtain by search, the particular cancelled checks and letters of which plaintiff complains as set forth in its memorandum, then defendant is ordered to produce the same for plaintiff's inspection and copying. The court is unwilling, however, to enter an order, without a better showing in some sort of an evidentiary hearing that defendant willfully destroyed, altered or concealed documents and so declines to enter an order—which in reality would do no more than restate the rule in any event since the plaintiff has no specific document or documents in mind. The only reason for such an order is plaintiff's feeling that because of past incidents, such will occur again. The mere entry of such an order presumes prior guilt. Of course the court does not wish for a moment to be understood as approving any such conduct on defendant's part, if in fact it has occurred and if such is shown to occur in the future, the court will expect to deal harshly with defendant and its counsel.

GENUINE PARTS COMPANY v. FEDERAL TRADE COMMISSION[*]

No. 30884—F.T.C. File No. 671 0673

(Court of Appeals, Fifth Circuit, July 21, 1971)

1. In Administrative Law Principles of *Escobedo* v. *Illinois* Do Not Apply

   Principles of *Escobedo* v. *Illinois* do not apply in field of administrative law.

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[*] Reported in 445 F.2d 1382.

2. **Investigative Proceedings and Adjudicative Proceedings Though Both Administrative Are Separate and Distinct**

   Although it is possible to view investigative proceedings and adjudicative proceedings as merely constituent parts of administrative enforcement process, they are separate and distinct proceedings serving different functions and entitling parties to different rights under due process clause.

3. **Party Investigated May Not Contest Discovery and Production of Evidence as He May in Adjudication**

   Party under investigation by agency may not contest discovery and production of evidence in same manner he may contest use of evidence in adjudication by proper objection, by introduction of other evidence, and other safeguards traditional in adversary proceedings.

4. **Procedural Safeguards of Due Process Unavailable Until FTC Issues and Serves Complaint**

   There is no shift from investigative to adjudicative stage of FTC proceeding until complaint is issued and served by FTC on party charged, and until that point is reached procedural safeguards required by due process in adjudicative proceeding are unavailable.

5. **When No Complaint Issued Auto Parts Distributor Not Entitled To Employ Discovery Procedures To Determine Nature of Inquiry**

   Automobile parts distributor ordered to file special report was not entitled to employ discovery procedures to determine if FTC contemplated adjudication rather than mere investigation with respect to activities of distributor, where no complaint had been issued or served by FTC.

6. **Administrative Agency Must Meet Test of Reasonableness**

   Investigation by administrative agency must meet test of reasonableness.

7. **FTC Investigation May Be Objected to on Grounds of Oppressiveness or as Burdened Compliance**

   Investigation by FTC to determine if there is reason to believe there has been violation of antitrust laws may be objected to on grounds of oppressiveness and as requiring unreasonably burdened compliance.

8. **Compliance With Order To Show Its Relations With Jobbers and Suppliers Not Unduly Burdensome on Auto Parts Distributor**

   Automobile parts distributor under investigation by FTC could be required to provide information as to its relationship with jobbers and suppliers, and compliance with order was not shown to be unduly burdensome.

9. **Person Ordered To File Special Report May Seek Review in Action for Declaratory Judgment After FTC Serves With Notice of Default**

   Person under FTC order to file special report has right to seek review by way of action for declaratory judgment after FTC serves it with notice of default but before statutory penalty for failure to comply begins to accrue and without necessity of awaiting action by FTC seeking judicial enforcement of order by way of injunction.

10. **Failure To Exhaust Administrative Remedies Did Not Preclude Action on Submission of Special Report**

    Failure of corporation under FTC investigation to exhaust administrative remedies did not, in view of uncertainty as to administrative remedy, preclude commencement of action to contest FTC order requiring submission of special report.

11. Stay of Statutory Penalty Not an Abuse of Discretion Where District Court Limited Order Requiring Special Report

Where district court found it necessary to limit FTC order requiring special report by automobile parts distributor in order to avoid any unreasonable burdensomeness, stay of statutory penalty was not abuse of discretion.

(The syllabus, with substituted captions, is taken from 445 F.2d 1382)

On appeal court held auto parts distributor not entitled to employ discovery procedures where no complaint had been issued, it could be required to give information regarding its jobbers and suppliers, and compliance with order not unduly burdensome. Affirmed.

Alex P. Gaines, *John K. Train, III*, Atlanta, Ga., *John H. Brebbia*, Washington, D.C., for appellant; *Alston, Miller & Gaines*, Atlanta, Ga., of counsel.

John W. Stokes, Jr., U.S. Atty., Atlanta, Ga., *Charles C. Moore, Jr.*, Federal Trade Commission, Washington, D.C., *Alan S. Rosenthal*, *Raymond D. Battocchi*, Attys., Dept. of Justice, Washington, D.C., *L. Patrick Gray, III*, Asst. Atty. Gen., for appellees; *Joseph Martin, Jr.*, Gen. Counsel, *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, of counsel.

Before Gewin, Bell and Morgan, *Circuit Judges*.

Lewis R. Morgan, *Circuit Judge:*

This is an appeal from an order of the District Court for the Northern District of Georgia directing the appellant Genuine Parts Company to comply with an Order to File a Special Report issued by the Federal Trade Commission (hereafter, the Commission or the F.T.C.) pursuant to a resolution of the Commission, dated December 18, 1967, authorizing a non-public investigation of Genuine Parts under Section 6 of the Federal Trade Commission Act, 15 U.S.C. § 46 (1963) (hereafter, the Act),[1] to determine whether there was reason to believe Genuine Parts had violated the antitrust laws in making certain acquisitions and corporate mergers. The district court's opinion is reported at 313 F. Supp. 855. The district court later amended its order and stayed the accrual of the penalties imposed for failure to respond to a special report order within thirty days after notice of default, under Section 10 of the Act, 15 U.S.C. § 50 (1963),[2] "pending final outcome of any appeal which may be taken from this order" and staying the judgment pending appeal insofar as it represents a judgment for enforcement of the Commission's order. The Commission cross-appeals from this portion of the order.

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[1] Section 6 provides in relevant part:

The commission shall also have power—***

(b) To require, by general or special orders, corporations engaged in commerce, * * * to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

Genuine Parts is the largest warehouse distributor of automotive parts in the country, with annual sales in 1967 in excess of $204,000,000. It operates 35 warehouse distributor outlets in 22 states. A warehouse distributor such as Genuine Parts purchases automotive parts from manufacturers and then resells them to jobbers. Jobbers in turn stock a smaller inventory of parts and resell them to repair garages and service stations for use in maintenance or repair work for the ultimate consumer. Genuine Parts also operated 185 jobber stores or outlets scattered among the states in which its warehouses were located and rebuilt a limited number of types of automotive parts at three other locations.

The order to file a special report here in question was issued by the F.T.C. on December 28, 1967, in conjunction with an investigation of the automotive parts industry and was served on Genuine Parts on January 2, 1968. Genuine Parts was required to file its answer with the Commission within 90 days after the date of issuance. The order contains about sixty questions divided into eight specifications, numbered I to VIII.[3] These specifications are further broken down into lettered questions. On March 27, 1968, Genuine Parts filed a report with the F.T.C. in which it responded to nineteen of the sixty questions, offered to respond to two other questions if they would be received *in camera* and treated as confidential. Genuine Parts offered no response [4] to the remaining thirty-nine questions, notwithstanding the preface of the F.T.C. order, which provided:

> * * * If any question cannot be answered fully, give such information as is available to you, and explain why your answer is incomplete and the source from which a more complete answer may be obtained. If books and records which

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[2] Section 10, 15 U.S.C. § 50, provides:

* * * If any corporation required by sections 41–46 and 47–58 of this title to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure * * *.

[3] The titles of the eight specifications are: I, Corporate Background; II, Overall Operations; III, Warehouse Distributorships; IV, Wholly Owned Jobber Stores; V, Dependent Jobbers; VI, Rebuilding Operations; VII, Procurement; and VIII, Relations with NAPA (an association of parts jobbers).

[4] As to each of these questions, the reply merely stated: "[No response]".

provide accurate answers are unavailable, enter your best estimates, indicating the sources or bases of your estimates. * * *

Instead of giving any explanation for its failure to respond to these questions, it stated in its report:

> Genuine Parts Company respectfully refuses to respond to certain items of the Order on grounds, among others, that response to these items would be unduly burdensome; that the information sought by such items is irrelevant; and that the Order, insofar as it contains said items to which no response is made, is beyond the Commission's authority.

There were no specific objections in the report to any of the thirty-nine unanswered questions. At a conference with Commission representative on April 2, 1968, counsel for Genuine Parts informed the officials present that Genuine Parts would provide responses to the unanswered questions of the order only when ordered to do so by court order.

On July 26, 1968, about four months after the partial response to the special report order had been filed with the F.T.C. and Genuine Parts still not having replied to any of the unanswered questions, the Commission served upon it a notice of default, informing Genuine Parts that it was in default in failing to provide much of the information required by the December 28, 1967, order, and that if its failure continued it would become subject to a penalty of $100 for each day after the thirtieth day of the notice of default.[5] The notice specified each of the unanswered questions and then noted that Genuine Parts' answers to some of the other questions might be deficient in specified respects.

On August 14, 1968, Genuine Parts brought this action for declaratory and injunctive relief. By its complaint, Genuine Parts alleged that the Commission's order to file a special report constituted a denial of due process by requiring responses that were oppressive, unreasonably burdensome, irrelevant and beyond the scope and purpose of the investigation the Commission had undertaken, and sought a declaration that it need not comply with provisions of the Order and that any action the Commission might take to impose the statutory penalty of Section 10 would be illegal. Genuine Parts also sought what it termed a preliminary injunction to prevent the accrual of the penalty pending the resolution of the matter.

On August 21, 1968, a hearing was held before the district court on the preliminary injunction, and, although neither the court nor the F.T.C. had been apprised of Genuine Parts' specific objections to the unanswered questions, the court entered an order "that no statutory penalties shall accrue under the provisions of Section 10 of the * * * Act pending further order of this Court." Specific objections to the unanswered questions were first filed with the F.T.C. and the court on September 18, 1968. Upon suggestion of the district court, negotiations were entered into between the F.T.C. and counsel for Genuine Parts. These negotiations, however, proved fruitless and the F.T.C. filed a counterclaim seeking enforcement of its order of November 13, 1968.

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[5] See n. 2, *supra*.

The matter was set for hearing before the district court on January 6, 1969. At the hearing, however, Genuine Parts stated its intention to amend its complaint and file a motion for discovery. Genuine Parts was given until March 3rd to file its motion for discovery. The stated reason for the motion for discovery was to determine whether the F.T.C.'s actions toward Genuine Parts had shifted from the "investigative to the adjudicative stage". Genuine Parts based its belief that the mode of the proceeding before the Commission had shifted on an article in the October, 1968 issue of *Motor Age*, a trade magazine, which reported an interview with Mr. Paul Teetor, the F.T.C. counsel in charge of the Genuine Parts investigation, and stated that "cases * * * have been prepared" against four firms, including Genuine Parts, and that these firms were "caught in the Commission's web". In response to this motion, the F.T.C. filed three affidavits, one from Mr. Teetor and the two others from members of the F.T.C. staff involved in the Genuine Parts investigation, stating that the F.T.C. had not made a decision to issue a complaint against Genuine Parts and that no complaint had been prepared or drafted by any member of the F.T.C. staff.

On May 8, 1968, the district court denied the motion of Genuine Parts for discovery, stating that it saw "no way in which the depositions requested by [Genuine Parts] could be relevant to the constitutionality of the 'Order to File Special Report' which is the subject matter of the complaint", and that the time for such discovery would be after the Commission filed a complaint in an adjudicative proceeding. Genuine Parts filed a motion to amend this order or for the allowance of an interlocutory appeal under 28 U.S.C. § 1292(b). The F.T.C. opposed the motion to amend and filed a motion for summary judgment. The motion to amend was denied on August 7, 1969, and on November 4, 1969, a hearing was held on the merits of the order to file a special report.

On May 21, 1970, the district court entered a final order on the issues raised by the complaint. In summary, the final order held that Genuine Parts did not have to comply with the order to the extent that the underlying records necessary to respond to some of the questions were no longer in existence; defined certain disputed words and phrases used in the order; and ordered the remaining unanswered questions to be answered, either precisely as they had been presented by the F.T.C. or on the terms stated in the order.

On June 1, 1970, Genuine Parts filed a motion to alter or amend the May 21st order so as to delay the answers to certain questions until the F.T.C. had received other responses and demonstrated a need for the additional responses to the satisfaction of the district court; to enjoin the accrual of statutory penalties pending the exhaustion of appellate relief; and, insofar as the order constituted a judgment on the F.T.C. counterclaim for enforcement, that such judgment be stayed pending resolution of all appellate proceedings and subsequent district court proceedings.

On August 3, 1970, the district court denied the motion to alter or amend, but ordered that no penalties would accrue pending final outcome on appeal and stayed its judgment insofar as the order represents a judgment for enforcement of the Commission's order pending appeal. Genuine Parts subsequently filed notice of appeal and a cross-appeal was filed by the Commission.

The appellant Genuine Parts makes two main contentions: First, it contends that the district court erred in denying its motion to discover from the Commission whether the proceedings against it had shifted from the investigative to the adjudicative stage, so as to entitle it to the procedural safeguards provided for by the Commission's rules in adjudicative proceedings, notwithstanding the fact that no complaint had been filed against it by the F.T.C. Secondly, it contends that the district court erred in ordering it to respond to the question set out in Specifications V and VII, Sections (F), (G), (H), and (I), of the Commission's order on the ground that the questions are unreasonably burdensome, not reasonably relevant to the investigation and outside of the scope of the Commission's authority. The Commission, in its cross-appeal, contends that the district court erred in enjoining the accrual of penalties under Section 10 of the Act.

I. *Discovery.*

Genuine Parts takes the position in this appeal that when an F.T.C. investigation is no longer a general inquiry, but has begun to focus, and the Commission is in the process of gathering evidence to be used in an agency process for the formulation of an order in an adjudicative proceeding, prior to the formal initiation of that proceeding through the issuance and service of a complaint, the adjudicative process *substantively* commences and from that point forward the requirements of due process demand that further investigation be conducted pursuant to the procedural rules established by the Commission for adjudicative hearings. Cf. *Escobedo* v. *Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). On this basis, Genuine

Parts seeks the right to discover from the Commission facts which would enable the district court to find that the adjudicative process had, in substance, begun, and order the Commission to conduct any subsequent investigation according to the discovery rules applicable to adjudicative proceedings.[6]

[1] We find this novel attempt to engraft the principle of *Escobedo* into the field of administrative law without merit.

[2] Although it is quite possible to view investigative proceedings and adjudicative proceedings as merely constituent parts of the administrative enforcement process, they have long been recognized as separate and distinct proceedings serving different functions and entitling parties to different rights under the due process clause of the Fifth Amendment. In *Hannah* v. *Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960), the Supreme Court held that the procedures used by the Civil Rights Commission, a purely investigative body, did not violate due process. In so doing the Court observed:

> A typical agency is the Federal Trade Commission. Its rules draw a clear distinction between adjudicative proceedings and investigative proceedings. 16 C.F.R., 1958 Supp., § 1.34. Although the latter are frequently initiated by complaints from undisclosed informants, id., §§ 1.11, 1.15, and although the Commission may use the information obtained during investigations to initiate adjudicative proceedings, id., § 1.42, nevertheless, persons summoned to appear before investigative proceedings are entitled only to a general notice of "the purpose and scope of such investigation," id., § 1.33, and while they may have the advice of counsel, "counsel may not, as a matter of right, otherwise participate in the investigation." Id., § 1.40. The reason for these rules is obvious. The Federal Trade Commission could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial. We have found no authorities suggesting that the rules governing Federal Trade Commission investigations violate the Constitution, and this is understandable since any person investigated by the Federal Trade Commission will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding, * * * Id., 446, 80 S.Ct., 1517.

See also, *F.T.C.* v. *Cinderella Career and Finishing Schools, Inc.*, 1968, 131 U.S.App.D.C. 331, 404 F.2d 1308. A further indication of the distinction recognized between investigative and adjudicative proceedings is the fact that "both industrywide investigations and adjudicative proceedings, involving the same general subject matter may be instituted and conducted simultaneously" and "that the exercise of such dual functions by an administrative agency does not constitute a deprivation of due process". *Lehigh Portland Cement Company* v. *F.T.C.*, E.D.Va., 1968, 291 F. Supp. 628, *aff'd. per curiam* 4 Cir., 1969, 416 F.2d 971(1).

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[6] See Federal Trade Commission Rules of Practice and Procedure, 16 C.F.R. §§ 3.31–3.37, 15 U.S.C.A. (App.Supp.1971).

[3] The purpose of an investigative proceeding conducted by an administrative agency "is to discover and produce evidence not to prove a pending charge or complaint, but upon which to make one if, in the [agency's] judgment, the facts thus discovered should justify doing so". *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 201, 66 S.Ct. 494, 501, 90 L.Ed. 614 (1946). Thus, granting that to be effective an administrative investigation must focus on specific parties and particularized matters "to get information from those who best can give it and who are most interested in not doing so," *United States* v. *Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950); such an investigation serves a function which is directly related to, but at the same time distinct from, the function of an adjudication. An investigation discovers and produces evidence; an adjudication tests such evidence upon a record in an adversary proceeding before an independent hearing examiner to determine whether it sustains whatever charges are based upon it. A party under investigation may not contest the discovery and production of evidence in the same manner he may contest the use of that evidence in an adjudication by proper objection, by the introduction of other evidence, and the other safeguards traditional to an adversary proceeding under our system. An investigation does not determine guilt or innocence; that is done at the adjudication, and thus it is there the whole plethora of due process rights designed to insure the fairness of such a determination come to bear.

Aside from this, there are grave policy considerations that militate against allowing the process of administrative investigation to become adversary in nature, even after it becomes specific and particularized. These considerations were succinctly stated by the Supreme Court in *Hannah* v. *Larche*, *supra*, 363 U.S. at 443–444, 80 S.Ct. at 1515, where it stated:

> * * * [The investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings * * *. Fact-finding agencies * * * would be plagued by the injection of collateral issues that would make the investigation interminable. * * * This type of proceedings would make a shambles of the investigation and stifle the agency in its gathering of facts.

[4, 5] We therefore hold that there is no shift from the investigative to the adjudicative stage until a complaint is issued and served by the Commission on the party charged, 16 C.F.R. § 3.11(a) (1971), and until that point is reached the procedural safeguards required by due process in an adjudicative proceeding are unavailable.

II. *Objections to Order to File Special Report.*

Genuine Parts contends that two Specifications of the Special Report Order were not sufficiently limited by the district court in its order of May 21, 1970. Of these, Specification V seeks information concerning the relationship between Genuine Parts and what the Order terms dependent jobbers; and Specification VII, of which Genuine Parts objects only to §§ (F) through (I), deals with Genuine Parts' relationship with its suppliers.[7] The district court clarified several of the questions contained in these specifications and limited the response required by others.[8]

Genuine Parts argues that Specification V is too broad in scope and that any attempt to respond would be unreasonably burdensome because it would be required to report all of the detailed information called for on each jobber customer falling within any of the categories stated in the Specification's definitions of "dependent jobber". Genuine Parts makes similar objection to the controverted sections of Specifications VII on the grounds that it would be required to report each instance of financial or other assistance given to it or its jobber customers by suppliers named in response to the specification. It also objects to the descriptions used in Specification VII, such as "sales promotional or other kinds of services", and "advertising allowances".

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[7] The challenged specifications provide as follows:

V. *Dependent Jobbers*—By supplying warehouse (identifying same), report the following information for each and every jobber customer of such warehouse (1) whose business on December 31, 1967 was partially owned, directly or indirectly by Genuine Parts, or (2) who on December 31, 1967 was indebted for any reason either to Genuine Parts or to a third party whose debt was guaranteed in any way by Genuine Parts (except indebtedness for rent due less than 30 days or merchandise bought on open account within the previous 60 days) or (3) who on December 31, 1967 had possession or custody of any merchandise consigned, leased or bailed to him by Genuine Parts; or (4) who on December 31, 1967 was renting his store and/or fixtures and/or equipment from Genuine Parts or from a third party whose rent was guaranteed by Genuine Parts; or (5) whose store was purchased by him from Genuine Parts and/or was subject to any kind of purchase or repurchase options in favor of Genuine Parts.

A. Name and address of jobber's business.

B. Genuine Parts total 1967 sales to this jobber (in dollars) and its approximate share (%) of his total purchases.

C. Genuine Parts 1967 sales of automotive parts, accessories and equipment to this jobber (in dollars) and its approximate share (%) of his total purchases of such products.

D. The percentage of equity in this jobber's business (whether in common or preferred stock, capital account or other) owned by Genuine Parts on December 31, 1967.

E. The total indebtedness owing from this jobber to Genuine Parts or guaranteed by it on December 31, 1967.

F. The portions (in dollars) of total indebtedness owing from this jobber to Genuine Parts or guaranteed by it on December 31, 1967 which arose out of the following causes:

(1) Open account for merchandise purchased more than 60 days but less than 120 days previously.
(2) Open account for merchandise purchased more than 120 days previously.
(3) Rent for any period ending more than 30 days but less than 90 days previously.
(4) Rent for any period ending more than 90 days previously.
(5) Loan from Genuine Parts.
(6) Loan guaranteed by Genuine Parts.
(7) Purchase price of jobber store and/or land;
(8) Purchase price of store fixtures and/or equipment.
(9) Other (specify).

G. The average interest rate charged this jobber during 1967 Genuine Parts or by the creditor guaranteed payment by Genuine Parts as interest on each class of indebtedness (1 thru 9) listed in answer to Question F above.

H. The dollar value of all merchandise belonging to Genuine Parts but by consignment, lease or bailment in the possession or custody of this jobber on December 31, 1967.

I. The dollar value of all merchandise belonging to the manufacturer or other supplier thereof but by reconsignment, sublease or double bailment through Genuine Parts in the possession or custody of this jobber on December 31, 1967.

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[7] (Continued)

J. The average monthly rental paid by this jobber during 1967 to Genuine Parts or to a lessor whose rent was guaranteed by Genuine Parts and (where such rental payments existed) the undepreciated book value of the rental property.

K. The price paid by this jobber for this store, including land, if purchased from Genuine Parts, and (where such purchase existed) the undepreciated value of the property purchased (on Genuine Parts' books just prior to purchase by this jobber).

* * * * * * *

VII. *Procurement.*—List all Genuine Parts' suppliers of automotive parts, accessories, and equipment including those affiliated with it, from whom its total net purchases were $100,000 or more during 1967 and for each such supplier report the following information on a separate page:

* * * * * * *

F. The amount of all sales promotional or other kinds of services, including, but not exclusively, the providing of premiums, prizes, free goods, bargain goods, cabinets, or other sales equipment and catalogues, any of which were provided to or for Genuine Parts or its jobber customers by or in behalf of this supplier during 1967, broken down by kinds of services rendered.

G. The amounts of all advertising allowances or payments of money by or in behalf of this supplier to or for Genuine Parts or its jobber customers during 1967 which are not included in your answer to the next paragraph (H) broken down by kinds of payments made.

H. Genuine Parts total dollar receipts (net) from this supplier for all sales by Genuine Parts of (1) all rebuilt automotive parts, and (2) all other goods and services sold to this supplier in 1967 broken down by kinds of products sold and services performed.

I. The nature and dollar value of any and all other dealings between Genuine Parts and this supplier during 1967 not covered in your answers to paragraphs F. G, and H above.

* * * * * * *

[8] With regard to Specification V, the district court took the following action:

(1) Genuine Parts need not attempt to identify jobbers who were in possession of any consigned merchandise if it "affirmatively represents in its response that the only consignment arrangement involving it and its jobbers was the battery program, and that such program was generally available to jobber customers, then Genuine Parts need not attempt to identify those jobbers who had batteries in their possession pursuant to the consignment program."

(2) "Clause 5 of the introductory paragraph of Specification V will be enforced in the conjunctive sense but not in the disjunctive * * *."

(3) "Specification V, §§ B, C, must be complied with insofar as sales figures are concerned but will be enforced as to percentage figures only to the extent that such figures are known to Genuine Parts; if the figures are not known the answer should so state."

(4) "Specification V, § F need not be answered at the present time; if after Genuine Parts has answered V, § E the Commission still wishes to have an answer to V, § F, Genuine Parts must either provide the answer or, at Genuine Parts' option, permit the Commission to obtain the information from Genuine Parts, files."

(5) "Specification V, § G can be answered giving the average interested rate and any abberations therefrom, as to the various classes of indebtedness but need not specify the interest charged each customer listed in the answer to V, § A."

(6) "Specifications V, § H and V, § I should be answered if Genuine Parts has the information in its files. It need not, however, survey all jobbers in order to obtain the information."

(7) "Specifications V, § J and V, § K contain the word 'value' which can be given either in terms of cost or market value provided it is clear which is being used."

Genuine Parts responded to Specification VII after the institution of this action, but the Commission was dissatisfied with the adequacy of the response. The matter was briefed by both sides, and with respect to the sections here in issue, §§ F through I, the district court ordered:

"* * * that in answering §§ F and G Genuine Parts answer insofar as it has knowledge of such preferential services and allowances even though it has no control over them; and that Genuine Parts answer § I of the specification which it heretofore has completely ignored. * * * if the information is not available or already has been supplied in full Genuine Parts should so state."

Genuine Parts Company v. *F.T.C.*, *supra*, 313 F.Supp. 858–859.

[6] The chief limitation on an investigation by an administrative agency is that it must meet the test of reasonableness. *Oklahoma Press Publishing Co.* v. *Walling, supra,* 327 U.S. at 208, 66 S.Ct. 494 [9] In *United States* v. *Morton Salt Company, supra,* the Supreme Court set out the standard by which Section 6 investigations conducted by the F.T.C. are to be judged:

> * * * [I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably revelant * * *. *Id.* at 652, 70 S.Ct. at 369.

At the same time the Court recognized the extreme breadth that must be accorded the Commission in conducting such an investigation.

> * * * Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest. *Id.* at 652, 70 S.Ct. at 369.

[7, 8] While an investigation under Section 6 may be objected to on the ground of oppressiveness and as requiring an unreasonably burdensome compliance, *United States* v. *Associated Merchandising Corporation,* S.D.N.Y., 1966, 261 F.Supp. 553, see *F.T.C.* v. *Hunt Foods and Industries, Inc.,* S.D. Calif., 1959, 178 F.Supp. 448, *aff'd.* 9 Cir., 1961, 286 F.2d 803, *cert. den.* 365 U.S. 877, 81 S.Ct. 1027, 6 L.Ed.2d 190, we do not think such an objection can be sustained in this case. It is clear that the demand contained in the F.T.C. Order here in question is within the authority of the Commission, is not too indefinite, and is reasonably relevant to the purpose of the investigation. Indeed, the portions of the Order here objected to go to the very heart of the inquiry—the relationship between Genuine Parts and its jobbers on the one hand and its suppliers on the other. When the degree of burdensomeness necessarily inherent in the preparation of a full response to the Order [10] is considered in light of the pertinent responses the objected portions of the Order will produce, we are unable to hold that the burden of compliance is unreasonable. We therefore hold that Genuine Parts must comply with the controverted portions of the

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[9] There the Supreme Court stated:

Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, insofar as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described", if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable. 327 U.S. at 208, 66 S.Ct. at 505.

[10] The president of Genuine Parts testified that it would require 1500 man hours to respond to the unanswered questions. This is less than half the time already expended in preparing the incomplete report.

Order, as limited by the district court, as well as those portions remaining unanswered which were not objected to in this appeal.

III. *Stay of Statutory Penalty.*

In contending that the district court erred in granting Genuine Parts a stay of the accrual of the penalty imposed by Section 10 of the Act upon failure to comply with an order to file a special report thirty days after issuance of a notice of default, the Commission advances two arguments: first, that the stay is void because Genuine Parts failed to exhaust its administrative remedies, relying on *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240, *reh. den.* 368 U.S. 972, 82 S.Ct. 437, 7 L.Ed.2d 401 (1961), and *United States* v. *Morton Salt Company*, *supra*; and, second, that Genuine Parts failed to make any of the showings required to obtain an injunction of an administrative sanction, relying on *Virginia Petroleum Job. Ass'n.* v. *Federal Power Com'n.*, 1958, 104 U.S.App.D.C. 106, 259 F. 2d 921, 925. Genuine Parts counters by contending that under *St. Regis Paper* persons served with an order to file a special report by the F.T.C. have the right to challenge that order in federal court after the notice of default has been served but before penalties begin to accrue under Section 10, and that such persons are entitled to a stay of the accrual of penalties during the pendency of such challenge.

[9] It is clear from both *United States* v. *Morton Salt Company*, *supra*, and *St. Regis Paper Co.* v. *United States*, *supra*, that the Supreme Court has sanctioned, at least in *dicta*, the manner being used here to review an order to file a special report, and that a person under such an order has the right to seek review by way of an action for a declaratory judgment after the Commission serves it with a notice of default, but before the statutory penalty for failure to comply begins to accrue and without the necessity of awaiting action by the Commission seeking judicial enforcement of the order by way of injunction.[11] See *Continental Baking Company* v. *Dixon*, D.Del., 1968, 283 F.Supp. 285. But see *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U.S. 160, 47 S.Ct. 553, 71 L.Ed. 978 (1927), and *Anheuser-Busch, Incorporated* v. *F.T.C.*, E.D. Mo., 1965, 242 F. Supp. 122, which hold that a person under an order to file a special report cannot seek judicial review prior to the issuance of a notice of default, triggering the forfeiture provisions of Section 10.

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[11] In *Morton Salt* the Court said:

It is argued that if we sustain this use of § 6, the power will be unconfined and its arbitrary exercise subject to no judicial review or control, unless and until the Government brings suit, as here, for penalties. The Government, it is said, may delay such action while ruinous penalties accumulate and defendant runs the risk that his defenses will not be sustained. However, we are not prepared to say that courts would be powerless if after an effort to clarify or modify such an order it still is considered to be so arbitrary as to be

These cases, however, leave in doubt the two issues we face here: whether the person seeking to contest the Commission's order must exhaust his administrative remedies, if indeed any are or were available, and whether, and under what circumstances, such a person is entitled to a stay of the penalty pending review of the contested order.

A. *Exhaustion of Remedies.*

[10] It is not contested that at the time this suit was filed the Commission's Rules of Practice and Procedure did not provide for any administrative procedure to contest the issuance or the terms of a special report order. Subsequently, and apparently in response to this litigation, the Commission amended its rules to provide that a person served with a special report order may file a motion with the Commission to limit or quash the order within 10 days after the special report order was served. 16 C.F.R. § 2.12(b), 15 U.S.CA. (App. Supp. 1971). Notwithstanding the absence of such a rule when this lawsuit was commenced, the Commission asserts that there was

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[1] (Continued)

unlawful and the Government pursues a policy of accumulating penalties while avoiding a judicial test by refusing to bring action to recover them. Since we do not think this record presents the question, we do not undertake to determine whether the Declaratory Judgments Act, [28 U.S.C.A. §§ 2201, 2202], the Administrative Procedure Act, or general equitable powers of the courts would afford a remedy if there were shown to be a wrong, or what the consequences would be if no chance is given for a test of reasonable objections to such an order. Cf. *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596. It is enough to say that, in upholding this order upon this record, we are not to be understood as holding such orders exempt from judicial examination or as extending a license to exact as reports what would not reasonably be comprehended within that term as used by Congress in the context of this Act. 338 U.S. at 654, 70 S.Ct. at 370.

Similarly, in *St. Regis Paper*, the Court quoted from *Morton Salt*, stating:

> Upon the commencement of the action by the Government, petitioner might have then sought a stay, as it did when the decision went against it in the Court of Appeals.[13] Moreover, after the entry of the notices of default by the Commission, petitioner might have itself sought relief before the § 10 forfeitures began to accrue instead of waiting for the Attorney General to sue for their collection. As was said in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 654, 70 S.Ct. 357, 94 L.Ed. 401, 417 (1950), "we are not prepared to say that courts would be powerless" to act where such orders appear suspect and ruinous penalties would be sustained pending a good faith test of their validity. There the record did not present and the Court did not determine "whether the Declaratory Judgments Act, the Administrative Procedure Act, or general equitable powers of the courts would afford a remedy if there were shown to be a wrong, or what the consequences would be if no chance is given for a test of reasonable objections to such an order." Similarly, as this matter comes here now, the petitioner has pursued none of these remedies, and we could not therefore say that it had "no chance" to prevent the running of the forfeiture pending a test of the validity of the orders. Cf. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S.Ct. 67, 97 L.Ed. 54, 58 (1952); *Natural Gas Pipeline Co.* v. *Slattery* 302 U.S. 300, 310, 58 S.Ct. 199, 82 L.Ed. 276,281 (1937). We note, however, that the Declaratory Judgments Act, 28 U.S.C. § 2201, provides that "In a case of actual controversy within its jurisdiction * * * any court * * * may delcare the rights * * * of any interested party seeking such declaration. * * *" This appears sufficient to meet petitioner's needs.

368 U.S. at 226-227, 82 S.Ct. at 299.

> [13] Petitioner unsuccessfully moved in the Court of Appeals for a postponement of the effective date of the Commission's orders. Coming when it did, however, we cannot say that such denial was an abuse of discretion. Cf. *Virginian R. Co.* v. *United States*, 272 U.S. 658, 47 S.Ct. 222, 71 L.Ed. 463 (1926). Furthermore, a short while thereafter we stayed the accumulation of further penalties when the petition for writ of certiorari was granted. If petitioner had unsuccessfully sought a stay in the District Court, a different question might have been presented. That action, after final judgment, could have been reviewed both in the Court of Appeals and here.

an informal procedure of which Genuine Parts ought to have been aware, which would have accorded it the same right of review now accorded by § 2.12(b) any time before the issuance of the notice of default, and that the failure to exhaust this remedy barred it from seeking judicial review of the order, much less a stay of the statutory penalty.

In *Morton Salt, supra,* the Court refused to consider objections to the terms of a special report order, saying:

> If respondents had objected to the terms of the order, they would have presented or at least offered to present evidence concerning any records required and the cost of their books, matters which now rest on mere assertions in their briefs. The Commission would have had opportunity to disclaim any inadvertent excesses or to justify their demands in the record. We think these respondents could have obtained any reasonable modifications necessary, but, if not, at least could have made a record that would convince us of the measure of their grievance rather than ask us to assume it. 338 U.S. at 653–654, 70 S. Ct. at 369.

While this suggests the possibility of a procedure by which to make objections to the terms of an order before the Commission, it must be noted that the whole thrust of the controversy in *Morton Salt* was whether the Commission had authority to issue the order in the first place. No objection had been raised to the terms of the order until the case was before the Supreme Court. In this light the above-quoted passage from the opinion is at best ambiguous and could refer to the lack of a district court record on the issue, as well as the lack of any prior administrative proceeding. Likewise, in *St. Regis Paper, supra,* the existence of such a procedure is suggested by the fact that the party under investigation filed a motion to vacate several special report orders prior to seeking judicial review and the Commission temporarily suspended the order while the motion was under consideration.[12] However, there is nothing in the opinion to indicate that such a motion was a necessary precondition to judicial review or that such motions to vacate were part of a well-established informal procedure before the Commission, rather than merely a good faith effort to avoid litigation by informal means.

Section 3(a) of the Administrative Procedure Act, now codified at 5 U.S.C. § 552(a) (1967), provides that "* * * [e]ach agency shall separately state and currently publish in the Federal Register for the guidance of the public—* * * (C) rules of procedure * * *" and that "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." See *United States* v. *Morton Salt Company, supra,* 338 U.S. at 644, 70 S.Ct. 357. Even though the record before us indicates that Genuine Parts made every effort to avoid a timely presentation of its specific objections to the Commission, and in doing so in all probability unduly lengthened and complicated the present litigation, this Court is hesitant, on the authority here before us, to hold that Genuine Parts was barred from seeking judicial review as a result of its failure to exhaust an uncertain informal remedy, at the time unreported in the Federal Register. It must be noted, however, that in light of the Commission's new Rule § 2.12(b) this decision cannot offer solace to others of like mind who wish to "by-pass" the Commission in the future.

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[12] In *St. Regis Paper*, the Court simply noted:

* * * On motion of petitioner, the Commission temporarily suspended these orders while it considered petitioner's motion that they be vacated. On May 6, 1959, the motion to vacate was denied, and petitioner was directed to comply by May 28, 1959. * * *

368 U.S. at 214, 82 S.Ct. at 293.

B. *Availability of a Stay*

In *St. Regis Paper, supra,* the Supreme Court indicated that a stay could have been sought at the commencement of the action in the district court (brought by the Commission to enforce its special report order and for the forfeiture of accrued penalties) and, although it refused to hold that the court of appeals abused its discretion in denying a stay upon appeal, the Court itself stayed the accumulation of further penalties when it granted the petition for writ of certiorari. See n. 11, *supra.* Thus, it is clear that a stay of the accrual of Section 10 penalties is at least available in the type of review proceedings contemplated by *St. Regis Paper.* What is not clear is under what circumstances a person challenging a special report order is entitled to a stay. In discussing the availability of a stay in *St. Regis Paper,* the Court said: "we are not prepared to say that courts would be powerless 'to act where such *orders appear suspect* and ruinous penalties would be sustained pending a good faith test of their validity' " * * * "for a test of reasonable objections to such an order." (Emphasis supplied.) 368 U.S. at 226–227, 82 S.Ct. at 300. The implication is that a stay of the accrual of Section 10 penalties would be appropriate whenever the challenged order "appears suspect" and the review seeks a "good faith test" of "reasonable objections" to the order. Such a stay was issued in *Continental Baking Company* v. *Dixon, supra,* 283 F.Supp. at 288, although the district court did not discuss the grounds upon which it granted the stay, except to cite *St. Regis Paper.*

[11] It is thus left to determine whether the district court abused its discretion in granting the stay under the standard set out above. See *St. Regis Paper Co.* v. *United States, supra,* 368 U.S. at 226, n. 13,

82 S.Ct. 289. The Commission strongly argues that this action was brought in bad faith for the purpose of delaying any potential adjudication that might come about as a result of the information elicited by the special report order. Upon the record before us, such a contention is not without support. No real effort was made by Genuine Parts to obtain relief directly from the Commission to limit the questions contained in the order by informal discussion and some of the objections, particularly those concerning the definition of terms,[13] seem nothing less than picayune. However, the district court found it necessary to limit the order in certain respects in order to avoid any unreasonable burdensomeness, and for that reason alone, we are unable to say that it abused its discretion in granting the stay under what we understand to be the logic of *St. Regis Paper*. Now that the issues presented by Genuine Parts have finally, after inordinate delay, been decided, however, the stay must be dissolved upon the issuance of the mandate of this court.

The judgment of the district court is hereby in all things affirmed. Affirmed.

S.O.U.P., INC. v. FEDERAL TRADE COMMISSION*

No. 24476—F.T.C. Docket C–1741

(United States District Court, District of Columbia, July 27, 1971)

1. CORPORATION NOT ALLOWED TO PROCEED IN FORMA PAUPERIS IN SPITE OF PUBLIC INTEREST WHERE COSTS NOT LIKELY TO EXCEED $100

   Where costs of review proceeding were not likely to exceed $100 and members of corporation were able to pay same, corporation would not be allowed to proceed in forma pauperis notwithstanding good faith of members and their public interest motivation.

2. CONVENIENCE OF CORPORATE FORM DOES NOT JUSTIFY USING IT AS A MEANS OF AVOIDING COSTS AS IF CORPORATION WERE A PAUPER

   Corporate form is convenient, organizational vehicle, but its convenience does not justify turning it into vehicle also for avoiding costs involved in lawsuit as if it were pauper.

(The syllabus, with substituted captions, is taken from 449 F.2d 1142)

On appeal Court held where costs of appeal not likely to exceed $100 and members of firm were able to pay a motion to proceed in forma pauperis was denied.

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*Reported in 449 F. 2d 1142 (1971). For case before Commission, see 77 F.T.C. 664. See also F.T.C. order of Nov. 3, 1972, Docket 8818, Firestone Tire & Rubber Co., 81 F.T.C. 1032, where the Commission ordered payment to S.O.U.P., Inc., as intervenor, those costs it properly substantiates in its Bill of Costs.

[13] For example, Genuine Parts strongly maintained the phrase "automotive parts, accessories and equipment" and the word "franchise" were too indefinite to enable it to even attempt to answer the questions in which they appeared.

Before BAZELON, *Chief Judge*, FAHY, *Senior Circuit Judge*, and WILKEY, *Circuit Judge*.

ORDER

PER CURIAM.

[1] Petitioner S.O.U.P., Inc., a corporation, has filed a motion to proceed in forma pauperis in the above entitled case. At the request of members of the Court, a financial statement of each of the small number of members of the corporation was filed. In light of the statute governing forma pauperis appeals; 28 U.S.C. Section 1915(a), which we are bound to construe reasonably, assuming arguendo that a corporation may proceed in forma pauperis, we think it would be inconsistent with the congressional intent to hold that this corporation should be allowed to proceed in that manner in view of the financial data submitted since it is likely that the costs of proceeding would not exceed $100.00. We think we would not comply with the statute, properly construed in the situation presented, if we granted the application, although in so deciding we appreciate the good faith of applicants and their public interest motivation. Accordingly, it is

Ordered by the Court that petitioner's aforesaid motion for leave to proceed in forma pauperis is denied.

Statement of *Senior Circuit Judge* FAHY in support of the order of the court, in which *Circuit Judge* WILKEY concurs.

[2] SOUP is not prevented by our order from proceeding with the litigation. It can easily arrange for the small item of costs by assessment or voluntary contribution of its members. The corporate form is a convenient, organizational vehicle, but its convenience does not justify turning it into a vehicle also for avoiding the costs involved in a lawsuit as if it were a pauper. The public interest motivating SOUP's members which I join in applauding, does not help make the corporation "a person * * * unable to pay such costs or give security therefor." 28 U.S.C. § 1915(a).

The text of the statute reflects the congressional intent and purpose to enable "person[s]" to obtain exemption, not corporations formed by persons who themselves do not come within the exemption. The statute has the salutary purpose of opening the doors of the courts to poor persons on a basis of equality with the more well-to-do, not to open the doors to "poor" corporations formed by nonpoor members as a convenient form by which to organize and litigate. If the statute is to be enlarged as SOUP contends, I think it should be done by legislation rather than by a strained construction which does not reflect the statute's purposes.

The "time-consuming" responsibility the court has had to assume in this matter, and the "remarkably poor economics" of the court's involvement, referred to by our dissenting colleague, are not the answer to the problem, for the court does not pass over problems which are presented because to decide them consumes judicial resources.

Bazelon, *Chief Judge* (dissenting).

This case presents an important question concerning the right of a corporation to sue without prepayment of costs under 28 U.S.C. § 1915(a) (1970).[1] A majority of this panel has concluded that even if the statute applies to corporations, this petitioner has not made a showing sufficient to warrant in forma pauperis treatment. Because I believe that the statute does apply to corporations and that the petitioner has satisfied all reasonable standards which might be applied to test such applications, I would grant leave to proceed without payment of costs.

Students Opposing Unfair Practices, Inc. (SOUP) is a private, non-profit corporation designed primarily to assist the Federal Trade Commission in "more vigorously protecting the consumers' rights to fair and honest advertising."[2] Pursuant to this goal, SOUP attempted to intervene in an FTC proceeding against the Campbell Soup Company. The case is now before this Court on SOUP's petition for review of an FTC order accepting a consent decree against Campbell. Petitioner challenges both the adequacy of the decree as a remedy for alleged violations of the Federal Trade Commission Act, and the agency's refusal to grant SOUP full rights to intervene in the proceeding before it.

I.

Section 1915(a) provides that a federal court may authorize litigation without prepayment of costs "by a *person* who makes affidavit that he is unable to pay such costs or give security therefor." [Emphasis added.] The statute's reference to "person" does not indicate, however, that the section has no application to corporations. On the contrary, the statutory guidelines for the interpretation of Congressional acts, 1 U.S.C. § 1 (1970), make clear that the term "person" should ordinarily be taken to "include corporations * * * as well as individuals." Moreover, there is no indication in the legislative history of § 1915 that Congress intended to depart from this well-established canon of statutory construction.[3] But my conclusion that § 1915(a) applies to corporations rests on more than this admittedly formal approach to the statute's interpretation. The purpose of the in forma pauperis statute is to insure that indigent parties will not be precluded from litigating significant questions merely because they are unable to pay a relatively small fee. Like an individual, a corporation may lack the means to meet this threshold expense, and thus it too may be barred from the courtroom without regard to the merits of its claim. I can find no reason to believe that Congress's concern for the obstacles facing an indigent litigant extended only to natural persons, and I would therefore hold the statute applicable to corporations.

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[1] The statute provides:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

[2] Petitioner's Memorandum in Support of Motion for Leave to Proceed on Appeal in Forma Pauperis, at 1.

II.

We are not required at this time to delineate comprehensive principles to govern the application of § 1915(a) to corporations. I am persuaded that SOUP's motion should succeed under any set of guidelines that we might eventually prescribe.

First, SOUP's appeal to this Court is neither frivolous nor malicious, as indicated by the vigorous dissenting opinions of two of the FTC's five Commissioners.[4] Second, since the members of the corporation have no personal financial stake in the outcome of the litigation, it seems unlikely that they have adopted the corporate form as a subterfuge to avoid the payment of court costs.[5] To be sure, there is potential for abuse in the in forma pauperis scheme as applied to corporations no less than as applied to individuals. But an excessive concern with this potential at this stage is, to say the least, premature. Neither this Court nor a corporation's adversary in litigation lacks the means to expose abuse and to take corrective action when it does appear.[6] Moreover, the fact that SOUP is apparently the first corporation to apply to this Court for in forma pauperis treatment since the enactment of the statute would seem to belie any fears that we are soon to be deluged with such applications.

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[3] The predecessor of § 1915(a) provided that a "citizen of the United States" could be granted leave to proceed as a pauper. Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252. Because the Supreme Court had held that corporations are not "citizens," *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch.) 61, 3 L.Ed. 38 (1809), two Circuits held that the former statute did not apply to corporations. *See Atlantic S.S. Corp.* v. *Kelley*, 79 F.2d 339 (5th Cir. 1935); *Quittner* v. *Motion Picture Producers*, 70 F.2d 331 (2d Cir. 1934). In 1959 Congress substituted "person" for "citizen" in defining the reach of the statute, but that change was apparently designed to extend the statute's benefits to aliens. H.R. Rep. No. 650, 26th Cong., 1st Sess. (1959).

[4] Commissioner Elman stated in dissent that hearings on the consent decree were necessary because "basic issues relating to the adequacy of the remedy have not been fully canvassed on evidentiary record and remain unresolved." Also dissenting, Commissioner Jones maintained that "the instant petition for intervention by SOUP raises important issues going to the effectiveness of Commission action. These issues affect the basic viability of the Commission and its potential for effective action."

[5] *Compare Honolulu Lumber Co.* v. *American Factors, Ltd.*, 265 F.Supp. 578 (D. Hawaii 1966), *aff'd* on other grounds, 403 F.2d 49 (9th Cir. 1968), holding that a corporation cannot qualify under § 1915 (a). The court noted that the small group which formed the corporation would benefit directly from any recovery award in this treble-damage antitrust suit.

[6] *Cf. Boddie* v. *Connecticut*, 401 U.S. 371, 381-382, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Askins* v. *E. I. Dupont De Nemours & Co.*, 335 U.S. 331, 338, 69 S.Ct. 85, 93 L.Ed. 43 (1948).

The real difficulty with SOUP's motion, it seems, concerns the assertion of indigency. SOUP is conceded to lack the *corporate* resources to pay the costs of proceeding in this Court.[7] Indeed, the FTC not only accepts the corporation's claim of indigency, but itself permitted SOUP to proceed in forma pauperis before the agency. Nevertheless, this Court has apparently concluded that a corporation cannot be indigent for purposes of § 1915(a) so long as its members have the personal means to pay the costs of the proceeding. This approach, which disregards the petitioner's corporate form and treats it as a collection of individual litigants, imposes unnecessary administrative burdens on this Court and may effectively discourage litigation by certain corporations.

Moreover, by looking behind the corporation to the individuals it represents, today's order may have the unfortunate effect of deterring the use of corporations as vehicles for raising issues of great public importance. By measuring the corporation's indigency in terms of the assets of its wealthiest member, we may discourage non-indigent individuals from joining corporations that intend to bring law suits on behalf of the public. If these persons are forced to commit their personal resources to the cause, they may prefer to sue as individuals. Yet it seems clear that in this type of law suit a corporation or association is often a more valuable party than an individual.[8] Furthermore, if these persons refuse to assume personal liability for the costs of litigation, issues of great importance may fail to reach a judicial hearing. For these reasons I cannot accept the Court's approach to the determination of indigency of corporations under § 1915(a) in these circumstances. Nothing in this record indicates that SOUP's effort to proceed in forma pauperis is in any way offensive to the public interest. Nor does anyone assert that its application is a sham or an abuse of this Court. Since a decision in favor of SOUP would in no sense deprive us of the ability to forestall any possibility of abuse in subsequent cases, I would grant petitioner's application.

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[7] In support of its application for leave to proceed in forma pauperis the president of SOUP submitted an affidavit stating that the corporation has no money in its treasury, no established sources of income, and no property which it could offer as security. We indicated recently that an individual is indigent for purposes of § 1915(a) if he cannot because of his poverty 'pay or give security for the costs * * * and still be able to provide' himself and dependents 'with the necessities of life.' *Harris* v. *Harris*, 137 U.S.App.D.C. 318, 322, 424 F.2d 806, 810 (1970), quoting *Adkins* v. *E. I. DuPont De Nemours & Co.*, 335 U.S. 331, 339, 69 S.Ct. 85, 93 L.Ed. 43 (1948). With no source of income and its limited resources committed to its meager operating expenses, or "necessities of life," SOUP would seem to meet that standard. But at the request of this Court petitioner submitted further affidavits from each of its five current members describing their personal financial positions and revealing that as individuals they could not satisfy our standards of indigency. On the basis of this information the Court has concluded that the application to proceed in forma pauperis must be denied.

[8] L. Jaffe, Judicial Control of Administrative Action 542–543 (1965).

Instead of resolving the question of indigency on the basis of a single affidavit from a corporate officer, it is now apparently necessary for us to evaluate affidavits from each of the "members" of the corporation. In this case the corporation comprises only five persons. But if "members" refers to shareholders, the problem of evaluating these affidavits could in some cases be staggering. For us to undertake this time-consuming responsibility as a means of collecting about $100 in court costs strikes me as remarkably poor economics. It is also inconsistent with Congress's evident intention of simplifying the inquiry into indigency.

WARNER-LAMBERT COMPANY v. FEDERAL TRADE COMMISSION*

Civ. Ac. 1385–71—F.T.C. Docket 8850

(United States District Court for the District of Columbia, Aug. 10, 1971)

The Commission here notified the plaintiff that it intended to institute a formal proceeding charging that the plaintiff's acquisition of Parke, Davis & Company was a violation of Section 7 of the Clayton Act. After some negotiation the plaintiff submitted a proposal for a consent agreement which the Bureau of Competition of the Commission rejected. A second proposal for a consent order was also rejected. The Commission thereupon issued a formal complaint against plaintiff charging violation of Section 7 of the Clayton Act. Here the court found that the Commission waived the thirty-day limitation on negotiating a consent settlement when the regulations did not provide for any waiver. The court further denied the Commission's motion for a preliminary injunction and ordered the complaint dismissed for failure to state a claim upon which relief can be granted.

BRYANT, *District Judge*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come before the court on plaintiff's motion for preliminary injunction, and on defendant's opposition thereto; defendant also having suggested pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure that the Court now dismiss the action for lack of jurisdiction; upon consideration of the foregoing and of the entire record in the case, including the testimony and exhibits adduced at the hearing on July 19, 1971, the court makes the following Findings of Fact and Conclusion of Law:

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*Not otherwise reported.

FINDINGS OF FACT

1. Defendant Federal Trade Commission (Commission) has promulgated rules providing for a consent order procedure prior to the institution of formal proceedings against a party where time, the nature of the proceeding and the public interest permit (Federal Trade Commission's Nonadjudicative Procedures, Sections 2.31–2.34, 16 CFR 2.31–2.34).

2. Section 2.31 of the said Nonadjudicative Procedures provides for notification to a proposed respondent of the Commission's intention to institute a formal proceeding, which notice is to be accompanied by a form of complaint the Commission intends to issue together with a proposed form of order. Under Section 2.32 the proposed respondent is afforded 10 days after service of the notice to advise the Commission whether he is interested in having the proceeding disposed of by entry of a consent order. If the party so desires, h will be afforded an opportunity to execute an appropriate agreement for consideration by the Commission. Section 2.33 contains various provisions relative to the form of and consideration by the Commission of a consent agreement.

3. Section 2.34(a) affords 30 days after the filing by a proposed respondent of his reply under Section 2.32 stating that he is interested in having the matter disposed of by entry of a consent order within which an executed agreement conforming with the requirements of Section 2.33 may be submitted to the Commission through the operating Bureau in which the matter is pending.

4. Section 2.34(c) provides that "if at any time it appears to the operating Bureau in which the matter is then pending that the execution of a satisfactory agreement is unlikely, such Bureau, after notification to the proposed respondents of its intention to do so, shall submit the matter to the Commission, together with any written offers of settlement which the proposed respondents desire to have the Commission consider. The Commission will thereupon take such action as may be appropriate."

5. On April 21, 1971, acting pursuant to Section 2.31, the Commission notified plaintiff of its intention to institute a formal proceeding against it, charging plaintiff Warner-Lambert Company's acquisition of Parke, Davis & Company to be a violation of Section 7 of the Clayton Act (15 U.S.C. § 18). On April 21, 1971, plaintiff Warner-Lambert Company (Warner-Lambert), in compliance with Section 2.32, advised the Commission of its interest in having the proceeding disposed of by the entry of a consent order.

4. On April 28, 1971, attorneys for Warner-Lambert met with members of the Staff of the Bureau of Competition of the FTC, at the offices of the Bureau, to discuss settlement of the matters by consent agreement. No specific settlement proposal was advanced by Warner-Lambert at this meeting. The Bureau advised Warner-Lambert that the burden of submitting a settlement offer was upon the company and that any settlement proposal should be submitted in formal form for forwarding to the Commission.

5. On May 17, 1971, plaintiff submitted to the Bureau of Competition a proposed consent agreement.

6. On May 20, 1971, representatives of plaintiff met with Mr. Alan S. Ward, the Director of that Bureau, and members of his staff to discuss plaintiff's submittal of May 17. At this meeting Mr. Ward advised plaintiff's representatives that the Bureau would submit the matter to the Commission during the week of May 24, 1971, and that, although the Bureau ordinarily did not tell an involved company what the Bureau's recommendation to the Commission would be, he thought it would be best in this case to state frankly that the proposal was unacceptable to the Bureau and that, because the offer did not afford a basis for further negotiations, the Bureau intended to recommend to the Commission that a complaint issue. After much discussion, attorneys for Warner-Lambert stated that they would like to submit another settlement proposal for consideration. In answer to the company's inquiries about an extension of the thirty day time limit for negotiations of a consent agreement, Mr. Ward stated that an extension would have to be sought by the company from the Commission itself, that the Bureau was without power to grant such an extension, but that in fact the Commission would not consider the Bureau's report for a couple of weeks because the Chairman of the Commission was out of the country.

7. On May 28, 1971, the Bureau submitted to the Commission plaintiff's settlement proposal together with the Bureau's report and adverse recommendation.

8. On June 10, 1971, Warner-Lambert submitted a new proposal to the Bureau. This proposal was viewed by attorneys for Warner-Lambert as being substantially different from the May 17 proposal.

9. On June 15, 1971, attorneys for Warner-Lambert met with Messrs. Ward, Garfield and Teetor of the Bureau to discuss the new proposal. In the course of discussions, the attorneys for Warner-Lambert proposed that additional studies, including studies by investment bankers, be made and submitted to the Commission in support of the revised proposal. The Bureau agreed that such additional studies would be helpful in clarifying the new proposal to the Commission. Mr. Ward was absent from this meeting briefly and in his absence, Mr. Teetor

stated that he was not "buying" the new proposal. Mr. Alexander, attorney for Warner-Lambert, complained to Mr. Ward, upon the latter's return to the meeting, about Mr. Teetor's "hard-nosed" attitude. Mr. Ward replied that Mr. Teetor would make a report to Mr. Garfield, who would make a report to Mr. Ward, who would in turn make a report to the Commission. Mr. Ward stated that he would make his report to the Commission as soon as possible and that the Commission probably would act soon on whether to extend the consent order time or to issue a complaint. Mr. Ward reiterated that Warner-Lambert should direct any request for an extension of time to the Commission itself promptly. Upon request from Mr. Alexander that the Bureau join in the company's request for an extension, Mr. Ward refused to make such a commitment. Mr. Ward did not state what action the Bureau would recommend on the second proposal, as he had done at the May 20 meeting with respect to the first proposal.

10. On June 18, 1971, the Bureau forwarded plaintiff's second proposal to the Commission with the recommendation that it be rejected. In telephone communications with Warner-Lambert's attorneys shortly after June 18, Bureau representatives did not advise them that an adverse recommendation had in fact been forwarded.

11. By letter of June 21, 1971, Warner-Lambert requested that the Commission grant an extension of time to July 15, 1971, for Warner-Lambert to submit under the Consent Order Procedure a memorandum expanding its written proposal of June 10, 1971, for divestiture, together with financial and marketing data and related material in support of the proposal.

12. On June 29, 1971, the Commission voted to issue a formal complaint against plaintiff, charging a violation of Section 7 of the Clayton Act. The complaint was executed by the Commission Secretary on June 30 and was served upon plaintiff by mail on July 14, 1971.

13. Plaintiff filed its complaint and its motion for a preliminary injunction in this cause on July 12, 1971, alleging that the Commission's Bureau of Competition had failed, as required by Section 2.34(c) of the Nonadjudicative Procedures, to notify Warner-Lambert of its intention to submit the matter to the Commission together with the written offers of settlement which Warner-Lambert desired to have the Commission consider; and plaintiff requested the court to enter an injunction requiring the Commission to comply with its Rules, particularly Section 2.34(c), and to order withdrawn the Commission's decision of June 29, 1971, directing the issuance of a formal complaint against Warner-Lambert.

CONCLUSION OF LAW

The Commission and its staff complied with the Commission's Nonadjudicative Procedures, and in particular with Section 2.34(c) thereof. Therefore the court concludes that plaintiff has shown no likelihood of success on the merits of its complaint and the preliminary injunction must, accordingly, be denied.

It is undisputed that the thirty days provided by the rules for the submission of a proposed consent order agreement expired on May 24, 1971, that the Bureau not only notified plaintiff of its intention to submit the matter to the Commission but also advised plaintiff what its recommendation would be, and that in fact the matter was submitted on May 28, 1971. Plaintiff's position in a nutshell is that the Bureau of Competition "waived" the thirty day limitation when it continued to meet with plaintiff beyond the expiration of the thirty days, such a theory is impossible for the court to accept in view of the regulations themselves, which provide for no such waiver, in view of the testimony and affidavits to the effect that the Bureau staff repeatedly warned plaintiff that any extension of the thirty days would have to be sought from the Commission itself and that the Bureau was powerless to grant such an extension, and especially in the light of the testimony of Mr. Alexander, counsel for plaintiff before the Bureau, that he was worried all through the month of June about the fact that the time period for negotiations had in fact expired.

Furthermore, even apart from the court's conclusion that the Commission's rules governing consent order procedures have in fact been complied with, the court concludes that the complaint in this case fails to state a claim upon which relief can be granted. On the one hand, the procedural infirmity in the administrative proceedings alleged by plaintiff does not appear to be of the fundamental "due process" nature that warranted district court intervention in *Amos Treat & Co.* v. *Securities and Exchange Commission*, 306 F.2d 260, 113 U.S. App. D.C. 100 (1962). On the other hand, the procedural infirmity alleged is one "which can always be judicially reviewed when the story is fully told and recorded," *Wolf Corporation* v. *Securities and Exchange Commission*, 317 F.2d 139, 115 U.S. App. D.C. 75 (1963).

ORDER

Upon consideration of plaintiff's motion for a preliminary injunction and defendants' opposition thereto and the entire record in the case, oral hearing having been held on July 19, 1971, it is by the court this 10th day of August, 1971,

Ordered, That the motion for a preliminary injunction is denied, and it is further

Ordered, That the complaint is dismissed for failure to state a claim upon which relief can be granted.

UNITED STATES v. GEORGE R. HOFFMANN AND ROYCE GEORGE HOFFMANN*

No. T-CR-1592—F.T.C. Docket 8136

(United States District Court, District of Kansas. Sept. 1, 1971)

In a contempt proceeding instituted by the United States two officers of an aircraft mechanics trade school were found guilty of contempt of court by violating an injunction of the court. The injunction violated prohibited practices barred by an FTC order by falsely representing that (1) they offer employment, (2) they sell their courses only to those with special qualifications, (3) on the job training is provided students, (4) their graduating students are in demand, (5) employment with airline companies is guaranteed, (6) graduates have been placed with aircraft or airline companies. The officers contended that the court's injunction was entered to enjoin acts prohibited by the terms of a consent decree and no findings of fact was ever made and no evidence produced to sustain order or injunction. However, such a decree has sanction of the court when entered and is given the same effect as any other judgment.

For petitioner: *Robert J. Roth,* U.S. Atty., and *Edward H. Funston,* Asst. U.S. Atty., Topeka, Kan.

For defendant: *Stephen B. Millin,* Kansas City, Mo., for Royce George Hoffmann, *Douglas Lancaster,* Overland Park, Kan., for George R. Hoffmann.

TEMPLAR, *District Judge:*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT

This contempt proceeding was instituted by the plaintiff, United States of America, when it filed a petition in this Court for an order to show cause why respondents George R. Hoffmann and Royce George Hoffmann, President and Vice President, respectively, of Hoffmann Aircraft Institute, should not be adjudged guilty of contempt for violating the provisions of an injunction entered by a judgment of this Court on March 17, 1967, sustaining an application of the United States of America at the request of the Federal Trade Commission because of alleged violations by respondents of a cease and desist order entered by that agency on May 12, 1961.

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*Reported in Trade Reg. Rep. (1971 Trade Cases) 73,721 at p. 90,996. For Commission case see 58 F.T.C 730.

[*Injunction*]

The pertinent provisions of this Court's judgment are as follows:

That defendants, their representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of home study and correspondence courses, in commerce, as "commerce" is defined in the Federal Trade Commission Act, are enjoined from;

1. Representing, directly or by implication, that:

(a) Defendants offer employment when in fact, employment is not offered.

(b) Defendants will sell their course only to those who have special qualifications.

(c) Defendants are an aircraft manufacturing or airline company.

(d) Defendants give purchasers of their courses on the job training in an aircraft or airline plant.

(e) Persons who satisfactorily complete defendants' courses are in demand in the aerodynamics and aeronautics fields, unless such is a fact.

(f) Defendants guarantee employment with aircraft and airline companies to those that satisfactorily complete their courses.

(g) Defendants have placed persons who have satisfactorily completed their courses in positions with aircraft or airline companies.

(h) Defendants give actual training by visits of their instructors or teachers to the homes of persons purchasing the courses.

(i) Defendants will employ persons who have satisfactorily completed the courses in their plant.

(j) Defendants refund the purchase price of their courses to persons who take and fail to pass the same, unless such refunds are actually made.

2. Using pictures of plants or other facilities, in connection with the solicitation of the sale of their courses, which they do not own or misrepresenting in any manner the plant or other facilities which they may own.

3. Using the words "Aircraft Company" as a part of any trade or corporate name under which they do business.

[*Jury Trial Demand*]

Respondents demanded a jury trial but the Court determined that no penalty for such a violation is prescribed by law and that the penalty assessed, if respondents were found guilty, would not exceed a fine of $500.00 or imprisonment for not more than six months, and would therefore be classified as a petty offense. Under such circumstances, the Court ruled that respondents were not entitled to a jury trial and denied respondents' request for one. *Frank* v. *United States*, 395 U.S. 147.

The defendant, George R. Hoffmann, requested that counsel be appointed to represent him because he demonstrated that he was financially unable to employ an attorney or provide an adequate defense to the charges alleged against him. Counsel was appointed for him.

An evidentiary hearing was held on the charges, though the Court may adopt such mode of trial as, in its discretion, it sees fit, in order to determine the fact of contempt, provided due regard is had on the essential rules that obtain in the matter of contempts. *Gompers v. Buck*, 221 U.S. 418, 432. In such proceedings a respondent is entitled to the presumption of innocence and must be proven guilty beyond a reasonable doubt. *Yates v. U.S.*, 315 F.2d 718 (10 Cir.). Such presumption was afforded respondents and proof of violation of the Court injunction, beyond a reasonable doubt, was required.

The injunction which was allegedly violated by respondents was designed to prevent fraud upon the public by false, deceptive and fraudulent representations and practices. The record in this case is saturated with proof of fraud, scarcely denied, and convinces, beyond doubt, that respondents countenanced and permitted their agents and employees and indeed did themselves mislead and deceive members of the public who were ensnared by their deceptive practices in violation of the Court's injunction. Respondents failed to produce any of their salesmen or representatives to refute the evidence of fraud practiced by them. Respondents made no efforts to do so. The government made vigorous efforts to locate and produce some of them but none could be located by officers of the United States.

[*Prior Consent Decree*]

Respondents argue vigorously that the Court's injunction was entered to enjoin acts prohibited by the terms of a consent decree and that no determination of facts were ever made and no evidence was ever produced to sustain the order or the injunction. Such a decree has sanction of the Court when entered and is given the same force and effect as any other judgment. *U.S. v. Swift*, 286 U.S. 106, 115. Nor is the claim of respondents that they acted on advice of counsel a defense, *U.S. v. Goldfarb*, 167 F.2d 735, though this may be considered in mitigation of punishment.

The conduct and attitude of the respondents in carrying on their teaching and training courses compel a conclusion that respondents never intended in good faith to comply with the Court's injunction issued after they had failed to desist their fraudulent practices when ordered to do so by the Federal Trade Commission.

Respondent Royce George Hoffmann has offered a portion of the transcript of proceedings held in the Johnson County, Kansas Court in Case No. 46263, *State of Kansas, ex rel. v. Hoffmann Aircraft Institute, Inc.*, attached to his letter of June 4, 1971, and marked Royce George Hoffmann's Exhibit "G", purporting to be a portion of testimony of Royce George Hoffmann at the trial of that case. The evidence is cumulative but the objections to it are overruled and it will be received and is considered in evidence.

Likewise, defendant George R. Hoffmann makes an offer of proof, (Doc. 58), in which a portion of the transcript in the same case is offered by him. The objections to this evidence are overruled and it will be received and will be considered in evidence.

Also, there appears in the record, submitted by plaintiff, an authenticated copy of extracts from files of the Federal Trade Commission (See Exhibit "A" to Doc. 67) relating to the original proceedings, files and records in the original proceedings out of which the case arose. In a contempt proceeding this Court may take judicial notice of these items. See cases cited in *O'Malley v. U.S.*, 128 F.2d 676 at 687.

After considering all the evidence, the arguments and briefs submitted by the parties and upon being fully advised in the premises, the Court makes the following

FINDINGS OF FACT

1. Respondents George R. Hoffmann and Royce George Hoffmann are charged with criminal contempt of this Court, by reason of their alleged violations of numerous provisions of an injunction entered by this Court on March 17, 1967, in *United States v. George R. Hoffmann and Royce George Hoffmann*, Civil Action No. KC-2224. The March 17, 1967 Judgment recites in the opening explanatory paragraph that the Judgment was consented to by the attorneys for the United States and the attorneys for defendants without a trial and without the adjudication of any issue of fact or law, and without any admission by the United States or the defendants with respect to any issue.

2. *United States v. George R. Hoffmann and Royce George Hoffmann*, Civil Action No. KC–2224, was an action to assess civil penalties against respondents for numerous and persistent violations of a Federal Trade Commission cease and desist order, entered on May 12, 1961, Docket No. 8163 before the Federal Trade Commission. The cease and desist order directed respondents to cease and desist from engaging in certain unfair and deceptive acts and practices in violation of Section 5(a)(1) of the Federal Trade Commission Act. 15 U.S.C. § 45(a)(1).

3. The purpose of the injunction entered by this Court on March 17, 1967, in Civil Action No. KC–2224, was to stop finally and decisively the fraudulent and deceptive practices of respondents delineated in the Federal Trade Commission cease and desist order.

4. At all times material to the present action, respondents George R. Hoffmann and Royce George Hoffmann.

a. were President and Vice President respectively of the Hoffmann Aircraft Institute;

b. were each members of the three man board of directors of the Hoffmann Aircraft Institute, the third member being George's wife, Emma;

c. have directed and controlled the acts and business practices of the Hoffmann Aircraft Institute;

d. trading and doing business as the Hoffmann Aircraft Institute, Inc. have operated a trade school offering, *inter alia,* courses in the fields of jet propulsion and airplane power plant systems;

e. trading and doing business as the Hoffmann Aircraft Institute, Inc., have employed, trained and supervised the activities of a number of sales representatives or agents who sold defendants' courses of instruction in various states of the United States. Among the sales representatives or agents so employed, at all times that such employment was relevant to the present action, were Lee L. Sanders, James R. Easley, W. M. Jamison and James Presley.

5. In reports submitted to the Secretary of State of the State of Kansas, the Hoffmann Aircraft Institute, Inc. was stated by representatives to be a wholly owned subsidiary of the Hoffmann Aircraft Company, Inc.

6. The referenced injunction entered by this Court on March 17, 1967, enjoins respondents from making certain representations or committing certain acts or practices in connection with the offering for sale, sale or distribution of home study or correspondence courses.

7. Prior to March 17, 1967, the date that this Court's injunction was entered, respondents' course of instruction in jet propulsion and airplane power plant systems was offered primarily through the medium of home study or correspondence lessons; however, sometime prior to March 17, 1967, respondents had begun to offer resident training.

8. Subsequent to March 17, 1967, respondents at least partially in an attempt to effect colorable evasion of the technical letter of the injunction of this Court, altered the form of materials used in connection with their course of instruction in jet propulsion and airplane power plant systems to emphasize the residence training aspects thereof.

9. At no time did respondents petition this Court for a modification, clarification or construction of the referenced injunction.

10. Although the jet propulsion and airplane power plant systems course offered by respondents subsequent to the entry of this Court's injunction purported to include a residence training requirement, the "course of study" offered by the defendants still possessed many indicia of a home study or correspondence course, and indeed, home study or correspondence lessons have remained an integral part of the respondents' operation.

11. Respondents caused to be prepared and printed fifty correspondence lesson booklets, which were made available to all students enrolled in respondents' jet propulsion and airplane power plant systems courses. Each booklet contained a test, covering the material presented in the booklet, and all test pages were perforated to facilitate their removal from the lesson booklets.

12. Respondents, by their representations and statements to students and by their correspondence with students who signed respondents' enrollment contracts, strongly encouraged the students, prior to reporting for residence training, to study the lesson booklets, complete the test in the rear of each lesson booklet and return the same to respondents for grading, in addressed envelopes provided by the respondents for such purpose.

13. It was respondents' *modus operandi* to mail the first two or three lesson booklets to every student accepted for enrollment in respondents' jet propulsion and airplane power plant systems course, at or shortly after the time that the student was accepted. If and when the completed tests from these booklets were submitted to the school, they were graded and subsequently returned to the student along with several succeeding lesson booklets and another addressed envelope. This process was repeated until the student completed the fifty-lesson course, reported for resident training or lost interest and stopped submitting completed lessons.

14. Almost all students enrolled in defendants' jet propulsion and airplane power systems course received and completed respondents' first two or three lesson booklets; and, some of respondents' students received and completed upwards of 35 lesson booklets.

15. Respondents had a specific employee or employees who mailed respondents' lesson booklets to students, received completed tests from students, graded the tests and returned the graded tests with new lesson booklets to the students.

16. Respondents maintained a record card for each of their jet propulsion and airplane power plant systems students, on which respondents' course was described as consisting of "320 hours [sometimes 1000 hours] 50 lessons." On this card, respondents kept a record

of the numbers of lesson booklets mailed to the student, the numbers of completed tests submitted by the student, the grade received by the student on each test and the dates on which lesson booklets were mailed and completed tests received by the school.

17. Respondents' form contract states that respondents' jet propulsion and airplane power plant systems course consist of "320 hours of shop training including Fifty Lesson course."

18. Respondents, as stated in Government Exhibit 79, encouraged their students to work on correspondence lessons and make monthly payments before reporting to Overland Park, Kansas, for resident training. Moreover, respondents expressly instructed their students, in a form acceptance letter, not to report for resident training until they had received a confirmed class date.

19. In a prior proceeding, *State of Kansas v. Hoffmann Aircraft Institute, Inc., George R. Hoffmann and Royce George Hoffmann*, tried in the District Court of Johnson County, Kansas, Division No. IV, Case No. 46263, decided March 18, 1971, George R. Hoffmann and Royce George Hoffmann each testified that their jet propulsion and airplane power plant systems course was a correspondence course.

20. Respondents supplied their sales representatives or agents, including Lee Sanders, James I. Easley, W. M. Jamison and J. Presley, with visual sales aids (see Government Exhibits 52 and 129), contracts and other forms.

21. Respondents' sales representatives or agents, in soliciting students for respondents' courses, were expressly authorized to place advertisements in local newspapers.

22. By providing the above-named sales representatives or agents with forms of contract, advertising brochures, and other materials, by continuing their employment and by ratifying and/or adopting their acts, the respondents clothed the said sales representatives or agents with full color of authority as the respondents' authorized agents or representatives.

23. On several occasions, subsequent to March 17, 1967, Lee L. Sanders, soliciting students for respondents' courses, placed advertisements in the "help wanted" columns of various local newspapers, which advertisements represented directly, or by implication, half truth, and nondisclosure of material information that:

a. respondents offered employment, when in fact employment was not offered;

b. respondents provided purchasers of their courses on-the-job training in an aircraft or airline plant.

24. On numerous occasions, subsequent to March 17, 1967, respondents or their duly authorized agents or representatives tendered to prospective students in respondents' jet propulsion and airplane

power plant systems course, a multicolored circular, Government Exhibit 52, representing that respondents have placed graduates of their school in positions with named aircraft or airline companies.

25. Graduates of respondents, jet propulsion and airplane power plant systems course were not placed with many of the companies named in respondents' multicolored circular, Government Exhibit 52.

26. Respondents' form acceptance letter, sent to almost every student who signed respondents' enrollment contract subsequent to March 17, 1967, represents by implication that respondents sell their courses only to persons who have special qualifications. In fact, there is no evidence of any instance where respondents refused to accept students who would sign respondents' enrollment contract and could make respondents' standard down payment of $187.50.

27. Respondents' form contract contains the following language in emphatic boldfaced type: "GUARANTEED EMPLOYMENT" and "FREE LIFETIME PLACEMENT SERVICE."

28. Respondents' correspondence lesson booklets, numbers 3, 4, 5, 6, 24, 25, 27, 28, 41, 42, 43, 44, 45, 46, 47, 48, 49, and 50, the covers of which bear the trade name "Hoffmann Aircraft Company," were distributed to numerous students of respondents' school, subsequent to March 17, 1967.

29. Subsequent to March 17, 1967, many prospective students in respondents' jet propulsion and airplane power plant systems course were required or requested to complete respondents' confidential qualification chart, representing by implication that respondents sold their courses only to persons who had special qualifications.

30. In a letter addressed to Mr. and Mrs. Robert Boies, dated October 31, 1969, Government Exhibit 77, George R. Hoffmann represented:

a. contrary to fact, that graduates of respondents' school were in demand in the aerodynamics and aeronautics fields;

b. that respondents had been successfully placing all of the graduates of their school in positions with airline or aircraft companies.

31. On or about March 25, 1970, in Danville, Virginia, Lee L. Sanders orally represented to Beverly Ray Marshall, a prospective student in respondents' jet propulsion and airplane power plant systems course, that respondents sold their courses only to persons who had special qualifications.

32. On or about March 25, 1970, in Danville, Virginia, Lee L. Sanders orally represented to James L. Hall, a prospective student in respondents' jet propulsion and airplane power plant systems course, that respondents:

a. offered employment when in fact employment was not offered;

b. would guarantee him employment with an aircraft or airline company upon completion of their course.

33. On or about January 10, 1970, in Huntsville, Alabama, James R. Easley orally represented to Billy Ray Hendrix, a prospective student in respondents jet propulsion and airplane power plant systems course, that after completion of respondents' course, the respondents would get him a job with an airline and place him with an airline.

34. On or about August 5, 1969, in Asheville, North Carolina, James R. Easley orally represented to William C. Suttles, a prospective student in respondents' jet propulsion and airplane power plant systems course, that respondents would guarantee him employment with an aircraft or airline company upon completion of their course.

35. On or about February 3, 1969, in Huntsville, Alabama, Lee L. Sanders orally represented to Terry J. Hyatt, a prospective student in respondents' jet propulsion and airplane power plant systems course, that respondents guaranteed him a job with an airline company upon completion of their course.

36. On or about November 3, 1968, in Rayville, Louisiana, W. M. Jamison orally represented to Ralph Boies, a prospective student in respondent's jet propulsion and airplane power plant systems course, and his parents, that respondents picked special students to take their course.

37. On or about October 20, 1968, in Overland Park, Kansas, George R. Hoffmann orally represented to Len E. Noah, a prospective student in respondents' jet propulsion and airplane power plant systems course, that respondents guaranteed lifetime employment in the airline industry to graduates of the respondents' school.

38. On or about September 16, 1968, in Overland Park, Kansas, George R. Hoffmann orally represented to James L. Jones, a prospective student in respondents' jet propulsion and airplane power plant systems course, that the Hoffmann Aircraft Institute had placed many of its graduates with Trans World Airlines.

39. On or about June 27, 1968, in Greenville, Tennessee, James Presley orally represented to James A. Gouge, a prospective student in respondents' jet propulsion and airplane power plant systems course,

a. contrary to fact, that there was a large demand for graduates of the respondents' school;

b. that he was guaranteed a job with the airlines after he completed the respondents' course of study;

c. that while attending respondents' school, he would be given on-the-job training at an airport with one of the major airlines;

d. that respondents' graduates had been placed with the Aeronautics and Space Administration, and with every major airline in the country.

40. On or about June 17, 1968, in Bristol, Virginia, Lee L. Sanders orally represented to Ervin H. Eads, a prospective student in respondents' jet propulsion and airplane power plant systems course,

a. contrary to fact, that there was a great demand for graduates of the respondents' school;

b. that the respondents would place him in any area of the country that he chose to work as a jet mechanic.

41. On or about March 15, 1968, in Middlesboro, Kentucky, Lee L. Sanders orally represented to Carl Givins, Jr., a prospective student in respondents' jet propulsion and airplane power plant systems course,

a. contrary to fact, that there was a great demand for graduates of the respondents' school;

b. that graduates of the respondents' school had been placed with all the major airlines in the United States;

c. contrary to fact, that the respondents had the most advanced jet training school in the United States, which included all the modern engines and equipment and a campus consisting of several hundred acres.

42. On or about August 5, 1967, in Columbia, Tennessee, Lee L. Sanders orally represented to Terry Locke, a prospective student in respondent's jet propulsion and airplane power plant systems course,

a. that respondents sold their courses only to those who had special qualifications;

b. contrary to fact, that as a result of the extreme demand for aircraft mechanics, he would be able to go to work for any airline of his choice after taking the training offered at the respondents' school;

c. that he would be given on-the-job training while attending the respondents' school;

d. contrary to fact, that the Hoffmann Aircraft Institute was a large school with dormitories and various buildings, and a large college-type campus.

43. Respondents authorized sales representatives or agents, in making the representations or committing the acts and practices set forth hereinbefore, were acting within the scope of their authority or employment.

44. The acts complained of in the petitioner's petition are qualitatively the very same acts for which the respondents were first given remonstrance by the Federal Trade Commission on the 12th day of May, 1961, and on the basis of which civil penalties were later assessed against the respondents.

45. George R. Hoffmann, and Royce Hoffmann have engaged in the business of operating a trade school in the State of Kansas and have offered courses in the field of jet propulsion, airplane power plant systems, electronics, airline training for clerks and stewardesses, and other curriculum related to the aircraft, airline and electronic training.

46. The Hoffmann Aircraft Institute, Inc. was an FAA-approved school at all times relevant herein and that the respondents were licensed by the State of Kansas to solicit prospective students to attend their school

From the foregoing facts, the Court makes the following:

CONCLUSIONS OF LAW

1. Whether particular acts are proscribed by an injunction depends largely on the specific provisions of the decree or order, construed in light of its purpose and the mischief it was designed to remedy. Colorable observance of the technical letter of an injunction will not suffice if by some connivance, evasive scheme or subterfuge its purpose is being undermined.

2. The Court in a criminal contempt proceeding will take judicial notice of all orders in the civil proceeding out of which it grows.

3. In a criminal contempt proceeding before the Court without a jury, the Court sits as trier of the facts as well as the law, and in passing upon the alleged contempt, may draw such inferences from circumstances as a jury might legitimately have drawn.

4. The matter of proving criminal intent in a criminal contempt case is not materially different from any other type of criminal case. Since there is seldom direct evidence of criminal intent, it must be inferred from all the circumstances.

5. A corporation or other business entity can function only by and through its principal officers, agents and employees.

6. Although George R. Hoffmann was the prime mover behind the Hoffmann Aircraft Institute, Royce George Hoffmann acted as a knowledgeable, willing, and, therefore, culpable agent of both the Hoffmann Aircraft Institute and his co-respondent, George R. Hoffmann.

7. The Court finds from the evidence, and beyond a reasonable doubt, that each of the respondents had the necessary criminal intent to and did willfully and contemptuously violate the injunction of this Court entered in the case of the *United States v. George R. Hoffmann and Royce George Hoffmann*, Civil Action No. KC–2224, in the particulars set forth in the following paragraph.

8. On the specific occasions noted in the preceding findings of fact, respondents George R. Hoffmann and Royce George Hoffmann, their representatives, agents or employees, have directly or through corporate or other devices in connection with the offering for sale, sale or distribution of home study and correspondence courses, in commerce, as "commerce" is defined in the Federal Trade Commission Act,

a. Represented directly or by implication that:

(1) Respondents offer employment when, in fact, employment is not offered, in violation of paragraph II–1(a) of the injunction of this Court;

(2) Respondents sell their course only to those who have special qualifications, in violation of paragraph II–1(b) of the injunction of this Court;

(3) Respondents give purchasers of their courses on-the-job training in an aircraft or airline plant, in violation of paragraph II–1(d) of the injunction of this Court;

(4) Persons who satisfactorily complete respondents' courses are in demand in the aerodynamics and aeronautics fields, when such is not the fact, in violation of paragraph II–1(e) of the injunction of this Court;

(5) Respondents guarantee employment with aircraft and airline companies to those that satisfactorily complete their courses, in violation of paragraph II–1(f) of the injunction of this Court;

(6) Respondents have placed persons who have satisfactorily completed their courses in positions with aircraft or airline companies, in violation of paragraph II–1(g) of the injunction of this Court.

b. Used pictures of plants or other facilities in connection with the solicitation of the sale of their courses, which they did not own or misrepresented the plant or other facilities which they did own, in violation of paragraph II–2 of the injunction of this Court.

c. Used the words "Aircraft Company" as a part of a trade or corporate name under which they did business, in violation of paragraph II–3 of the injunction of this Court.

9. The respondents George R. Hoffmannn and Royce George Hoffman are guilty as charged in the Petition to Show Cause, beyond a reasonable doubt.

10. In a criminal contempt proceeding brought under 18 U.S.C. 401(3), which is being treated as a petty offense, the maximum penalty that may be imposed on any individual respondent is six months' imprisonment *or* a fine of $500.00.

STERLING DRUG, INC. v. FEDERAL TRADE COMMISSION*

No. 24878—F.T.C. Docket 8797

(Court of Appeals, District of Columbia Circuit. Sept. 22, 1971)

1. COMMISSION NEED NOT DISCLOSE DOCUMENTS TO ONE DRUG COMPANY REGARDING ANOTHER DRUG COMPANY'S ACQUISITION

Although Federal Trade Commission should have stated its reasons for denying diversified drug company's request for disclosure of documents in Commission's possession concerning Commission approval of another drug company's acquisition of a company, case would not be remanded to Commission for statement of the reason for its denial where the reasons for denial were fairly obvious and the drug company had suffered no hardship by virtue of the failure to state.

2. FREEDOM OF INFORMATION ACT REQUIRES AGENCIES TO DISCLOSE IDENTIFIABLE RECORDS NOT SPECIFICALLY EXEMPT

Purpose of Freedom of Information Act is to increase citizen's access to government records and to require federal agencies upon proper request to make available to any person identifiable records not specifically exempt.

3. TRIAL COURT'S STATEMENT ABOUT INTERNAL WORKING PAPERS OF FTC WAS SUFFICIENT TO SHOW THEY WERE WITHIN THE FREEDOM OF INFORMATION ACT EXEMPTION

Trial court's statement that documents in questions were "internal work papers in which opinions are expressed and policies formulated and recommended" was sufficient statement of reason for concluding that the Federal Trade Commission documents for which discovery was sought were within Freedom of Information Act exemption for "inter-agency or intra-agency memorandum or letters which would not be available by law to a party other than an agency in litigation with the agency."

4. REMAND TO TRIAL COURT TO CONSIDER DELETING PORTIONS OF DOCUMENTS TO MAKE THEM AVAILABLE UNDER FREEDOM OF INFORMATION ACT

Action by diversified drug company against Federal Trade Commission to enjoin the Commission from withholding as confidential certain records of the Commission with respect to another case which drug company contended was similar to its own would be remanded to trial court to consider possibility of deleting portions of the documents and thus remove them from "inter-agency or intra-agency memoranda" exemption from Freedom of Information Act and for determination of whether there were appendices or statements of fact which were clearly subject to disclosure.

5. TEST OF DISCLOSURE IS WHETHER "A PRIVATE PARTY—NOT NECESSARILY THE APPLICANT" WOULD ROUTINELY BE ENTITLED TO THE MEMORANDA

Disclosure under the Freedom of Information Act does not depend on needs of particular litigants as the correct test for determining which documents are not exempt as "intra-agency or inter-agency memoranda;" the test is whether "a private party—not necessarily the applicant" would routinely be entitled to the memoranda through discovery process in litigation with the agency.

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*Reported in 450 F.2d 698. For case before the Commission see 80 F.T.C. 477. Case dismissed as moot on April 18, 1972.

6. MEMORANDA OF FTC REGARDING CORPORATE ACQUISITION WERE WITHIN THE FREEDOM OF INFORMATION ACT EXEMPTION FROM DISCOVERY

Memoranda of Federal Trade Commission with respect to approval of corporate acquisition of merger were within Freedom of Information Act exemption from discovery for inter-agency or intra-agency memoranda which would not be available by law to a party other than an agency in litigation with the agency.

7. INSURANCE THAT AGENCY ENJOY FREE FLOW OF IDEAS IS PRIMARY PURPOSE FOR EXEMPTION FROM FREEDOM OF INFORMATION ACT

Primary purpose for exemption from Freedom of Information Act of administrative agency memoranda is to insure that federal agencies enjoy free flow of ideas essential to making of reasoned decision.

8. MEMORANDA OF COMMISSION'S STAFF CONCERNING DECISION-MAKING FUNCTION IN ONE CASE NOT SUBJECT TO DISCLOSURE TO LITIGANTS IN ANOTHER CASE

Memoranda prepared by staff of Federal Trade Commission with respect to Commission's decision-making function in one case were not subject to disclosure to litigants in another case pending before the Commission.

9. ANY COMMISSION MEMORANDA INDICATING REASONS FOR DECISION IN PRIOR CORPORATE ACQUISITION CASE IS SUBJECT TO DISCLOSURE TO LITIGANTS IN PENDING CASE

Any memoranda prepared by Federal Trade Commission staff or by an individual Commissioner which specifically indicated that reasons for its decisions in prior corporate acquisition case were spelled out in one or more of other inter-agency memoranda would be subject to disclosure to litigants in pending corporate acquisition case in order to prevent development of secret law within the Commission.

10. COMMISSIONERS' MEMORANDA IN PRIOR ACQUISITION CASE NOT SUBJECT TO DISCLOSURE TO LITIGANTS IN PENDING CASE

Memoranda prepared by individual Commissioners of the Federal Trade Commission prior to issuance of Commission order in prior corporate acquisition case were not subject to disclosure to litigants in corporate acquisition case pending before the Commission.

11. MEMORANDA FROM COMMISSION AS WHOLE INTERPRETING LAW IN PRIOR CASE ARE SUBJECT TO DISCLOSURE TO PENDING CASE LITIGANTS

Memoranda issued by the Federal Trade Commission as documents emanating from the Commission as a whole, which set forth the interpretations and law which it actually applied in prior corporate acquisition case were subject to disclosure to litigants in corporate acquisition case pending before the Commission.

12. BUSINESS AND FINANCIAL RECORDS SUBMITTED TO FTC DURING CORPORATE ACQUISITION APPROVAL NOT SUBJECT TO DISCLOSURE IN ANOTHER ACQUISITION

Business and financial information submitted by corporations to Federal Trade Commission during course of corporate acquisition approval matter before the Commission were within Freedom of Information Act exemption for trade secrets and commercial or financial information obtained from a person and privileged or confidential and were not subject to disclosure to litigants in another corporate acquisition matter pending before Commission.

13. EXHAUSTION OF ADMINISTRATIVE REMEDIES IS TO FACILITATE JUDICIAL REVIEW AND ALERT AGENCY TO CORRECT EARLIER MISTAKES

Purpose of doctrine of exhaustion of administrative remedies is to avoid premature interruption of the administrative process and to facilitate judicial review and to give agency opportunity discover and correct its earlier mistakes.

14. ONLY WHERE AGENCY HAS CLEARLY VIOLATED CONSTITUTIONAL OR STATUTORY RIGHT MAY PARTY BYPASS ESTABLISHED AVENUES FOR REVIEW

A party may bypass established avenues for review within administrative agency only when the issue in question cannot be raised from later order of the agency or where the agency has very clearly violated important constitutional or statutory right.

15. WHERE ADMINISTRATIVE REMEDIES WERE NOT EXHAUSTED LITIGANT IS NOT ENTITLED TO RAISE CONTENTION BEFORE DISTRICT COURT

Where litigant in corporate acquisition approval proceeding before Federal Trade Commission had not exhausted its administrative remedies, litigant was not entitled to raise contention before district court that it would be denied fair hearing on the approval because of the Commission's refusal to disclose certain documents relating to another corporate acquisition which the Commission had previously approved.

(The syllabus, with substituted caption, is taken from 450 F.2d 698)

On appeal from Commission's decision against disclosing documents in a prior case Court remanded case to trial court to consider possibility of deleting portions of documents and thus remove them from "inter-agency and intra-agency memoranda" exemption from Freedom of Information Act. Remanded with directions.

Mr. Lionel Kestenbaum, Washington, D.C., with whom *Messrs. Herbert A. Bergson* and *Murray J. Belman*, Washington, D.C., were on the brief, for appellant.

Mr. Robert V. Zener, Atty., Department of Justice, with whom *Mr. Thomas A. Flannery*, U.S. Atty., was on the brief, for appellees. *Messrs. Harold D. Rhynedance, Jr.*, *Alvin L. Berman*, and *Robert E. Duncan*, Attys., Federal Trade Commission, also entered appearances for appellees.

Messrs. Jerrold G. Van Cise, New York City, and *Donald J. Mulvihill*, Washington, D.C., field a brief on behalf of Miles Laboratories, Inc., as amicus curiae urging affirmance.

Before BAZELON, *Chief Judge*, and TAMM and WILKEY, *Circuit Judges*.

TAMM, *Circuit Judge:*

In a case now in progress before the Federal Trade Commission (hereinafter "the Commission"), Sterling Drug, Inc. (hereinafter "Sterling") has been charged with a violation of section 7 of the Clayton Act, 15 U.S.C. § 18 (1964), in connection with its acquisition of Lehn & Fink Products Corporation (hereinafter "Lehn & Fink"). In the course of the proceeding the Commission denied Sterling's request for certain documents which it felt were essential to the presentation of its case. On this appeal Sterling seeks reversal of a District Court decision upholding that order. It claims that the documents are subject to disclosure under the Freedom of Information Act, 5 U.S.C. § 552 (Supp. IV 1969), and, in the alternative, that it will be denied the full and fair hearing required by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1964) if it is not granted access to the documents.

I. *History of the Case*

Sterling manufactures, distributes and sells drug products, household consumer products, and cosmetics throughout the United States. (J.A. 41). In 1966 Sterling acquired Lehn & Fink, whose primary products are "Lysol" brand disinfectants and deodorizers. Lehn & Fink also produces health and beauty aids, acne aids, and external antiseptics, among other products.

On April 12, 1968, the Commission served upon Sterling a complaint alleging that its acquisition of Lehn & Fink violated section 7 of the Clayton Act, 15 U.S.C. § 18 (1964). The complaint charged that the acquisition would have an adverse competitive effect in the markets for household liquids and aerosol disinfectants and deodorizers. There were no allegations of anticompetitive consequences in other fields.

Shortly after the complaint against Sterling was issued, another case involving a diversified drug company came before the Commission. This was the proposed acquisition of S.O.S. Company (hereinafter "S.O.S.") by Miles Laboratories, Inc. (hereinafter "Miles"), a direct competitor of Sterling. General Foods Corporation (hereinafter "General Foods") had originally acquired S.O.S., but it had been ordered to divest itself of the company in an earlier proceeding[1] and on July 8, 1968, filed with the Commission an application for approval of Miles as the purchaser. Three days later the Commission approved the divestiture plan, stating that it had "entirely relied upon the information submitted by General Foods and its approval

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[1] General Foods Corp., 68 F.T.C. 581 (Dkt., 8600, 1966), *aff'd sub nom. General Foods Corp.* v. *FTC*, 386 F.2d 936 (3d Cir. 1967), *cert. den.*, 391 U.S. 919, 88 S.Ct. 1805. 20 L.Ed.2d 657 (1968).

[was] conditioned upon this information being accurate and complete." (J.A. 8.) On September 27, 1968, the Commission received notice that the merger had been consummated.

In the course of these proceedings Miles twice wrote the Commission requesting that certain documents which it and General Foods had submitted in support of the Miles-S.O.S. merger be considered confidential. Then, on October 25, 1968, General Foods, acting for itself and Miles, formally requested confidential treatment of these documents. The documents were resubmitted as part of the General Foods Final Compliance Report, and on November 29, 1968, the Commission notified General Foods that they would be classified confidential.

Believing that the Miles-S.O.S. merger was very similar to its merger with Lehn & Fink and that the Commission's approval of the former merger was therefore dispositive of the case against it, Sterling petitioned the Commission to close the file on the proposed complaint issued to it and requested a hearing on this petition. On December 2, 1968, the Commission notified Sterling that both its petition to close the file and its request for a hearing were denied.

The Commission eventually issued a formal complaint against Sterling on August 7, 1969. This complaint charged that the Sterling-Lehn & Fink merger would have anti-competitive effects in three product lines in addition to the one specified in the proposed complaint—household deodorizers. The three additional product lines were health and beauty aids, proprietary drugs and personal care products, and acne aids and external antiseptics.

In its answer to this complaint Sterling asserted two affirmative defenses. It first reiterated its contention that the Commission's approval of the Miles-S.O.S. merger demonstrated that its acquisition of Lehn & Fink did not violate the Clayton Act. Second, it charged that the Commission's issuance of the formal complaint was:

> arbitrary and capricious and a denial of due process of law because the drastic revisions and change in theory from the proposed complaint constituted a deliberate attempt to avoid the consequences of the *Miles-S.O.S.* determination, and to accord diametrically opposing treatment to substantially identical transactions.

(Brief for appellant at 9.)

To obtain information regarding these defenses, Sterling moved for production and disclosure of the following documents in the Commission's files:

1. All documents submitted to the Commission by General Foods and others concerning the sale of S.O.S. to Miles which were not in the public record.

2. All documents prepared by the Commission or its employees giving findings or reasons for its approval of the Miles-S.O.S. merger or otherwise commenting on this merger.
3. All documents prepared by the Commission or its employees comparing the two mergers.
4. All documents prepared by the Commission or its employees "reflecting the Commission's reasons for (a) limiting its original proposed complaint to the grounds asserted therein or (b) changing the grounds for challenging the subject acquisition from those asserted in its original proposed complaint to those contained in the present complaint."

Sterling's request for these documents was based on the Commission's rules and the Freedom of Information Act.

The Hearing Examiner struck Sterling's affirmative defenses and denied its request for production of documents on the ground that the defenses to which these documents related were no longer in the case. Although he noted that a claim had been made under the Freedom of Information Act, he did not rule upon this claim.

[1] Sterling applied to the Commission for leave to appeal these actions on the part of the Examiner, but this application was denied. In its opinion the Commission said:

> The hearing examiner is responsible for framing the issues to be tried and permitting discovery based upon those issues. At present, the examiner is in the process of defining and delineating the issues prior to discovery. By striking respondent's "affirmative defenses" as separate issues, the examiner has not eliminated the substance of those alleged defenses from the hearing. Nothing in the examiner's ruling has foreclosed respondent from arguing any point he wishes to raise concerning the Commission's action in approving Miles Laboratories' acquisition of S.O.S.

(Brief for Appellees at 6.) Like the Hearing Examiner, the Commission did not pass on Sterling's claim under the Freedom of Information Act.[2]

Sterling then requested that the Hearing Examiner include in the contested issues of law and fact a number of issues exploring the similarities between the Miles-S.O.S. and Sterling-Lehn & Fink mergers and also requested admissions from the Commission relating to these issues. The Examiner denied both requests, and the Commission once again denied Sterling permission to appeal his decision. Its rationale was as follows:

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[2] Sterling charges that this failure was a violation of section 5(e) of the Administrative Procedure Act; 5 U.S.C. § 555 (e) (1964), which provides: Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial. Although we feel the Commission should have stated its reasons for denying Sterling's request, it does appear that the reasons for denial were fairly obvious and that Sterling has suffered no hardship by virtue of the Commission's failure in this regard. It would therefore serve no useful purpose to remand the case to the Commission for a statement of the reasons for its denial.

> The issue in this proceeding is whether [Sterling] has violated Section 7 of the Clayton Act, as amended, not the degree, if any, to which the facts here resemble the facts in the *Miles-S.O.S.* acquisition. [Sterling], therefore, is not entitled to discovery pertaining to the Commission's records or actions in that matter. (J.A. 39.)

On July 7, 1970, Sterling filed a complaint in the District Court in which it sought to enjoin the Commission from withholding the documents described above. In its complaint Sterling contended that the Commission's apparent conclusion that the Miles-S.O.S. decision was not particularly relevant to its case and its consequent refusal to disclose documents related to that earlier decision would necessarily deny Sterling a fair hearing. It also charged that production of the documents was required under the Freedom of Information Act. The Commission filed a motion to dismiss the complaint, or, in the alternative, for summary judgment, and Miles moved to intervene as a defendant.

The District Court judge did not pass on Miles' motion to intervene. On the merits of the case he first concluded, on the basis of his *in camera* inspection of the documents in question, that they were exempt from disclosure under the Freedom of Information Act. Next, he held that the issue of denial of a fair hearing was not properly before the court because Sterling had failed to exhaust its administrative remedies with regard to this issue. As a result of these rulings, he granted the Commission's motion for summary judgment. This appeal followed.

II. *Sterling's Claim Under the Freedom of Information Act*

[2] The Freedom of Information Act was intended "to increase the citizen's access to government records." *Bristol-Myers Co.* v. *FTC*, 138 U.S.App.D.C. 22, 25, 424 F.2d 935, 938, *cert den.*, 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970). Under the Act federal agencies are required upon proper request to make available to "any person" identifiable records not specifically exempt, 5 U.S.C. §552(a) (3) (Supp. IV 1969). To insure that the disclosure requirements are liberally construed, Congress provided for *de novo* review in the District Court whenever an agency fails to produce documents, with the agency having the burden of proving that the documents are exempt.

The Commission contends that two exemptions to the disclosure requirements of § 552(a) (3) are applicable in this case. The first of these is the exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b) (5)

(Supp. IV 1969). According to the Commission, its memoranda containing analyses and recommendations with regard to the *Miles-S.O.S. and Sterling-Lehn & Fink* cases fall within this exemption. The District Court agreed with the Commission, concluding as follows:

> [These documents] are not "purely factual reports and scientific studies" (*Bristol-Myers Company* v. *Federal Trade Commission*, 138 U.S.App.D.C. 22, 26, 424 F.2d 935, 939 (1970)), but are in fact "those internal working papers in which opinions are expressed and policies formulated and recommended." *Bristol-Myers, supra*, citing *Ackerly* v. *Ley*, 137 U.S.App.D.C. 133, 138, 420 F.2d 1336, 1341 (1969).
> (J.A. 77.)

[3, 4] Sterling attacks the decision below on several grounds. To begin with, it alleges that the District Court judge did not follow the proper procedures for passing on a claim under the Freedom of Information Act. Citing our decisions in *Bristol-Myers*, *supra*, and *Grumman Aircraft Engineering Corp.* v. *Renegotiation Bd.*, 138 U.S. App.D.C.147, 425 F. 2d 578 (1970), Sterling contends that the District Court judge failed to take the required steps of stating his reasons for concluding that an exemption applied to the documents in question and of considering whether disclosure of the documents would be proper if certain deletions were made. With regard to the first contention, we feel that the judge's statement that the documents in question were "internal working papers in which opinions are expressed and policies formulated and recommended" clearly indicates the basis for his decision. We must agree, however, that there is no indication in the opinion below that the judge considered the possibility of deleting portions of the documents. It may well be that making deletions would not change the character of these documents, since they appear to consist primarily of the thoughts and recommendations of the Commission and its staff. However, there may be appendices or statements of facts which are clearly subject to disclosure. *See Soucie* v. *David*, 145 U.S.App.D.C. 144 at 155, 448 F.2d 1067 at 1078 (1971). We must therefore remand the case so that the District Court judge can consider this possibility and state in his opinion that he has done so.

[5, 6] Sterling's next contention relates to that portion of § 552(b) (5) which states that the exemption is applicable only to those internal memoranda "not * * * available by law to a party other than an agency." Sterling interprets this language as meaning that it is entitled to inspect the Commission memoranda under the Act if it has the right to discover these documents in its present suit against the Commission, but we believe this interpretation to be incorrect.[3] The

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[3] The documents might well be exempt even under Sterling's interpretation of the statute, for there is considerable doubt that Sterling is entitled to discovery of the documents in its current case against the Commission. We will discuss this issue in the third portion of our opinion.

language in question is admittedly somewhat difficult to interpret because many documents cannot in the abstract be said to be either available "by law" or unavailable "by law"; their discoverability is dependent upon the showing of need made by the litigant. Davis, The Information Act; A Preliminary Analysis, 34 U.Chi.L.Rev. 761, 795 (1967). However, Congress' description of those entitled to disclosure under the Act[4] and earlier cases decided by this court[5] clearly indicate that disclosure under the Act is not to depend upon the needs of a particular litigant. The correct test for determining which documents are not exempt under § 552(b) (5) is given in the House Committee's report on the section, which states that "any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." H.R.Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966), U.S.Code Congressional & Admin.News, p. 2428. The question for decision is thus whether " 'a private party'—not necessarily the applicant—would routinely be entitled to [the Commission memoranda] through discovery." *Davis, supra,* 796. The clear answer is that he would not be so entitled. While some cases suggest that government memoranda containing legal analyses and recommendations may in some circumstances be subject to discovery,[6] it is beyond question that granting dicovery of such documents is a very extraordinary step, not a routine one. Accordingly, we conclude that the Commission memoranda in question here are the type which should be exempt under § 552(b) (5).

This conclusion would seem to resolve the matter, but Sterling makes a further argument for the proposition that many if not all of the Commission memoranda it seeks must be disclosed even though they would normally be exempt under §552(b)(5). As we noted earlier, the

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[4] But when a memorandum or letter would be subject to discovery by a party whose need for it is strong but not by a party whose need for it is weak, should the agency disclose it, refuse disclosure, or apply discovery law to the facts about the particular applicant? The last course seems desirable, but the Act seems to forbid that course, for it requires disclosure to "any person" and it replaces the statutory words "persons properly, and directly concerned."[90] The applicant's need cannot be the test. The agency cannot say that one person is "any person" but that another person is not.

But since the purpose of the exemptions is to cut down the requirement of disclosure to "any person," the purpose of the fifth exemption could be to whittle down the "any person" requirement so that, in effect, only a person with a strong enough interest is entitled to disclosure of a memorandum or letter. This idea makes practical sense, but it is contrary to the words of the fifth exemption. The key words are "a private party." The words are not "the applicant" or "the party requesting disclosure." The focus is not on the applicant but on an abstract person, "a private party."

Davis, *supra*, at 795–796.

[90] The Senate committee said the bill "eliminates the test of who shall have the right to different information." Sen. Rep. 5. The House committee emphasized the same thought. House Rep. 8.

[5] *Soucie* v. *David, supra: Grumman Aircraft Engineering Corp.* v. *Renegotiation Bd., supra.*

[6] *See Carl Zeiss Stiftung* v. *Carl Zeiss Jena*, 40 F.R.D. 318 (D.D.C.1966); *Lykes Corp. and Lykes Bros. Steamship Co.*, 185 Ct.Cl. 792 (1968); *Weiss* v. *United States*, 180 Ct.Cl. 863 (1967).

Commission did not issue an opinion giving the reasons for the *Miles-S.O.S.* decision, and Sterling believes that these reasons must of necessity be contained in the documents it seeks and that these documents must be disclosed "in order to provide access to the basis for the agency decision and its rationale." (Brief for Appellant at 23.) In support of this line of reasoning, Sterling cites our opinion in *American Mail Line, Ltd.* v. *Gulick*, 133 U.S.App.D.C. 382, 411 F.2d 696 (1968).

In *Gulick* the only document involved was a memorandum which the Maritime Subsidy Board of the Department of Commerce had clearly incorporated into one of its decisions, stating that its decision was based on the memorandum and setting forth the last five pages of the memorandum as its own findings and conclusions. We held that in those circumstances the memorandum was not an intra-agency memorandum exempt under §552(b)(5) but a portion of an agency order specifically subject to disclosure under §552(a)(2)(A), which requires federal agencies to disclose to any person upon request all "final opinions, * * as well as orders, made in the adjudication of cases." Our reasoning was as follows:

> If the Maritime Subsidy Board did not want to expose its staff's memorandum to public scrutiny it should not have stated publicly in its April 11 ruling that its action was based upon that memorandum, giving no other reasons or basis for its action. When it chose this course of action "as a matter of convenience" (Brief for appellee at 9) the memorandum lost its intra-agency status and became a public record, one which must be disclosed to appellants. Thus, we conclude that the Board's April 11 ruling clearly falls within the confines of 5 U.S.C. §552(a)(2)(A) and consequenlty it must be produced for public inspection.

(133 U.S.App.D.C. at 389, 411 F.2d at 703.)

In discussing the applicability of *Gulick* to the case at hand, we feel it is necessary to divide the Commission memoranda into three categories—those prepared by the Commission staff, those prepared by individual members of the Commission, and those prepared, or at least issued, by the Commission itself.[7] With regard to the first category, we do not believe *Gulick* supports appellant's position. Here the Commission has not indicated publicly that staff memoranda contained the rationale for this decision,[8] and we do not agree with Sterling's assertion that this must of necessity be the case. To begin with, most of these memoranda were written after the Commission's decision in Miles-S.O.S. and were directed toward the litigation in the Sterling-Lehn & Fink case. While these later memoranda contain analyses of the earlier decision, many of these analyses might well be based only on the staff's speculations as to the reasons underlying the decision and not on the reasons which actually motivated the Commission. Even if the Commission furnished its staff with a statement of its reasons for the Miles-S.O.S. decision, the staff memoranda might still be misleading and incomplete, for in them the staff was not attempting to state these reasons in the abstract, but was applying them to Sterling's acquisition of Lehn & Fink. Instead of granting the public access to documents of such questionable validity, it would seem more logical to allow inspection of the memorandum from the Commission disclosing the grounds for its decision, assuming for the moment that such a memorandum exists. We will, of course discuss this subject further below.

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[7] Although the dissenting opinion herein characterizes our classification of the material involved as an "artificial division" of this material, it simultaneously accepts our third division as "consistent with the act." We cannot accept the dissent as to the first two categories as logical, reasoned or correct. The rationale of this division, which refutes the idea of artificiality, is that categories one and two are not *policy* unless adopted by the Commission. If the memoranda classified as categories one and two are adopted by the Commission, then they might be required to be produced, because the adoption does make them policy and they then fall within the productive category. This was precisely the rationale of *Gulick*, on which we of the majority rely. As we read the dissenting opinion's footnote 8 it is consistent with our opinion since we are doing precisely what the last two sentences of dissenting footnote 8 say is the correct rationale.

[8] In note 11, *infra*, we deal with the possibility that the Commission made such an indication in the interagency memoranda which it issued.

The staff memoranda submitted to the Commission prior to the Miles-S.O.S. decision undoubtedly contain ideas which affected that decision to some extent. However, our experience with the decision-making process leads us to believe that the material in these memoranda was probably filtered and refined by the Commission, with the result that its ultimate decision was something more than, or at least different from, the sum of its "parts." Consequently, we doubt that examination of the "parts" would give a very accurate picture of the decision.

[7–9] On the negative side, disclosure of documents such as the staff memoranda at issue here might well have a detrimental effect on an agency's decision-making process. Congress' primary purpose in drafting § 552(b) (5) was to insure that federal agencies continued to enjoy the free flow of ideas essential to the making of reasoned decisions. Thus, the House Committee Report on the section states:

> [A] full and frank exchange of opinions would be impossible if all internal communications were made public. [Agency witnesses] contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced "to operate in fishbowl."

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) U.S. Code Congressional and Administrative News, p. 2427. Authorizing disclosure of the staff memoranda would appear to run counter to this Congressional expression of policy. Sterling contends this is not the case, however. Its theory is that disclosure is only warranted in this case because the Commission did not issue an opinion giving the reason for its *Miles-S.O.S.* decision and that requiring disclosure in this case and others like it will have the salutary effect of requiring agencies to issue an opinion with every order. Although persuasive in the abstract, this reasoning is unrealistic when applied to the everyday world of overburdened administrative agencies.[9] Agencies are required to issue opinions with many of their orders,[10] but it is completely unreasonable to suppose that every agency order can be accompanied by an opinion. The probable effect of a decision requiring disclosure of the staff memoranda would thus be to inhibit "a full and frank exchange of opinions" at least in that class of cases where opinions are not, and as practical matter cannot be, issued. We decline to make such a decision. Accordingly, we hold that the staff memoranda are not subject to disclosure under *Gulick*.[11]

[10] We also feel that *Gulick* does not compel disclosure of the two memoranda written by individual Commissioners. Although the Commissioners were obviously parties to the *Miles-S.O.S.* decision and probably discussed the grounds for that decision to some extent in their memoranda, these memoranda do not necessarily contain a full and accurate account of the grounds for the decision. The Commissioners may have intended to give only a brief summary of Miles-S.O.S. in their memoranda. Moreover, since different Commissioners may have approved the merger for different reasons, the two memoranda at issue may provide only the individual Commissioner's reasons for approving the decision, not the reasons of the Commission as a whole. Finally, both memoranda contain comparisons of the Miles-S.O.S. and Sterling-Lehn & Fink cases, and it may well be that in making their comparisons the Commissioners emphasized certain principles underlying the earlier decision while neglecting others. In sum, then, we believe it is questionable whether the memoranda prepared by the individual Commissioners accurately reflect the grounds for the Commission's decision in *Miles-S.O.S.*

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[9] The Social Security Administration issues more than four million orders a year, the Bureau of Customs three million orders, the Department of Agriculture two million feed grain and wheat diversion orders, and the FCC more than one million licenses (each an order). Davis, *supra*, at 782.

[10] Section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 555(e) (1964), provides that agencies must give a brief statement of their reasons when they deny "a written application, petition, or other request of an interested person made in connection with any agency proceeding." (*See* note 2, *supra*.) Agency rules require the issuance of opinions with certain other orders. In fact, since its approval of the Miles-S.O.S. merger the Commission has enacted a rule requiring that decisions approving such mergers be accompanied by a "statement of supporting reasons." 16 C.F.R. 3.61(e) (1971). Finally, procedural due process may require agencies to issue opinions in some cases not covered by statute or rule.

[11] This holding and our subsequent holding that *Gulick* also does not require disclosure of the individual Commissioner's memoranda are, however, subject to the proviso that the memoranda issued by the Commission do not specifically indicate that reasons for its decisions in *Miles-S.O.S.* are spelled out in one or more of the other inter-agency memoranda. If it develops on remand that the Commission has referred to memoranda in this manner, then any memoranda referred to, or the relevant portions thereof, must be disclosed. *Gulick* does not by its express terms require this result, since in that case we relied to some extent on the fact that the agency document containing the reference to staff memoranda was made public. The result is nonetheless necessary to prevent the development of secret law within the Commission. *See* pages 709, 710, *infra*.

The possible inaccuracies and omissions in these memoranda are not, however, the most important consideration affecting our conclusion that they need not be disclosed. We are primarily motivated by our belief that there is a great need to preserve the free flow of ideas between Commissioners. As we have noted, Congress expressly indicated that intra-agency communications of thoughts and opinions are to be protected, and nowhere is that protection more needed than between the ultimate decision-makers within an agency. In most agencies the exchange of views between Commissioners or Board members is considered perhaps the most essential element in the decisional process. Thus, continual expression of ideas and strong advocacy of positions are to be encouraged to the fullest at this level. In our opinion any attempt to separate a Commissioner's statements as to the basis for a past decision from his views regarding the disposition of a current case and to disclose the former might well infringe upon these essential communications. We therefore conclude that Gulick should not be extended to require that such attempts be made.

[11] With regard to the memoranda issued by the Commission, however, we think the philosophy underlying *Gulick* requires a different result. These memoranda were prepared by the individuals directly responsible for the *Miles-S.O.S.* decision and, as documents emanating from the Commission as a whole, they are presumably neither argumentative in nature nor slanted to reflect a particular Commissioner's view. Hence, the danger that any explanation they may give of Miles-S.O.S. is not the correct one is greatly reduced. We also feel the policy of promoting the free flow of ideas within the agency does not apply here, for private transmittals of binding agency opinions and interpretations should not be encouraged. These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Thus, to prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it. *See generally* Davis, *supra* at 797. On remand, then, the District Court judge should re-examine the memoranda issued by the Commission to determine whether they do in fact contain such material. If they do, this material must be made available to Sterling. Moreover, as we have already noted, if the Commission memoranda specifically indicate that reasons for its Miles-S.O.S. decision are contained in one or more of the memoranda prepared by individual members of the Commission or its staff, these memoranda, or the relevant portions thereof, must also be disclosed.

[12] The Commission contends that the remaining documents at issue in this case fall within the exemption for "trade secrets and com-

mercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b) (4) (Supp. IV 1969). These are the documents contained in the General Foods Final Compliance Report. They were described by the District Court judge as follows:

> 1. *Numbered paragraphs 3(b) and 4 of Exhibit VII of a document dated July 5, 1968 entitled "Memorandums on Divestiture of S.O.S. Business by General Foods Corporation."* Paragraph 3(b) indicates the markets shares of certain Miles Laboratory products, i.e. ALKA-SELTZER, ONE-A-DAY, and CHOCKS. Paragraph 4 reflects the dollar amounts of sales of certain products between Miles Laboratories and General Foods.
>
> 2. *Report dated May 27, 1968, entitled "The S.O.S. Business."* This item contains a breakdown of sales and profit data for each S.O.S. product over the ten year period, 1959–1968.
>
> 3. *Report dated June 3, 1968, entitled "The S.O.S. Business—Index to Exhibits"*, contains breakdown of sales, cost and profit data by product and customer classification.
>
> 4. *S.O.S. Offers at July 8, 1968.* This item lists the bids submitted to General Foods on a closed basis. The amounts of the various bids—not the names of the bidders—were labelled confidential.

(J. A. 72.)

We feel the District Court judge was correct in his conclusion that these documents are covered by § 552(b) (4). The Senate Reports on the Freedom of Information Act describe the purpose of this section as follows:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. *This would include business sales statistics,* inventories, customer lists, and manufacturing processes. * * *

S. Rep. No. 813, 89th Cong., 2d Sess. 9 (1964). The House Reports add:

> It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1964). The documents involved here contain information concerning business sales. Moreover, both Miles and General Foods have sought to prevent public disclosure of these documents, and the Commission has agreed to treat them as confidential. Sterling contends that the Commission's decision regarding the confidentiality of the documents was made in connection with the transfer of S.O.S. to Miles and that even if that initial decision was correct, the reasons for it "no longer obtain so long after the transfer has been made, and so long after the trade information was current." (Brief for Appellant at 25.) However, judging from the District Court judge's descriptions of these documents and from Miles' continuing efforts to prevent disclosure of them, we conclude that the information contained therein remains the type "which would customarily not be released to the public by the person from whom it was obtained."

The judge's descriptions also lead us to believe that making deletions will not render the documents subject to discolsure under the Act. Sterling apparently agrees, for it does not raise this point.

Sterling does, however, argue once again that these documents, though otherwise exempt, are subject to disclosure under *Gulick*. In doing so it relies very heavily on the Commission's statement that in approving the sale of S.O.S. to Miles it "entirely relied upon the information submitted by General Foods and its approval is conditioned upon this information being accurate and complete." (J.A. 8.) Sterling equates this statement with one made by the Maritime Subsidy Board which we commented upon as follows in our *Gulick* opinion:

> If the Maritime Subsidy Board did not want to expose its staff's memorandum to public scrutiny it should not have stated publicly in its April 11 ruling that its action was based on that memorandum, giving no other reasons or basis for its action.

(133 U.S.App.D.C. at 389, 411 F.2d at 703.) We do not believe the two statements are comparable, however. The clear intent of the Maritime Subsidy Board was to indicate that the reasons underlying its decision were embodied in the earlier memorandum. The purpose of the Commission's statement concerning its *Miles-S.O.S.* decision was, on the other hand, merely to indicate that it would later reopen this decision if it discovered that the facts presented by General Foods were not accurate. It is ludicrous to imply from this statement that every particle of information submitted by General Foods was essential to the Commission's decision. Moreover, even if such an implication were feasible, we would be unwilling to lay down a rule whereby an agency would be required to disclose confidential commercial or financial information which it received and relied on in making a decision, yet would not be required to disclose similar information which it did not rely upon; we see no rational reason for drawing such a distinction. For that reason the relevant documents in the General Foods Final Compliance Report are exempt from disclosure under the Freedom of Information Act and unaffected by our decision in *Gulick*.

III. *Sterling's Claim of Denial of a Fair Hearing*

Before reaching the question whether the Commission's refusal to consider the *Miles-S.O.S.* decision a highly relevant precedent and whether to disclose the documents Sterling seeks will deny it a fair hearing, we must first ascertain whether the District Court Judge had jurisdiction to consider this question at this interlocutory stage of the Commission proceedings. He concluded that he did not have jurisdiction because Sterling had not exhausted its administrative remedies, and we agree with this conclusion.

[13] The reasons for requiring exhaustion of administrative remedies were set forth recently by the Supreme Court in *McKart* v. *United States*, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969). The primary purpose served by the doctrine appears to be "the avoidance of premature interruption of the administrative process." *Id.* at 193, 89 S.Ct. at 1662. As the Court said:

> The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages.

Id. at 193–194, 89 S.Ct. at 1662. Exhaustion is also required to facilitate judicial review, which "may [otherwise] be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise." *Id.* at 194, 89 S.Ct. at 1663. Interests of judicial economy are also served. If the agency discovers and corrects its earlier mistakes or the complaining party prevails in the later administrative proceedings, judicial review may well be unnecessary.

[14] In applying these principles in cases involving interlocutory appeals from agency action, the courts appear to have formulated the general rule that a party may bypass established avenues for review within the agency only where the issue in question cannot be raised from a later order of the agency, *Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155 (7th Cir. 1970); *Elmo Division of Drive-X Co.* v. *Dixon*, 121 U.S.App.D.C. 113, 348 F.2d 342 (1965), or where the agency has very clearly violated an important constitutional or statutory right. *Amos Treat & Co.* v. *SEC*, 113 U.S.App.D.C. 100, 306 F.2d 260 (1962). *See also Oestereich* v. *Selective Service System* Local Bd., 393 U.S. 233, 89 S.Ct. 414, 21 L.Ed.2d 402 (1960); *Leedom* v. *Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). Some cases, including *McKart*, suggest that judicial intervention may also be proper even though the agency action is not clearly illegal if the question involved is a strictly legal one not involving the agency's expertise or requiring for their decision the development of other factual or legal issues. The rationale for this extension of the general rule is that "judicial review [of these questions] would not be significantly aided by an additional administrative decision" *McKart* v. *United States, supra*, 395 U.S. at 199, 89 S.Ct. at 1665; hence, the additional decision is not required.

[15] In view of the judicial principles and practices discussed above, the requirement that administrative remedies be exhausted appears applicable here. The Commission may reverse its position with regard to the issue before us or may eventually uphold the Sterling-Lehn & Fink merger. If either event comes to pass, there will be no need for Sterling to seek judicial review. If neither occurs, Sterling will be able to raise the due process issue on appeal from the Commission's final order in the case. At that time we will have before us the entire record of the proceedings and the Commission's rulings and will thus be qualified to determine whether Sterling received a fair hearing. This is not such a strictly legal question that it can be properly decided on the incomplete facts and argument now before us. Accordingly, we feel its resolution should be deferred until the Commission proceedings have run their course.

Sterling disputes this reasoning on at least two grounds. To begin with, Sterling contends that requiring exhaustion of remedies so that a full record may be developed is not a sound policy here because it is so handicapped by its inability to know the basis of the *Miles-S.O.S.* decision that it cannot present a proper case. As a result, we will, according to Sterling, be unable "accurately to appraise the relevance of the undisclosed *Miles-S.O.S.* information or the prejudice to Sterling resulting from its exclusion." (Brief for Appellant at 31.) We do not agree with this appraisal. If on a later appeal Sterling raises the issue of the fairness of the hearing it received before the Commission, we will not simply determine the extent to which the *Miles-S.O.S.* case should be regarded as a precedent, as Sterling seems to think, but whether Sterling had sufficient evidence to argue the precedential value of that case. Moreover, we are fully aware that the Commission did not set forth its reasons for approving the Miles-S.O.S. merger and we will closely scrutinize whatever efforts it may make to distinguish that case if called upon to do so. It is thus our opinion that there are benefits to be gained from requiring exhaustion of remedies and that Sterling will not be unduly prejudiced by being required to proceed through the established administrative channels.

Sterling's second point is that raising the due process issue on appeal from the Commission's final order in this case will not provide it an adequate remedy because we may well be required to apply a narrow standard of review at that later date. According to Sterling, our review may be limited because of the general rule that, absent a patent abuse of discretion, the Commission has discretion to proceed against one party without acting against others similarly situated. *E.g.*, *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 250, 87 S.Ct. 1622, 18 L.Ed.2d 249 (1967). It fears that the Commission's approval of the sale of S.O.S. to Miles may be equated with the Commission's not attacking a merger so that the "patent abuse" test applies.[12] Even if it were clear that Sterling's fears would be realized, which it is not, we do not feel the exhaustion of remedies question would be affected. The fact that an agency is not required to treat similarly situated parties the same certainly does not bolster one party's argument that he should be granted access to information which allegedly explains how another party was treated. Moreover, if Sterling continues to feel that it "is being denied access to evidence which might demonstrate the patent abuse required by *Universal-Rundle*" (Brief for Appellant at 32), it can raise this issue on appeal from the Commission's final order when a full record has been made.[13]

We thus conclude that the District Court judge correctly ruled that he did not have jurisdiction to decide whether the Commission's refusal to grant Sterling access to the documents in question would deny Sterling a fair hearing. However, since it is necessary for the judge to make further findings regarding Sterling's right to some of these documents under the Freedom of Information Act, we must require a remand.

Remanded for proceedings consistent with this opinion.

BAZELON, *Chief Judge* (concurring in part and dissenting in part):

Sterling Drug, Inc. contends that the Freedom of Information Act, 5 U.S.C. § 552 (1970), requires the Federal Trade Commission to disclose two types of documents:[1] first, Commission-prepared papers which allegedly described the rationale for the Commission's approval of a merger between Miles Laboratories and S.O.S.; and second, statements submitted to the Commission in connection with the Miles-S.O.S. merger and which were apparently relevant to the

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[12] There is some indication that the Commission feels that these two situations are comparable. Its brief contains the following passage:

> Then again, the Commission may hold that Sterling has violated Section 7 and may agree that the Miles-S.O.S. situation is similar, but may go on to explain that the sale of S.O.S. to Miles was approved not because of a finding that it did not violate Section 7, but rather because Miles was the least objectionable feasible purchaser of the S.O.S. business; and it was deemed preferable to have Miles purchase the business rather than having the divestiture order against General Foods fail because of lack of purchasers. This, indeed, would be consistent with the Commission's statement in its latest interlocutory order that the possible resemblance of the facts of Miles-S.O.S. to the fact of Sterling-Lehn & Fink is not pertinent. * * *

(Brief for Appellee at 26.) Of course, if the Commission does ultimately conclude that the "patent abuse" test applies in this situation, this conclusion will be subject to judicial review.

[13] There are also some indications that Sterling feels the limited standard of review generally applicable to final agency orders will prevent it from obtaining full review of its claim of denial of a fair hearing on a later appeal. However, the rule that agency decisions must be affirmed if supported by adequate findings of fact and substantial evidence in the record obviously does not apply where a proper hearing has not been held.

[1] Sterling contends alternatively that absent disclosure it will be denied the full and fair hearing required by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1970). I agree with the Court that consideration of this alternative claim is barred by the failure to exhaust administrative remedies.

Commission's review of that merger.[2] The Commission refused disclosure on the grounds that the documents fall within the Act's exemptions for intra-agency memoranda,[3] or confidential financial information.[4] Thus, the interpretation of these exemptions lies at the heart of this controversy, and I respectfully disagree with the interpretation put forward by the Court.

I.

The Freedom of Information Act requires disclosure of each agency's

> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (B) those statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register.

§ 552(a) (2) (A–B). It then exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." § 552(b) (5).[5]

In *Bristol-Myers Co.* v. *FTC,* 138 U.S. App.D.C. 22, 424 F.2d 935 (1970) we pointed out that the inter-agency memorandum exemption was designed to encourage "the free exchange of ideas among government policy makers." [6] But it should be clear that Congress hoped to encourage discourse during the *policy formulation stage;* the exemption was not designed to facilitate the easy exchange of substantive declarations of policy. Indeed, if it were, the exemption would have engulfed the rule. For at the same time that Congress sought to enhance the process of policy formulation, it indicated unequivocally that the purpose of the Act was to forbid secret *law.*[7] And substantive declarations of policy are clearly "law" within the meaning of that prohibition. It necessarily follows that opinions and statements of policy must be disclosed while memoranda drafted as part of the agency's process of formulating such policy need not.[8]

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[2] Shortly after issuing a complaint charging that the acquisition by Sterling Drug of Lehn & Fink violated Section 7 of the Clayton Act, 15 U.S.C. § 18 (1964), the FTC approved without opinion a divestiture plan in another case calling for the sale of the S.O.S. Company to Miles. In the proceedings before the Commission, Sterling has taken the position that the approval of the Miles-S.O.S. merger demonstrates that its acquisition of Lehn & Fink did not violate the Clayton Act. Sterling seeks disclosure in order to show that both mergers involve factors which require application of the same policy and result.

[3] 5 U.S.C. § 552(b) (5) (Supp. IV 1969).

[4] 5 U.S.C. § 522(b) (4) (Supp. IV 1969);

[5] Contrary to my view, the Court concludes that most of the documents are "memorandums" within the terms of the exemption. It then goes on to consider the explicit limitation on the exemption. By its terms the exemption protects only those "memorandums" which "would not be available by law to a party other than an agency in litigation with an agency." The Court construes this awkward phrase to mean that only those memoranda which would be routinely available through discovery in litigation—without regard to special need—fall outside the exemption. I agree. Whether or not the purpose of the Act would have been better served by allowing courts to apply discovery law to the facts of the particular applicant, that course is prohibited by the language of the Act and its legislative history.

[6] 138 U.S.App.D.C. at 26, 424 F.2d at 939. *See* S. Rep.No.813, 89th Cong., 1st Sess. 9 (1965); H. Rep. No. 1497, 89th Cong., 1st Sess. 10 (1965).

[7] "The governing principle, which I think is without exception, is that secret law is forbidden." K. Davis, Administrative Law Treatise, § 3A.21 at 159 (1970 Supp.). Such an accommodation comports with this Court's earlier holding that "[t]he legislative plan creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed." *Bristol-Myers* v. *FTC, supra,* 138 U.S.App.D.C. at 25, 424 F.2d at 938. *See Soucie* v. *David,* 145 U.S.App.D.C. 144, at 157, 448 F.2d 1067, at 1080 (1971).

Instead of asking whether any of the documents at issue were in substance policy declarations which should be disclosed, the Court makes an artificial division of the material into three categories: first, memoranda prepared by the Commission staff; second, memoranda prepared by individual members of the Commission; and third, memoranda issued by the Commission itself. The Court's treatment of documents in the third category—remanding them to the District Court to determine whether they contain binding opinions or statements of policy and interpretation—is consistent with the purposes of the Act. But I disagree strongly with the Court's conclusion that memoranda falling within the first or second categories need never be disclosed.

The Court denies access to memoranda of staff and individual Commissioners primarily on the ground that the memoranda may not accurately reflect the decision of the Commission. I agree that the scheme of the Act exempts memoranda which are wholly preliminary or tentative in character, but I insist that the Act does require disclosure where the memoranda reveal opinions or policy statements which provided the basis for the administrative action in question. The Court seems to concede the point since it follows *Gulick* by allowing disclosure of memoranda within the forbidden categories if they are *specifically referred to* in memoranda within the nonforbidden category.[9] But *Gulick* was, after all, a fairly easy application of the statutory principle, and I can see no reason to read the facts of that particular case as marking the outer limits of the statute's reach. If these memoranda were in fact treated as having been adopted by the agency—as indicated by an affidavit of the Commission or testimony at the remand hearing—then the statute would clearly require disclosure even though the documents had never been referred to in other

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[8] Davis, *supra* note 7, at 159. The application of this principle is not limited to the precise facts in *American Mail Line, Ltd.* v. *Gulick*, 133 U.S.App.D.C. 382, 411 F.2d 696 (1968). In *Gulick* the Maritime Subsidy Board specifically stated that its decision was based upon the memorandum sought disclosed, and quoted the last five pages of the memorandum as its own findings and determination. In this situation it was clear that the memorandum was substantive law adopted by the agency rather than a recommendation or step in the process of formulating policy. Accordingly, the Court ordered disclosure. It is crucial, however, to understand the limited significance of both the Board's reference to the memoranda as the basis of its decision and its extensive quotation from it. By doing so, the Board made it obvious that the memoranda had been adopted as policy. It is the *adoption* of a memorandum as policy, however, and not the particular manner in which the adoption is indicated which is the touchstone of disclosure.

[9] *See* note 11 of the opinion of the Court.

Commission memoranda.[10] Indeed, the Court recognizes that a particular document must be disclosed if it was *adopted* by the Commission, regardless of how that adoption is indicated.[11]

It follows that the case should be remanded with an instruction to determine whether *any* of the documents, regardless of artificial categories or labels, are "opinions" or "statements of policy and interpretation." [12] In making this determination, the burden of proof is upon the Commission, § 552(a) (3). If it seeks to withhold *all* of the memoranda, the Commission must show that an accurate statement of either the reasons for or the policies adopted by its approval of the Miles-S.O.S. merger *does not exist*.[13] Although proof may be made by affidavit, a bare statement that the documents are within the exemption is insufficient. *See* Affidavit of Joseph Shea, Secretary of the Federal Trade Commission, Joint Appendix at 52.

II.

The Commission also refused Sterling's request for various documents submitted to the Commission by General Foods and others in connection with Miles' Purchase of S.O.S. and contained in the General Foods Final Compliance Report.[14] I agree with the Court that at this stage of the controversy these documents fall within the confidential financial information exemption. § 552(b) (4). But if on remand the District Court finds that one or more of the Commission prepared documents are "opinions" or "statements of policy and interpretation," it may well also find that they contain sales, cost, or profit data derived from documents in the Compliance Report. The statute provides:

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[10] See note 8 *supra*. The Ninth Circuit seems to have reached the result I suggest in *General Services Administration* v. *Benson*, 415 F.2d 878 (9th Cir. 1969). With reference to documents that had apparently never been made public or referred to by the agency, the court stated:

> For example, exhibits A and B, described in *Benson* v. *General Services Administration*, D.C. 289 F.Supp. 590, 591, are not merely advisory opinions submitted for policy making purposes. Rather once exhibit A (the disposal plan) was approved, "it was to be followed by the regional office in making the disposal;" and the memorandum described as exhibit B "was used as a guide for higher authority and as a record of the reasons for the action taken." Thus, documents A and B took on the character of "statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register"—a category of materials specifically available to the public under 5 U.S.C. § 552(a)(2)(B).

Id. at 881.

[11] See note 7 of the opinion of the Court.

[12] The Court would deny access to the statements issued by the individual Commissioners on the possibility that "[s]ince different Commissioners may have approved the merger for different reasons, the two memoranda at issue may provide only the individual Commissioner's reasons for approving the decision, not the reasons of the Commission as a whole." Opinion of the Court at 707. I submit, however, that if the memoranda in fact provide the reasons for the vote of the individual Commissioners to approve or disapprove the merger, they fall directly within the terms of the statute since subsection (a) (2) (A) provides for disclosure of "final opinions, *including concurring and dissenting opinions*." (Emphasis added).

[13] If the Commission had issued either an opinion or statement of reasons with its order approving the Miles-S.O.S. merger, there would have been no necessity to disclose the underlying memoranda. The Court says that it is unrealistic to require an opinion or statement to protect agency documents since some agencies, such as the Social Security Administration, issue millions of orders each year. Opinion of the Court at 14, 14n.9. Unlike the Social Security Administration, the Federal Trade Commission does not issue millions of orders of the type involved here. Indeed, as of 1965, the F.T.C. brought only 23 Section 7 cases which culminated in finding a violation or the entry of a consent decree. And only some fewer number resulted in the eventual approval of a divestiture purchaser. Elzinga, The Antimerger Law: Pyrrhic Victories?, 12 J. of Law & Econ. 43 (1969). In those agencies where millions of orders are issued the likelihood is that extensive memoranda are not written or required because decisions are made simply on the basis of staff manuals, already required to be disclosed, § 552(a)(2)(C).

[14] These documents are described at page 708 of the Court's opinion.

> To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual.

§ 552(a) (2). *See Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 138 U.S.App.D.C. 147, 425 F.2d 578 (1970).

In this case, however, deletion is unlikely to provide a viable course. Deletion of names [15] would at this stage be fruitless, and deletion of the data, given the nature of Section 7 litigation, would likely render the opinion or interpretation meaningless. In such a situation the language of the statute, unlike that found in the confidential financial information exemption,[16] directs the court to balance the interests affected by disclosure.[17] The Senate Report indicates the nature of that balance as one of "the public's right to know with the private citizen's right to be secure in his personal affairs *which have no bearing or effect on the general public.*"[18] The maintenance of secret law would weigh heavily against the public interest.[19]

III.

In the proceedings below, the District Court reviewed the documents *in camera*. While we have recommended this procedure in Freedom of Information Act cases, *Soucie* v. *David*, 145 U.S.App.D.C. 144, 448 F.2d 1067 (1971), I am troubled by the fact that this short circuits the adversary process. The party seeking disclosure lacks the knowledge of the actual contents of the documents necessary to question the affidavits of the agency. Still, we are unable to discern any solutions which would not require disclosure of *all* agency documents. Perhaps the parties in this and future cases may be able to propose some acceptable solutions of the problem. Until then litigants will have to rely on the trial court's careful examination and appellate review.[20]

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[15] *See* S.Rep. *supra* note 6, at 7; H.Rep., *supra* note 6, at 8; *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 138 U.S.App.D.C. 147, 425 F.2d 578 (1970).

[16] *See generally*, Davis, *supra* note 7, at § 3A.19.

[17] *See* S.Rep., *supra* note 6, at 7; H.Rep., *supra* note 6, at 8.

[18] S.Rep., *supra* note 6, at 7.

[19] In construing the identical phrase in exemption 6, this Court recently held that "[t]he statutory language 'clearly unwarranted' instructs the court to tilt the balance in favor of disclosure." *Getman* v. *NLRB*, 146 U.S.App.D.C. 209, at 213, 450 F.2d 670, at 674 (1971).

[20] When the decision of the trial court is based on written or uncontraverted oral evidence alone, there is no particular reason to be bound by the trial court's findings of fact and the clearly erroneous rule does not apply. *See generally* 5 J. Moore, Federal Practice ¶ 52.04 (1969) and cases there cited.

THE BENDIX CORPORATION v. FEDERAL TRADE COMMISSION*

No. 20687—F.T.C. Docket 8739

(Court of Appeals, Sixth Circuit. Oct. 18, 1971)

When the Toehold Theory Was Never Presented During the Administrative Hearing the Commission's Holding Based on That Theory Violates the Administrative Procedure Act

Where complaint counsel in antitrust case stated that case was being tried on theory that merger eliminated potential competition by virtue of fact that acquiring company was potential entrant into market by internal expansion and toehold theory was never presented during administrative hearing or discussed by complaint counsel in appeal to Commission, Commission's determination, based on toehold theory, that acquisition violated anti-trust laws violated Administrative Procedure Act and would be vacated and case remanded.

(The syllabus, with substituted captions, is taken from 450 F.2d 534)

On petition for review, Court held that where antitrust case was tried on theory that merger eliminated potential competition, appeal based on toehold theory, violated Administrative Procedure Act. Vacated and remanded.

Abe Krash, Washington, D.C., for petitioner; *Daniel A. Rezneck*, *Peter K. Bleakley*, *Jack L. Lipson*, *Jerome I. Chapman*, Washington, D.C. on brief: *Charles F. Donnelly*, *B. G. Andrews*, Southfield, Mich., *Arnold & Porter*, Washington, D.C., of counsel.

Frederick H. Mayer, F.T.C., Washington, D.C., for respondent; *Joseph Martin, Jr.*, Gen. Counsel, *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, *Thomas F. Howder*, *Montgomery K. Hyun*, Attys., F.T.C., Washington, D.C., on brief.

Before Phillips, *Chief Judge*, and Weick and Edwards, *Circuit Judges*.

Phillips, *Chief Judge:*

The Federal Trade Commission held that the acquisition of Fram Corporation by the Bendix Corporation violated Section 7 of the Clayton Act, 15 U.S.C. § 18.[1] Reversing the decision of its Hearing

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*Reported in 450 F.2d 534. For case before the Commission see 77 F.T.C. 731.

[1] Section 7 of the Clayton Act provides in part:

"* * * no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Examiner, the Commission directed divestiture of Fram. The case is before this court on the petition to review filed by Bendix.

The complaint was filed June 29, 1967, charging that Bendix had violated not only § 7 of the Clayton Act but also § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1). The § 5 charge is not before this court in the present proceeding and will not be discussed further in this opinion.

The complaint alleged violations of § 7 with respect to three lines of commerce: (1) automotive filters,[2] (2) aerospace filters,[3] and (3) liquid separators.[4]

The results of the § 7 violations were averred to be:

> (a) actual and potential competition between Bendix and Fram in the manufacture and sale of automotive filters, aerospace filters and liquid separators will be eliminated;
>
> (b) actual and potential competition in the manufacture and sale of automotive filters, aerospace filters, and liquid separators, generally, may be substantially lessened;
>
> (c) Bendix will eliminate Fram as an independent competitive factor in the manufacture and sale of automotive filters, aerospace filters, and liquid separators;
>
> (d) concentration in the manufacture and sale of automotive filters will be maintained;
>
> (e) concentration in the manufacture and sale of aerospace filters and liquid separators will be increased substantially;
>
> (f) Bendix will obtain a decisive competitive advantage in the manufacture and sale of automotive filters, aerospace filters and liquid separators, to the detriment of actual and potential competition;
>
> (g) additional mergers and acquisitions may be fostered with a resultant lessening of competition in the manufacture and sale of automotive filters, aerospace filters and liquid separators; and
>
> (h) the entry of new firms and the growth of smaller filter manufacturing companies will be retarded, discouraged or prevented. (1968–70 Transfer Binder) Trade Reg.Rep. ¶ 17,997 at 20,394–95. (FTC 1967).

As the case proceeded Complaint Counsel dropped several of these theories and eventually reformulated the case. Before the Hearing Examiner he proceeded on three separate theories:

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[2] Automotive filters are of three types—oil, air, and fuel filters. They are used on a variety of vehicles and engines, including: passenger cars and light trucks, heavy-duty trucks, farm and earthmoving equipment, power lawn mowers, and stationary, outboard, and marine engines.

[3] Aerospace filters are those (including their assemblies, housing and elements) which are intended for use on aircraft (including spacecraft), missiles, and ground support equipment for aircraft and missiles.

[4] Liquid separators are mechanical devices which remove entrained and emulsified water and solid contaminants from a liquid product in one pass, at full flow, through water coalescing elements. Virtually the only use for filter water separators is the removal of water and dirt from low viscosity fluids, mainly aircraft fuels (*i.e.*, jet fuels, gasoline and kerosene). Less than 1% of filter water separators are used for purposes other than removing water and contaminants from aviation jet fuels. Filter water separators are not used on the aircraft itself, but at various transfer points for aircraft fuel, such as refineries, pipeline terminals and airports, with the latter being the biggest user.

(i) that the acquisition lessened actual competition between Bendix and Fram in the manufacture and sale of automotive filters;

(ii) that Bendix would confer "a decisive competitive advantage" upon Fram in the manufacture and sale of automotive filters; and

(iii) that Bendix was a potential entrant by internal expansion into the business of making and selling passenger car filters in the replacement parts market (known as the "aftermarket"), and that the acquisition of Fram eliminated Bendix's "potential competition" in this submarket.

The Examiner rejected each of these theories, concluding that Complaint Counsel had failed to sustain his burden of proof. The first theory, lessening of existing competition between Bendix and Fram, was abandoned by Complaint Counsel on the appeal to the Commission.

On appeal before the Commission most of the Examiner's findings of fact and conclusions of law were accepted without change, and his treatment of the three theories was not disturbed. The Commission held:

> To the hearing examiner it was dispositive of this case that the evidence showed that Bendix would not enter the passenger car filter aftermarket by internal expansion but only through merger with another firm already in that market. The examiner assumed that, from the standpoint of Section 7, it made no difference whether Bendix merged with Fram, an established market leader, or with a smaller firm which, by combining with Bendix's vast resources and managerial skills, would become a new and substantial competitive force in the market confronting Fram and the other established leading firms.
>
> The examiner's analysis of the potential competition problem—focusing exclusively on the probability of Bendix's entry by internal expansion and neglecting the likelihood of entry by merger other than with Fram—was unduly narrow and must be rejected, because it rests upon a misconception of the basic purpose and policy of Section 7. Various forms of merger entry other than through acquisition of a leading company—for example, a "toehold" acquisition of a small company capable of expansion into a substantial competitive force—may be as economically desirable and beneficial to competition as internal expansion into a relevant market, and must be considered in assessing the potential competition of the acquiring firm which has been eliminated as a result of the challenged merger.
>
> Although previous cases have only involved potential entry in one form, *i.e.*, by internal expansion, it is clear that the *form* of entry was not controlling in these decisions. What was determinative in each of these cases was (1) the actual elmination of the additional decision-making, the added capacity, and the other market stimuli which would have resulted had entry taken a procompetitive form, such as internal expansion; and (2) the anticompetitive

> consequences of the removal of the discipling effect of a potential competitor from the market's edge. We believe that these adverse effects on competition may result from the elimination of a potential entrant who might have entered by internal expansion or who might have entered by a toehold acquisition. 3 Trade Reg. Rep. ¶ 19,288 at 21,439, 21,445 (1970).

On the basis of the toehold theory of illegality, the Commission found that there was a substantial likelihood of a lessening of competition in the automotive filter aftermarket as a result of the acquisition and that the acquisition therefore violated § 7.

In this court Bendix does not seriously question whether the toehold theory is a valid theory of illegality under § 7. It contends that to establish a violation of § 7 based on the toehold theory, Complaint Counsel must prove that the effect of the acquisition "may be substantially to lessen competition" in some line of commerce in some section of the country.

Bendix asserts that Complaint Counsel failed to prove the essential points necessary to establish a toehold violation. In addition to contesting the efficacy of the proof, Bendix raises two probing questions: (1) Is the toehold theory of illegality as applied in the instant case inconsistent with the Commission's approval of the Examiner's finding that Bendix was not a likely potential entrant by internal expansion? and (2) Did the Commission violate the Administrative Procedure Act and the Fifth Amendment due process clause in deciding the case on a theory that was never considered by the Examiner or raised by Complaint Counsel and without affording Bendix an opportunity to present proof to rebut this theory?

To dispose of the present review we find it necessary to consider only the issue under the Administrative Procedure Act. For the reasons set forth later in this opinion, we conclude from the record before this Court that the Commission violated § 5 of the Administrative Procedure Act, 5 U.S.C. § 554, when it decided the case on a theory of illegality which was never charged, raised, nor tried during the administrative hearing; never presented for consideration by the Hearing Examiner; and not raised as an issue or discussed by Complaint Counsel in the appeal to the Commission from the order of the Hearing Examiner dismissing the complaint. Bendix had no notice that it was charged under the toehold theory of illegality and was accorded no opportunity to present evidence in defense against this theory. The order of the Commission therefore must be vacated and the case remanded.

Although we do not pass upon the merits of the § 7 charge, we recite in some detail certain merit-related factors as disclosed by the record which are relevant to the determinative issue under the Administrative Procedure Act.

RELEVANT MARKET

Filters sold in the relevant market are used for replacement of spent filters.

The relevant market is clearly distinguished in sales techniques, distribution channels, product outlets, and customers from the related market of filters for original equipment manufacturers (OEM's). The OEM market involves sales of the same types of filters to companies such as Chrysler and American Motors for use as parts on their new passenger automobiles. General Motors and Ford have divisions which supply all their needs in the OEM market.

The only proofs offered on the relevant geographic market were directed at the entire United States. For purposes of this review we do not consider any geographic submarket less than the entire United States.

THE INDUSTRY

The predominate force in the relevant market is General Motors. Through its automobile parts division General Motors sells under the trade name "AC" approximately one-third of the filters distributed in the relevant market. Purolator is the second largest company in the relevant market, having approximately 21 per cent of the automotive filter aftermarket business. Fram ranks third in the sale of filters in the aftermarket with approximately 17 per cent of the business.[5]

Other significant market members include Wix Corporation, ranking fourth with 9.5 per cent of the business, Walker Manufacturing Company ranking fifth with 3.9 per cent of the business and Hastings Manufacturing Company, ranking sixth with 3.2 per cent of the business.[6]

In addition to the companies previously mentioned, several companies sell filters in the aftermarket on a reduced scale. There are approximately 20 companies with less than one per cent of the business. These companies do not have a volume of business comparable to that of General Motors, Purolator and Fram. That fact does not mean, however, that these smaller companies are not significant market factors. Most of them are making profits, and many have well trained marketing staffs that vigorously promote their company's products in the market.

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[5] Reference to market shares are for the 1966 fiscal year unless indicated otherwise.

[6] The structure of the industry for the sale of all automotive filters is basically the same as that for the aftermarket, although the percentages differ somewhat. The only noteworthy exceptions are Donaldson Corporation, which, based on 6.3 per cent of the business, stands ahead of Hastings in sixth place in the total sales market; and the fact that Bendix does some business in the broader market encompassing a total sales—about .4 per cent of the total sales of automotive filters which ranks it approximately 17th in that market.

Sales in the aftermarket are made through four principal channels of distribution. First, there is the traditional aftermarket channel in which filter manufacturers sell to warehouse distributors, who in turn sell to jobbers. The latter in turn sell to automotive establishments such as gasoline stations and repair garages which service the cars of their customers. Second, filter manufacturers sell replacement filters to passenger-car manufacturers who in turn sell these filters to their franchised automobile dealers and also to independent warehouse distributors. Third, oil and tire companies constitute another channel of distribution; they purchase filters from the manufacturers and sell them primarily to franchised service stations but also to independent distributors. And fourth, there is still another main group of large-volume purchasers, *i.e.*, the mass-merchandisers (such as Sears Roebuck & Co., automotive chain stores and discount houses); they sell directly to consumers through their own retail outlets.

Mass-marketing and intense promotion as well as very substantial advertising are the hallmarks of successful distribution in the filter aftermarket. The distributional and promotional techniques including purchase bonus stamps, contest and prizes are aimed at the trade rather than the ultimate consumer, since the latter in most instances is not brand-conscious. These techniques are designated to differentiate the promoted and advertised brand from competing brands and so gain and retain widespread brand acceptance by the trade. These efforts are implemented by large sales staffs and great numbers of promotional men, so-called "missionary men," who are organized on a territorial, regional and national basis. The three leading filter makers, *viz.*, the A.C. Spark Plug Division of General Motors, Purolator and Fram, each employed over 100 missionary men.

Large sales staffs are not limited to the top companies in the industry. Several of the companies having a smaller share of the market employ as many as 100 of the so-called "missionary men."

These "missionary men" are essential in the aftermarket where entry is not precluded by any substantial technological barriers. There are no basis patents essential to any of the products or processes used in manufacturing operations. Since the set-up cost and cost of production are not prohibitively high, the primary factor for success in the business is promotion. The firms that promote their products and achieve acceptance in the distribution channels are the firms that succeed.

THE PARTIES

A. Bendix. Bendix is one of the largest industrial corporations in the United States. In 1966 its consolidated net sales were $1.05 billion. The company was founded shortly before World War I as a maker of starter drives for automobiles. It became diversified over the years with its manufacturing operations extending to components and assemblies for aerospace, automotive, automation, scientific, oceanic and other uses. In recent years more than one-half of Bendix's sales have been concentrated in sophisticated equipment for aircraft, missiles and spacecraft. Thus the company was heavily dependent on government sales and particularly government defense contracts. In 1967 the highly sophisticated technical products accounted for 53 per cent of all of Bendix's sales.

In 1966 Bendix sold $229 million worth of automotive products. That figure includes sales abroad by foreign subsidaries and affiliates, export sales and sales to the military, nearly all of which were shipped overseas. Automotive parts sold by Bendix in the United States totaled $165 million.

Bendix's automotive business consists principally of the manufacture of technologically complex parts such as starter drives, ignition components, brakes, power steering units, carburetors and car radios. About 75 per cent of all its automotive business is in the OEM market. The sale of all Bendix automotive products in the aftermarket was about $40 million in 1966. About one-half, or $20 million, was under the Bendix name. Thus, Bendix brand sales in the aftermarket amounted to less than one per cent of the total automotive parts sold in the aftermarket and less than two per cent of the company's total sales. Although these percentages are small, the dollar volumes cannot be called "insubstantial." Bendix is certainly no novice in the automotive parts aftermarket. Its principal aftermarket sales division, the Automotive Service Division (ASD), employs about 80 salesmen for all products sold by the ASD. However, it does not sell automotive filters in the aftermarket. At the time of the acquisition of Fram it did not make or sell any filters designed for use on passenger cars, and the ASD had never emphasized promotion and merchandising techniques, nor was it particularly adapted to selling and promoting low technology, consumer-type products, such as automotive filters. The 80 employees of the ASD call primarily on garages and repair shops and they do not customarily call on service stations, the main outlet for automobile filters in the aftermarket.

In regard to automotive filters, Bendix, through its Filter Division, focused upon the production and sale of heavy duty oil and fuel filters for the OEM market for use in large trucks, tractors and off-highway equipment. The Bendix Filter Division was one of the company's smaller divisions and in 1966 its sales of automotive filters were about $1 million, and of this total about $283,000 represented sales of filters manufactured for Bendix by a competitior, *i.e.*, Wix Corporation. Most of the filter sales were made in the OEM market, with the lucrative aftermarket accounting for a small amount. The only automotive filter manufactured by Bendix specifically for passenger cars was an air filter element made in the late 1950's primarily for Ford Motor Co. After losing money on the venture, Bendix in 1960 began subcontracting these filters until 1963, when its agreement with Ford was terminated.

B. Fram. Organized in 1934, Fram is a leading producer of various kinds of filters, including automotive filters, aerospace filters and filter water separators. In 1966, its net sales totaled $66.7 million, its assets amounted to $39.1 million, and net earnings were $4.4 million. Sales, earnings and assets in 1966 were the highest in its history. Fram's net profit on sales before taxes increased from 10.6 per cent in 1963 to 13.0 per cent in 1966, and return on stockholders' equity rose from 14.7 per cent to 19.8 per cent during the same period. It was thus a flourishing and growing company.

Prior to its acquisition by Bendix, Fram had six operating divisions, of which the Automotive Division was by far the largest. The latter was engaged in the manufacture and sale of automotive filters, primarily for passenger cars, but also for trucks, and other equipment utilizing internal combustion engines. Net profits on sales by the Automotive Division rose from 14.7 per cent in 1965 to 17.1 per cent in 1966. In that year, automotive filters accounted for 55 per cent of Fram's total sales.

Although Fram's Automotive Division sold filters in all distribution channels, about 90 per cent of its filter sales were made in the aftermarket for passenger cars. In that market Fram ranked third, accounting in 1966 for 17.2 per cent of total sales.

THE ADMINISTRATIVE PROCEEDINGS

The dispositive issue on this appeal is whether the Commission denied Bendix and Fram the opportunity to defend the charges with which they were ultimately faced; and, if so, did that denial violate § 5 of the Administrative Procedure Act (APA), 5 U.S.C. § 554.

Prior to the time the complaint in this case was filed, a number of decisions had been rendered under § 7 of the Clayton Act condemning the elimination of potential competition. *See, e.g., United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 84 S.Ct. 1710, 12 L.Ed.2d 775; *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 84 S.Ct. 1044, 12 L.Ed.2d 12. Foremost among these decisions is the Clorox case, *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed.2d 303, wherein the Court said:

> [T]he merger would seriously diminish potential competition by eliminating Procter as a potential entrant into the industry. Prior to the merger, the Commission found, Procter was the most likely prospective entrant, and absent the merger would have remained on the periphery, restraining Clorox from exercising its market power. If Procter had actually entered, Clorox's dominant position would have been eroded and the concentration of the industry reduced. 386 U.S. at 575, 87 S.Ct. at 1229.

The evils attending elimination of potential competition also have received exhaustive treatment in the periodicals. *See, e.g.*, Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv.L. Rev. 1313 (1965). Of the many consequences of conglomerate mergers, Professor Turner listed only one involving potential competition that he considered to be of possible antitrust significance:

> The acquisition may lessen "potential" competition either (a) because the acquiring firm would have entered the industry in any event by internal expansion of its own facilities, so that acquisition reduces the number of competitors by one; or (b) because the acquiring firm, although it might not have entered, was a sufficient threat to existing firms to exert a competitive influence on their price and other decisions. *Id.* at 1323.

No mention was made by Professor Turner of the effect of the availability of a toehold firm on the acquisition actually consummated. So far as our research has disclosed, the earlier considerations of the effects of § 7 on the elimination of potential competition were concerned with acquisitions where the acquiring firm was a potential entrant by internal expansion into the market of the acquired firm.

The toehold theory was not unheard of, however, at the time of the filing of the complaint. A clear formulation of the toehold concept is found in the Commission opinion in *Beatrice Foods Co.* (1965–67 Transfer Binder) Trade Reg. Rep. ¶ 17,244 at 22,332 (FTC 1965). The pertinent portion of the opinion reads as follows:

> The competitive effects are more difficult to predict when a very small factor in the market is acquired by a substantial potential competitor. The merger may increase competition in the market by injecting a substantial firm, one capable of challenging the dominant firms in the market, in place of a firm too small to be a significant competitive factor.
>
> * * * * * * *
>
> The competitive effects are likely to be most serious where the merger is between one of the dominant firms in a concentrated market and a substantial potential competitor. In such a case there is no improvement in the competitive structure of the market—for one dominant firm has simply been replaced by another—and substantial potential competition is eliminated. The dominant firms in the market no longer have to concern themselves with the consequences of

> entry by the potential competitor; he is already in. Nor need they cope with any additional competition as a result of his entry; he has not increased the number of substantial competitors in the market but simply taken the place of one of those competitors. The potential competitor enters the market in circumstances where there is no change in the competitive structure of the market, except that he is eliminated as a prospective entrant. Such a merger is even more injurious to competition if the acquired firm is a potential competitor in one or more of the acquiring firm's markets. For then potential competition is hurt twice: the merger eliminates the acquiring company as a potential entrant in the acquired firm's markets, and the acquired firm is eliminated as a potential entrant in the acquiring firm's markets.

Complaint Counsel's brief before the Commission did not mention the toehold theory in discussing the alleged violation. The only section that is pertinent to potential competition was headed "The Hearing Examiner in Concluding that Bendix Was Not a 'Potential Entrant into the Automotive Filter Replacement Market *by Internal Development*'." (Emphasis added.)

This is not a case where the initial complaint was couched in broad generalities but subsequently was tried on the specific theory that ultimately justified a finding that § 7 had been violated. In *Kroger* v. *FTC*, 438 F.2d 1372 (6th Cir.), petition for cert. filed 39 U.S.L.W. 3528 (No. 70–202) (May 24, 1971), Mr. Justice Tom C. Clark, speaking for this court on the argument that the case was tried on a different theory before the Commissioner than that pursued before the Hearing Examiner, said:

> Kroger's own counsel repeatedly objected before the Hearing Examiner to the relevance of certain evidence as to Kroger but not to Beatrice on the ground that "independent acts of Party A had nothing to do with the responsibility of Party B." That is exactly the theory on which the Commission acted in finding Kroger responsible. *Id.* at 1378.

In the present case counsel for Bendix specifically asked both the Hearing Examiner and Complaint Counsel for the theory upon which the case would be tried. In response to this questioning Complaint Counsel limited the case to the theory that the merger eliminated potential competition by virtue of the fact that Bendix was a potential entrant into the filter aftermarket by internal expansion. Throughout the hearing before the Examiner, the case was tried on the issue whether Bendix would have entered the passenger car filter aftermarket by internal expansion if it had not acquired Fram. Repeated statements by counsel, witnesses, and the Examiner showed that every one believed this to be the only issue with respect to potential competition. Complaint Counsel never suggested that Bendix could have and would have entered the automotive filter replacement business by acquiring a toehold firm if Fram had been unavailable. At the conclusion of the hearing, Complaint Counsel submitted elaborate proposed findings and conclusions, reiterating their position that Bendix was a potential entrant through internal expansion. There was no mention of potential entry by a toehold acquisition.

If there would have been any difference in defending the action based on the internal expansion theory as compared to the toehold theory, Bendix was entitled to an opportunity to defend against the theory upon which the Commission acted. It is readily apparent that different defenses and proofs would be used in defending against these two theories. As an example of the difference in proofs, Bendix states in its brief that:

> [An officer of Bendix] was specifically asked whether Bendix would have entered the passenger car filter aftermarket by *internal expansion* if the Fram acquisition had been unavailable. He said no (A. 1421) He and every other Bendix official who testified would have been asked if Bendix would have made a "toehold" acquisition of a small firm and expanded it, had it been known the Commission would decide the case on that issue.
>
> Numerous other examples can be given of how the case would have been tried differently, *e.g.*, by further proof that a "toehold" acquisition was not feasible for Bendix; by a more comprehensive analysis of alleged "toehold" candidates to demonstrate in detail why they did not meet the acquisition criteria established by the Bendix management; by the presentation of further proof that entry into the passenger car filter aftermarket through a "toehold" acquisition, followed by its expansion, would have entailed the same investments, risks, and activities as entry by internal growth; and by evidence of the economic problems of attempting to expand a "toehold" into a significant competitive factor in the context of this particular industry.

Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554, provides in relevant part: "(b) Persons entitled to notice of an agency hearing shall be timely informed of * * * (3) the matters of fact and law asserted."

This court repeatedly has held that an administrative agency must give a clear statement of the theory on which a case will be tried. *See, e.g.*, *NLRB* v. *Tennsco Corp.*, 339 F.2d 396 (6th Cir.); *NLRB* v. *Johnson*, 322 F.2d 216 (6th Cir.), *cert. denied*, 376 U.S. 951, 84 S.Ct. 968, 11 L.Ed.2d 971. See also *S. S. Kresge Co.* v. *NLRB*, 416 F.2d 1225, 1234–1235 (6th Cir.).

In the leading case on this issue involving the FTC, the United States Court of Appeals for the District of Columbia Circuit set aside an FTC order because the Commission sustained a charge on a ground neither alleged in the complaint nor tried before the Hearing Examiner. The Court held:

> [I]t is well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change. * * * By substituting an issue * * * for the one framed by the pleading, * * * the Commission has deprived petitioners of both notice and hearing on the substituted issue. The evil at which the statute [Section 5 of the APA] strikes is not remedied by

observing that the outcome would perhaps or even likely have been the same. It is the *opportunity* to present argument under the new theory of violation, which must be supplied. *Rodale Press, Inc.* v. *FTC*, 132 U.S.App.D.C. 317, 407 F.2d 1252, 1256–1257. (Emphasis in original.)

Bendix's case was prepared and presented in response to certain enumerated theories. The witnesses were questioned and cross-examined in terms of these issues. The documentary proof was keyed to these theories. Bendix was not accorded the opportunity to present proof and argument under the toehold theory of violation.

We hold that the Commission violated § 5 of the Administrative Procedure Act and that the case must be remanded to permit the parties to offer additional evidence. On remand, both Complaint Counsel and Bendix shall be permitted to offer evidence pertinent to the toehold theory of illegality and any related defenses. Both Commission Counsel and Bendix shall be accorded the right to require the presence of any previously sworn witness for additional testimony either on direct or cross examination. Upon rehearing the Commission may consider any evidence previously taken and now on file and such additional evidence as may be admissible and relevant to the issues involved.

Vacated and remanded.

COLONIAL STORES INCORPORATED v. FEDERAL TRADE COMMISSION*

No. 30198—F.T.C. Docket 8768

(Court of Appeals, Fifth Circuit. Oct. 22, 1971)

1. WHERE AGENCY HAS PLENARY AUTHORITY OVER COMMERCIAL ACTIVITY APPELLATE COURT REVIEW IS CONFINED BY THE SUBSTANTIAL EVIDENCE RULE

When Congress has vested in federal agency plenary authority to investigate and regulate particular forms of commercial or economic activity, entrusting it with primary responsibility for resolution of complex and usually sharply disputed factual issues, appellate court review of exercise of that authority is confined by narrow perimeter of the substantial evidence rule.

2. FINDINGS OF FACT WILL NOT BE SET ASIDE EVEN THOUGH SUGGESTED ALTERNATIVE CONCLUSIONS ARE EQUALLY PERSUASIVE

Findings of fact of federal agency in which plenary authority to investigate and regulate particular forms of commercial or economic activity has been entrusted will not be set aside if evidence in record reasonably supports administrative conclusion, even though suggested alternative conclusions may be equally or even more reasonable and persuasive; the findings must stand unless they are wrong and they cannot be reversibly wrong if substantial evidence supports them.

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*Reported in 450 F.2d 733. For case before the Commission see 77 F.T.C. 554.

3. On Appeal Findings of Commission as to Facts if Supported by Evidence Shall Be Conclusive

Trade regulation section of Federal Trade Commission Act providing that on appeal the findings of Commission as to facts, if supported by evidence, shall be conclusive means such evidence as is adequate to reasonably support the conclusion reached.

4. Credibility of Evidence and Inferences There From Are Wholly Within Competence of FTC

Assessments of credibility of evidence and inferences to be drawn from it are wholly within competence of Federal Trade Commission.

5. Application of Law to Facts Must Come From Judge

Where statutory standard is open to widely varying individual interpretations, final imprimatur on application of law to facts must come from judges rather than administrative agency.

6. When Findings of Commission Are Framed in Terms of Legal Conclusions Their Presumptive Validity Is Considerable

Even when finding of Federal Trade Commission are framed in terms of legal conclusions, their presumptive validity is considerable.

7. That Retail Grocery Chain Had Induced Promotional Allowances From Its Suppliers Was Supported by Evidence

Evidence supported findings of Federal Trade Commission that retail grocery chain had induced promotional payments from its suppliers and that it knew or should have known that such payments were not being offered to chain's competitors on proportionally equal terms, in proceeding on charges of price discrimination in violation of Robinson-Patman Act.

8. Supplier May Not Make Excessive Promotional Payments Solely on Theory It Obtained Superior Advertising Benefits

Under Robinson-Patman Price Discrimination Act, supplier may not make promotional payments greatly exceeding fixed percentage of purchases standard imposed on other, perhaps smaller, competitors and then justify the excess as nondiscriminatory solely on theory that it obtained superior advertising benefits.

9. The Supermarket Chain Store Could Make Larger Payments Than Smaller Competitors Does Not Justify Such Payments

Fact that multimillion dollar supermarket chain was capable of providing promotion services of considerably greater utility and sophistication than those of smaller competitors and that such services would be worth more to supplier did not, under Robison-Patman Price Discrimination Act, justify suppliers making payments to the chain that were comparatively larger than those made for competitors' promotional efforts of less commercial value.

10. **REQUIREMENTS OF PROPORTIONALITY OF PROMOTIONAL SERVICES ARE NOT SATISFIED MERELY BECAUSE SUPPLIER GIVES COMPETITORS CHANCE TO CONDUCT COMPARABLE PROMOTIONS**

Robinson-Patman Price Discrimination Act requirements of proportionality of promotional services provided by supplier to retailers are not satisfied merely because supplier gives competitors of one retailer a choice between initiating a promotion comparable in scale to that of the retailer or foregoing any corresponding promotional consideration whatever and some minimal effort to proportionalize in good faith must be made.

11. **BENEFITS TO SUPPLIER FROM PROPORTIONAL SERVICES BY ONE CUSTOMER CANNOT OBLITERATE FACT THAT RELATIONSHIP IS ONE OF PROPORTIONALITY**

While benefits received by supplier from promotional services provided by one customer may enter into calculation of sum supplier may furnish such customer, they cannot obliterate entirely the fact that fundamental relationship is one of proportionality among offers by supplier to its customers.

12. **WHEN COMMISSION HAS SUBSTANTIAL EVIDENCE OF PRICE DISCRIMINATION IT IS NOT REQUIRED TO NEGATE OTHER CONCEIVABLE INFERENCE**

If substantial evidence reasonably supports conclusion reached by Federal Trade Commission with respect to alleged price discrimination, fact that alternative conclusions may have remained unexplored is totally irrelevant and Commission is not required to affirmatively negate every conceivable adverse inference which can be drawn from the evidence.

13. **COURT OF APPEALS JUDGES ONLY SUFFICIENCY OF PROOF, NOT PROPRIETY OF COMMISSION'S INVESTIGATIVE METHODS**

On review of determination of Federal Trade Commission in price discrimination proceeding under Robinson-Patman Act, Court of Appeals judges only sufficiency of proof, not propriety of Commission's investigative methods.

14. **ROBINSON-PATMAN ACT PERMITS INFERENCE THAT PERSONS CHARGED SHOULD KNOW OF DISPROPORTIONALITY OF PAYMENT**

Although knowledge of customer that it has received consideration for handling commodities of supplier when such consideration is not available on proportionally equal terms to other competitors of customer must be proved to establish violation of Robinson-Patman Price Discrimination Act, it need not be by direct evidence and circumstantial evidence, premitting inference that persons charged knew, or in exercise of normal care would have known, of disproportionality of payment is sufficient.

15. **FORMS STATING THAT ALLOWANCES WERE BEING OFFERED TO COMPETITORS WERE NOT SIGNED UNTIL A MONTH AFTER CHAIN'S PROMOTION BEGAN**

Forms signed by suppliers stating that advertising allowances were being offered to competitors of chain grocery store on proportionally equal basis was not entitled to evidentiary weight in determining whether chain had been under duty to inquire about legality of payments to it, where forms were not signed until about a month after chain's promotion began and there was already good reason for suspecting that payments were discriminatory.

(The syllabus, with substituted captions, is taken from 450 F.2d 733)

On appeal Court held that chain grocery store had induced promotional allowances from its suppliers and that it knew competitors were not being offered payments on proportionally equal terms. Affirmed and enforced.

Ernest P. Rogers, *George B. Haley, Jr.*, *G. Kimbrough Taylor, Jr.*, *Kilpatrick*, *Cody*, *Rogers*, *McClatchey & Regenstein*, Atlanta, Ga., for petitioner.

Joseph Martin, Jr., *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, *J. B. Truly*, *Miles J. Brown*, Attys., FTC, Washington, D.C., for respondent.

Before JOHN R. BROWN, *Chief Judge*, COLEMAN and CLARK, *Circuit Judges.*

JOHN R. BROWN, *Chief Judge:*

Vividly illustrating the increasingly complex character of the retail grocery trade, this appeal also incorporates such diverse elements as a Walt Disney movie, frozen shrimp, canned beef stew and, most significantly, allegations of price discrimination under § 2(d) of the Robinson-Patman Act, 15 U.S.C.A. § 13(d).[1] The impetus for our consideration of this amalgam of entertainment, cuisine and trade regulation law is provided by the Federal Trade Commission's determination that petitioner Colonial Stores, Inc. (Colonial) had practiced an unfair method of competition in commerce[2] by inducing from its suppliers discriminatory advertising allowances that Colonial knew or should have known had not been offered to its competitors on proportionally equal terms. We affirm and enforce in its entirety the order of the Commission.

BACKGROUND: COLONIAL FALLS ON ITS "SWORD"

Colonial is a large, well-established retail grocery chain operating approximately 430 stores in nine States[3] with annual sales in the half-billion dollar range. Its activities are divided on a geographical basis into six operating divisions, each of which is supervised by a vice president and a general manager, and most of the buying and merchandising decisions originate at the division level. Within its own trade area the division is more or less autonomous, maintaining a warehouse and keeping separate records regarding purchases, sales, advertising and promotional activities.

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[1] "It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

[2] Section 5(a) (1) of the Federal Trade Commission Act, 15 U.S.C.A. § 45(a) (1), provides that "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared "unlawful." Indisputably a § 2(d) violation is per se a violation of § 5(a) (1). *F.T.C. v. Weingarten, Inc.*, 5 Cir., 1964, 336 F.2d 687, 693, n. 16, *cert. denied*, 1965, 380 U.S. 908, 85 S.Ct. 890, 13 L.Ed.2d 796.

[3] Colonial's trade area includes Georgia, Florida, Alabama, North Carolina, South Carolina, Virginia, Maryland, Kentucky and Ohio.

Traditionally Colonial has promoted sales of its products in a number of different ways, including direct mail, radio and television advertising and in-store display of particular items. It has also utilized periodically so-called "special event promotions," in which a variety of advertising and merchandising techniques are devoted to a particular theme derived either from the season (for example, Thanksgiving or Christmas) or from elaborately planned contests involving games or prizes. In addition to soliciting suppliers to participate in these promotions, selecting the themes, and establishing the time period for which they are to run, Colonial also dictates the terms for the events and determines the rate to be paid by suppliers in return for promotional assistance.

Early in 1964 Colonial initiated a promotion based on the Walt Disney motion picture "Sword in the Stone," a feature-length cartoon then being shown throughout the United States. The film's release was accompanied by a nationwide saturation advertising campaign initiated by its producers, and Colonial sought to capitalize on this extensive publicity by purchasing from a professional supermarket game promoter a packaged promotional campaign[4] built around a "Sword in the Stone" theme and employing, among other things,[5] color brochure advertising of its suppliers' products. Although each division utilized a slightly different format, in general each brochure contained approximately fourteen pages of 8 x 5-inch four-color advertising space, and altogether several million of them were mailed to customers in Colonial's nine-State trade area. Not all suppliers purchased space in this mailer but instead participated in other promotional arrangements involving either in-store displays or cooperative mass media advertising.[6]

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[4] The "Sword in the Stone" game, purchased by Colonial from Famous Character Promotions, Inc., was developed with the assistance of Walt Disney Productions and involved a printed paper card representing a "Stone" attached to another card symobolizing a "Sword," which when withdrawn by the customer revealed one of the four words in the title of the movie. If the customer collected cards spelling the title she presented them to Colonial in return for a cash award of $100. Some of the cards were imprinted with the names of particular products, which were then awarded to the customer as free prizes. Colonial acquired rights to the game on an exclusive basis and co-sponsored it with the manufacturer of "Melmac" plastic dinnerware as part of a joint promotional effort.

[5] In addition to each advertising brochure and game card, Colonial's mailer included offers of other premiums, including coupons and free childrens' rings.

Colonial sold to its suppliers—that is, persuaded them to purchase—brochure advertising space for a variety of well-known products, including Coca-Cola, Alcoa aluminum foil and Gordon's potato chips. Only two participants in the promotion are relevant for present purposes: Tradewinds Company, a supplier of seafood products which were ordinarily sold through Colonial retail stores, and Poss' Famous Foods, Inc., producers of a line of canned meat items.[7] During the first three months of 1964 Tradewinds paid a total of $7700 for brochure advertising of its breaded frozen shrimp in four Colonial division mailers, while Poss paid $1700 for the advertising of its Brunswick stew in the Columbia division mailer and for the display of its products in Colonial's stores during the first two weeks of 1965. The Hearing Examiner found, and the Commission agreed, that the promotional consideration paid by each of these suppliers was discriminatory because proportionally equal offers had not been made to Colonial's competitors.

THE COMMISSION'S FINDINGS

With respect to Tradewinds, the evidence establishes that during 1964 it maintained with Colonial a regular cooperative advertising program under which Colonial received a 1% advertising allowance on all purchases of Tradewinds products. Tradewinds also gave to Colonial periodic off-invoice discounts on particular items in return for promotional consideration. There is no dispute that both of these arrangements were offered to all of Colonial's competitors and were not discriminatory.

However, the FTC found that the payments received by Colonial's Atlanta Division in connection with the Sword in the Stone promotion were in addition to, rather than part of, the regular advertising allowances and that they were therefore unlawful because at least three of Colonial's competitors had not been offered similar payments.[8]

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[6] There is no evidence of any sort in the record even remotely suggesting that Colonial attempted to coerce any of its suppliers into participation in the "Sword" promotion, and we assume that all suppliers who took part did so on a strictly voluntary basis.

[7] Although the original complaint named eight suppliers as having discriminated in favor of Colonial, the Hearing Examiner concluded that the evidence established discrimination only with respect to the payments by Tradewinds and Poss. The Commission's final cease and desist order therefore must stand or fall on the basis of the findings respecting these two producers.

[8] Each of these competitors purchased Tradewinds products through Associated Grocers Co-operative, Inc. and would ordinarily have received offers of promotional payments from Associated, who in return would have received them from Tradewinds. However, none of the retail grocers received any direct offers, and Associated received only the 1% advertising allowance and the periodic off-invoice discounts usually offered.

This finding was grounded mainly on the fact that, in order for the $2400 payment to fall within the 1% allowance, Colonial would have had to purchase more than a quarter of a million dollars' worth of Tradewinds products during the first quarter of 1964, although the sales invoices reflected purchases during that period totaling only $33,553.80. Concluding that the "Sword" payments were in addition to the regular advertising allowance, and that equivalent payments had neither been offered nor made to at least some of Colonial's competitors, the Commission held that the promotional consideration paid was discriminatory and that Colonial knew or should have known of that fact.

With respect to Poss, the record reveals that its general manager testified that the company's standing policy was to offer all customers free goods in return for promotional consideration, in addition to an alternative advertising plan operated on a bill-back basis. However, Poss' records also showed that during 1964 the value of free goods and allowances offered to the trade generally under its usual programs was grossly disproportionate to the value of the payments made to Colonial for the Sword in the Stone promotion.[9] As a result the Commission found that (i) Poss' payments to Colonial were discriminatory because they so greatly exceeded the payments made to competitors under the usual arrangements, and (ii) Colonial should have known the payments were discriminatory because they so far exceeded the amounts allowed on its own purchases from Poss that there could be no realistic possibility for Poss to offer equivalent payments to competitors.

In addition, several representatives of Colonial's competitors testified that they had received no offers of proportionally equal promotional consideration equivalent to that paid by Poss for participation in the Sword in the Stone arrangement. At most this evidence establishes that Associated Grocers received $39 during the same quarter for an advertisement in its weekly order books, along with some free goods, but that no cash payments on the scale made by Poss to Colonial had ever been offered or accepted.

COLONIAL'S COUNTERATTACK

Colonial advances three distinct arguments to justify its contention that the FTC's cease and desist order cannot stand. The first is a

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[9] The $1700 Colonial received for Poss' brochure advertisement amounted to 45% of Colonial's total purchases of the product advertised (Poss' 24-ounce Brunswick stew) during the first quarter of 1964. The Commission found that Colonial's competitors received promotional consideration amounting to no more than 9% of their purchasers.

Charge of the Light Brigade [10] head-on-assault, mounted on the assertion that the findings of discriminatory payments are not supported by substantial evidence. The second is a flanking movement which proceeds on the theory that, even if the payments were not offered to Colonial's competitors on proportionally equal terms, Colonial may not be held responsible because it had neither actual knowledge nor reason to know of their illegality. The last is a stragetic retreat necessitated by a concession for the sake of argument: assuming that the payments were discriminatory, and that Colonial was aware of facts placing their legality into question, Colonial asserts that it satisfied its duty to make reasonable inquiry by eliciting from each participating supplier a signed statement to the effect that payments made in connection with the Sword in the Stone promotion were being offered to all Colonial competitors on a proportionally equal basis.[11]

FTC, NOT COURT, FINDS FACTS

[1–6] At this point a preliminary remark is necessary. As is frequently the case in appeals from orders of Federal regulatory commissions, Colonial finds itself in the unenviable position of challenging fact-findings made by an administrative agency whose primary function, by explicit Congressional mandate,[12] is the finding of fact. We have consistently reiterated—and we emphasize the point again now—that when Congress has vested in a Federal agency plenary authority to investigate and regulate particular forms of commercial or economic activity, entrusting it with primary responsibility for the resolution of complex and usually sharply disputed factual issues, appellate court review of the exercise of that authority is confined by the narrow perimeter of the substantial evidence rule.[13] Findings of fact cannot and will not be set aside if the evidence in the record reasonably supports the administrative conclusion, even though suggested alternative conclusions may be equally or even more reasonable and persuasive. The findings must stand unless they were wrong, and they cannot be wrong—that is, reversibly wrong—if substantial evidence supports them.[14]

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[10] "Was there a man dismay'd?
Not tho' the soldier knew
Some one had blunder'd.
Theirs not to make reply,
Theirs not to reason why.
Theirs but to do and die."
Alfred Lord Tennyson

[11] Each Colonial division utilized a printed standard form "vendor advertising and promotional arrangement" contract containing the provision, "It is understood that this same agreement is made available by the Vendor [Supplier] on a proportionally equal basis to all dealers in the competitive area who purchase products as herein specified."

[12] Section 5(b) of the Federal Trade Commission Act provides, in pertinent part: "Whenever the Commission shall have reason to believe that [a] person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so combined of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41–46 and 47–58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice." 15 U.S.C.A. § 45(b).

The wisdom of this rule is unassailable. If the corner grocery store—locally owned and competitively supreme within the ambit of the immediate neighborhood—has not yet died out entirely, it is nevertheless well on the way toward extinction. Its successor is the supermarket chain, operating hundreds of stores on a grandiose interstate scale, with thousands of employees, annual sales totaling hundreds of millions of dollars, and the initiative to devise merchandising and marketing techniques of a progressively intricate character.[15] Effective Federal regulation of such commercial giants, in order to preserve competition and thereby promote the public interest as formulated by Congress would be impossible if the FTC's factual determinations are periodically undermined in the courts. Judges are not equipped to explore the esoteric mysteries of the retail grocery business. The necessary expertise, acquired by long experience in the handling of complex problems involving a given activity, is administrative rather than judicial.

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[13] Section 5(c) of the Act, 15 U.S.C.A. § 45(c), provides that on appeal "the findings of the Commission as to the facts, if supported by evidence, shall be conclusive." Correctly construed, of course, this means such evidence as is adequate to reasonably support the conclusion reached. *Foremost Dairies, Inc.* v. *F.T.C.*, 5 Cir., 1965, 348 F.2d 674, 676, *cert. denied*, 382 U.S. 959, 86 S.Ct. 435, 15 L.Ed.2d 362; 15 U.S.C.A. § 21(c). Assessments of the credibility of the evidence and the inferences to be drawn from it are wholly within the competence of the Commission. *FTC* v. *A. E. Staley Mfg. Co.*, 1945, 324 U.S. 746, 760, 65 S.Ct. 971, 89 L.Ed. 1338, 1347; *F.T.C.* v. *Pacific States Paper Trade Assn.*, 1927, 273 U.S. 52, 63, 47 S.Ct. 255, 71 L.Ed. 534, 538; *Rushing* v. *F.T.C.*, 5 Cir., 1963, 320 F.2d 280, 283, *cert. denied*, 1964, 375 U.S. 986, 84 S. Ct. 519, 11 L.Ed.2d 473; *Keele Hair & Scalp Specialists, Inc.* v. *F.T.C.*, 5 Cir., 1960, 275 F.2d 18, 21.

[14] Obviously the line of demarcation between factual and legal conclusions in a case such as this will be wavering and uncertain, since the statutory standard ("proportional equality") is open to widely varying individual interpretations. Under such circumstances, the final imprimatur on the application of the law to the facts must come from Judges rather than Commissioners. *F.T.C.* v. *Colgate-Palmolive Co.*, 1965, 380 U.S. 374, 385, 85 S.Ct. 1035, 13 L.Ed.2d 904, 914. Nevertheless, even when the Commission's findings are framed in terms of legal conclusions, their presumptive validity is considerable. *F.T.C.* v. *Mary Carter Point Co.*, 1965, 382 U.S. 46, 48–49, 86 S.Ct. 219, 15 L.Ed.2d 128, 130, reversing 5 Cir., 1964, 333 F.2d 654. We have recently seen fresh proof of this. *Gainesville Utilities Dept.* v. *Florida Power Corp.*, 1971 402 U.S. 515, 91 S.Ct. 1592, 29 L.Ed.2d 74, *reversing Florida Power Corp.* v. *F.P.C.*, 5 Cir., 1970, 425 F.2d 1196.

[15] Colonial's Sword in the Stone promotion is itself an extravagant example of high-powered supermarket salesmanship, as the Commission's exhibits illustrate. In addition to a variety of cash prizes and merchandise premiums, the game also offered the opportunity to win all-expense-paid trips to Disneyland (CX 10), and Colonial supplied each of its stores with an assortment of game-promoting equipment, including window streamers, posters, cartoon character cut-outs, banners and pennants, game instruction cards, "stick-out" cards for shelf displays, employee lapel ribbons, bumper stickers, and cards to be used for posting winners' pictures near the front door (CX 21).

[7] To state those premises, under present circumstances, is almost to state the conclusion. The FTC, following extensive hearings in which both sides presented voluminous testimonial and documentary evidence,[16] determined that Colonial had induced from its suppliers illegal promotional payments which it knew or should have known were not being offered to its competitors on proportionally equal terms. Both direct and circumstantial evidence in the record supports this conclusion. The Commission's findings and order must therefore stand.

EVIDENCE OF DISCRIMINATORY PAYMENTS

Colonial argues first that the finding of discriminatory payments is not supported by substantial evidence because (i) no evidence excludes the possibility that the Tradewinds payments were not made pursuant to the standing 1% of purchases advertising agreement, (ii) no evidence excludes the possibility that Tradewinds made offers of free goods to Colonial's competitors in lieu of cash payments, (iii) the fact that Poss' payments to Colonial on a percentage of purchases basis were much greater than those received by competitors is not evidence that Poss did not *offer* similar arrangements to those competitors, and (iv) even if such offers were not made, the larger payments were not necessarily discriminatory because the standard is a comparative one, depending upon the type of promotional benefits received.

None of these assertions can withstand serious scrutiny. In the first place, although there was no direct evidence adduced to prove that the Atlanta Division's $2400 payment was not part of the regular 1% allowance—and under the circumstances it is difficult to see what form such proof would have taken—the circumstantial evidence introduced on the issue has a probative value equivalent to Thoreau's trout in the milk. The division's sales invoices reflect total first quarter purchases from Tradewinds of $33,553.80,[17] no single division purchase amounting to more than $8,000 in any one week. For the same period Colonial's billing under the 1% allowance amounted to $181.25.[18] Thus the total first quarter payments to Colonial's Atlanta Division totaled $2581.25 against a 1% allowance on purchases amounting at most to $335.54. We think this fact alone constitutes substantial evidence supporting the FTC's conclusion that the $2400 Sword payment was in addition to, rather than pursuant to, the 1% advertising allowance.[19] "Figures speak and when they do, Courts listen."[20]

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[16] In addition to nearly 2000 pages of testimony, the Hearing Examiner considered more than 130 documentary exhibits submitted by both parties.

Nor is there any substance to Colonial's further speculation—also wholly devoid of any evidentiary support—that the $2400 payment might have been offset by a Tradewinds offer of free goods to Colonial's competitors. Such a supposition is beyond credulity when—in a record of several hundred pages following proceedings which spanned nearly a year—the only facts bearing on the point reveal that the total value of such offers amounted to no more than $35 (CX 521c). Even if Colonial had advanced a viable hypothesis, however, the FTC was nevertheless not compelled to accept it, particularly in the absence of evidence establishing it and in the face of evidence refuting it. See note 13, *supra.*

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[17] Colonial argues that there is no evidence that the sales invoices show the total first quarter purchases made by the Atlanta Division. This contention borders on the frivolous, since the invoices were introduced by agreement of counsel following the Commission's request for invoices showing *all* first quarter purchases from Tradewinds. Since we assume that Colonial did not intend to deliberately misrepresent its total purchases by withholding some of the requested invoices, and since Colonial has never suggested that its records are incomplete, the conclusion must be that the Commission's figures are accurate. If they are not, Colonial could have and should have produced evidence of that fact, rather than indulging in untimely hypotheses regarding what might have been. "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. * * * Silence then becomes evidence of the most convincing character." *Interstate Circuit, Inc.* v. *United States*, 1939, 306 U.S. 208, 226, 59 S.Ct. 467, 474, 83 L.Ed. 610, 620.

[18] Since this amount was approximately $150 less than its maximum entitlement under the 1% of purchases allowances, Colonial suggests that the billing covered that portion of the allowance remaining after deduction of the $2400 Sword payment, and that the 1% allowance might have been computed on the basis of an aggregation of purchases from other periods or by other Colonial divisions. This suggestion is positively refuted by Colonial's own officials, who testified that, while diversion of regular advertising allowances to special promotions was sometimes permitted, the consistent practice was to make a notation of that fact on the contract itself so that the accounting department would know how to bill the supplier (App. 27, 69, 72, 173). Not only is such a notation omitted in the Tradewinds Sword contracts (CX 513, 514), but the agreements themselves affirmatively establish a separate and distinct transaction unrelated to the usual allowances. Moreover, Mr. Bazemore, the advertising manager for the Raleigh Division, testified that he was unaware of any practice that permitted Colonial to aggregate purchases from other divisions to increase the allowances in any one division (App. 75–76). And if somehow Colonial did aggregate purchases from other divisions or from other calendar quarters in order to increase the maximum allowance available in the Atlanta Division for the Sword in the Stone promotion, it had the burden either to produce evidence of that fact or to suffer the consequences of an adverse inference drawn from otherwise uncontested evidence. See notes 13 and 17, *supra*.

[19] Colonial apparently misapprehends the Commission's reasoning when it argues that only a "conjectural speculation" supports the conclusion. Documentary evidence establishes total first quarter purchases, the maximum allowance payable, the actual allowance paid and the amount paid for the Sword promotion. The only "speculation" involved is that which destroys Colonial's theory by supposing that the $2400 payment was made pursuant to the 1% allowance and then determining the total purchases that would have been required to justify a $2581.25 promotional payment computed on a 1%-of-purchases basis. That amount—$258,125—simply does not square with the undisputed evidence establishing actual first quarter purchases of only $33,553.80. In the absence of any evidence disputing these figures, the FTC was entitled to conclude that additional purchases simply did not take place.

[20] *Brooks* v. *Beto*, 5 Cir., 1966, 366 F. 2d 1, 9, *cert. denied*, 1967, 386 U.S. 975, 87 S. Ct. 1169, 19 L.Ed. 2d 135.

For similar reasons the finding that Poss' $1700 payment was discriminatory must stand, since Colonial does not really dispute the evidence upon which this finding is based but instead merely asserts that other evidence is more persuasive and thus dictates a different result.

Although Poss' general manager, Mr. Mangleburg, testified that the company's salesmen were under direct orders to proportionalize promotional payments by making equivalent offers to the trade generally, he did not testify that such offers had in fact been made in connection with the Sword in the Stone promotion.[21] On the other hand Mr. Ponder of Associated Grocers testified unequivocally that Poss made no offers of cash promotional consideration during the period in question, that it was ordinarily the policy of Associated to accept such offers when they were made, that if an otherwise acceptable offer had been made it would have been accepted, and that Associated had actually received from Poss no more than a few cases of free goods and three dollars a week for an ad in its order book (App. 162). In addition Mr. Veach of Bi-Lo, Inc., another Colonial competitor, stated that he did not recall any offers of promotional consideration from Poss that would have approximated Poss' payment to Colonial.[22] At this stage, then, the evidence reasonably supports the finding that, regardless of what its "established policy" might have been, Poss failed to follow up its Sword payment with offers of proportionally equal payments to all Colonial competitors.

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[21] "Q. Now you said a while ago, I believe on direct, that your salesman always offers to trade in any particular trade area when he makes a special promotion with somebody—promotional agreement with somebody, he makes an offer to the trade generally in that area. Do you know for a fact that this was done on or about the time of the Colonial "Sword in the Stone" promotion as a result of your agreement to participate in it?

A. I feel sure that it was because our salesmen have had that driven home to them and I think a competitor, either at that time or a little later in the year, was running a promotion comparable to it." (App. 118).
Besides failing to establish that proportional offers were actually made, the answer entitled the FTC to conclude that they were not since the reference to a competitor's comparable promotion indicates that the witness may have mistakenly assumed that such offers were required *only* when a competitor initiated a similar campaign.

[22] Colonial suggests that none of this testimony is credible because offers of promotional consideration in the grocery trade are customarily made orally rather than in writing, thereby precluding the possibility of all offers being accurately recalled. Apart from the fact that we do not review assessments of credibility, see note 13, *supra,* this argument logically implies that grocery store promotional arrangements between suppliers and retailers are, as a practical matter, immune from § 2(d) regulation because (i) the FTC cannot establish a violation unless it proves that offers were not made to competitors and (ii) it cannot prove that no offers were made because none of the participants can remember the circumstances clearly enough to provide reliable testimony. Needless to say, the reasoning is specious, the premises faulty, and the conclusion absurd.

Moreover, the Commission then nailed the lid on the coffin of the discrimination issue with evidence establishing that Colonial either knew or had reason to know that Poss' payments were illegal because they so greatly exceeded the normal proportion of allowances to purchases. Although not conclusive in itself, that evidence strongly reinforces the other testimony regarding the absence of equivalent offers.

PROPORTIONALITY: THE "PAYMENTS MADE—BENEFITS RECEIVED" THEORY

Finally, Colonial advances the contention that even though Poss may not have followed its payment to Colonial by offering to competitors payments proportionalized on a strict percentage of purchases basis, there can still be no finding of discrimination because Poss realized more valuable promotional benefits from Colonial than it would have received from any of its competitors. In other words, the argument is that the more effective promotional techniques employed in the Sword in the Stone contest justified payments that were comparatively larger than those made for promotional efforts of less commercial value. Or, to put it still another way, only Colonial had a Sword in the Stone project, so the suppliers could not have offered similar allowances to competitors who were not undertaking a similar promotional scheme.

[8–11] Unfortunately the cases cited by Colonial[23] do not justify such an expansive interpretation of § 2(d)'s requirement of "proportional equality." Obviously a multi-million dollar supermarket chain will be capable of providing promotional services of considerably greater utility and sophistication than those of a smaller competitor, and such services will be worth more to the supplier. But the requirements of proportionality are not satisfied merely because the supplier gives the competitors a choice between initiating a promotion comparable in scale to the Sword in the Stone game and foregoing any corresponding promotional consideration whatever.[24] Some minimal effort to proportionalize in good faith must be made, and while promotional benefits received may enter into the calculation, they cannot obliterate entirely the fact that the fundamental relationship is one of proportionality among *offers*.[25] To hold otherwise would result in widely varying promotional payments in amounts almost directly related to the size and mercantile prowess of the individual payee, a consequence which § 2(d) was enacted to preclude.

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[23] *F.T.C. v. Simplicity Pattern Co., Inc.,* 1959, 360 U.S. 55, 79 S.Ct. 1005, 3 L.Ed.2d 1079; *Lever Bros. Co.,* 1953, 50 F.T.C. 494. In construing the identical proportionality requirement of § 2(e), the Supreme Court in *Simplicity Pattern* suggested "the possibility that this tailoring of services and facilities to meet the different needs of two classes of customers" might in fact constitute proportionality. 360 U.S. at 61, n. 4, 79 S.Ct. at 1010, 3 L.Ed.2d at 1084. This was merely a reaffirmance of the principle expressed in *Lever Bros.* that § 2(d) does not "require a seller to pay at the same rate * * * for types of services which are of unequal cost or value. * * * Payments must be made in good faith for services or facilities actually rendered and there should be a fair and reasonable relation between the amount of the payment and the type of service rendered." 50 F.T.C. a 512. But neither case supports Colonial's broad assertion that a supplier may make promotional payments greatly exceeding the fixed percentage of purchases standard imposed upon other, perhaps smaller, competitors and then justify the excess as non-discriminatory solely on the theory that it obtained superior advertising benefits.

The conclusion is thus inevitable that Poss did not simply offer more for promotional activities that provided more, but rather failed altogether to offer Colonial's competitors anything approximating a proportionally equal arrangement. It made some offers of free goods, but these were trifling when compared to the $1700 lump payment made to Colonial. Several competitors testified that no equivalent offer had ever been made. Under these circumstances there is ample evidentiary support for the Commission's conclusion that the Poss payment was discriminatory.

[12, 13] The problem with Colonial's whole line of attack on these factual issues is that it mistakenly assumes that the Commission must affirmatively negate every conceivable adverse inference which can be drawn from the evidence. That is not the law. If substantial evidence reasonably supports the conclusion reached, the fact that alternative

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[24] Poss did not, as Lever Brothers did, 50 F.T.C. at 507, offer other competitors a choice of alternative advertising plans under which equivalent promotional benefits might have been secured. Indeed, the finding is that it did not make any equivalent offers at all (App. 242), but instead negotiated with Colonial for what was clearly a one-of-a-kind promotion that could not have been duplicated and probably not even imitated. Such individual bargains do not represent any meaningful attempt to comply with § 2(d)'s proportionality requirement. See *Liggett & Meyers Tobacco Co.*, 1959, 56 F.T.C. 221, 243; *Vanity Fair Paper Mills, Inc.* v. *F.T.C.*, 2 Cir., 1962, 311 F.2d 480, 486–487.

[25] As the leading commentator on the Robinson-Patman Act has pointed out, the principle announced by the Supreme Court in *Simplicity Pattern*

> "would allow suppliers, as long as all customers were given *some* benefits of proportional value, to channel their promotional funds into the most fruitful directions—to obtain greater returns from cooperative advertising campaigns while at the same time insuring fair treatment for all competing customers."

Likewise, the FTC's *Lever Bros.* decision merely permits

> "the supplier to formulate a promotional campaign maximizing the potency of the media of his choice—so long as *some* 'fair and reasonable' equivalent is provided for those competing rivals who could not otherwise participate. Nevertheless, the supplier's program need not ignore the relative desirability of particular promotional media and may scale reimbursement accordingly, thereby ensuring 'proportionality' not only with respect to 'customers' purchases' but also 'their ability and equipment to render or furnish the services to be paid for.' "

Rowe, Price Discrimination Under the Robinson-Patman Act 404, 409 (1962). Of course these considerations are largely irrelevant when, as here, no equivalent offers of any kind were ever made to Colonial's competitors.

conclusions may have remained unexplored is totally irrelevant. We judge only the sufficiency of the proof, not the propriety of the FTC's investigative methods. See *Niresk Industries, Inc.* v. *F.T.C.*, 7 Cir., 1960, 278 F.2d 337, 343 (concurring opinion), *cert. denied*, 364 U.S. 883, 81 S.Ct. 173, 5 L.Ed.2d 104.

DID COLONIAL HAVE REASON TO KNOW THAT THE PAYMENTS WERE DISCRIMINATORY?

Given the fact of discrimination, the question now becomes whether substantial evidence supports the Commission's findings that Colonial knew or should have known of it. *J. Weingarten, Inc.*, 1963, 62 F.T.C. 1521, 1525. Clearly it does.

[14] Instances in which the FTC will be able to prove actual knowledge of a § 2(d) violation are likely rare, since the only direct evidence of a state of mind must come from the testimony of the individuals who have broken the law. As a consequence, "although knowledge must be proved, it need not be by direct evidence; circumstantial evidence, permitting the inference that petitioners knew, or in the exercise of normal care would have known, of the disproportionality of the payments is sufficient." *American News Co.* v. *F.T.C.*, 2 Cir., 1962, 300 F. 2d 104, 110, *cert. denied*, 371 U.S. 824, 83 S. Ct. 44, 9 L. Ed. 2d 64; *Grand Union Co.* v. *F.T.C.*, 2 Cir., 1962, 300 F. 2d 92, 100; *Giant Food Inc.* v. *F.T.C.*, 1962, 113 U.S. App. D.C. 227, 3007 F. 2d 184, 187, *cert. denied*, 1963, 372 U.S. 910, 83 S.Ct. 723, 9 L.Ed.2d 718; cf. *Automatic Canteen Co. of America* v. *FTC.*, 1953, 346 U.S. 61, 73 S. Ct. 1017, 97 L.Ed. 1454.

The Commission's findings with respect to both the Tradewinds and the Poss payments are based on the theory that, by virtue of its own experience with the cooperative advertising agreements and off-invoice and free goods allowances of both suppliers, Colonial must have known that the $2400 and $1700 payments were so grossly disproportionate to the ordinary allowances computed on a percentage of purchases basis that neither supplier was making offers of proportionally equal payments to all competitors. Thus, Tradewinds' Sword in the Stone payment amounted to approximately 7% of Colonial's total first quarter purchases, in addition to whatever it received under the usual off-invoice allowances. Yet it knew that competitors were receiving payments under the cooperative agreement amounting to no more than 1% of purchases, and it must have known that Tradewinds simply could not have afforded to make offers proportional in value to all other dealers, a fact confirmed by the testimony of Mr. Mueller, Colonial's expert on grocery advertising and promotional programs.[26]

The $1700 payment received from Poss should have been even more suspect from Colonial's standpoint, since that amount represented 46% of the first quarter purchases of the product advertised,[27] while Poss' usual promotional allowance of one case of free goods for each ten cases purchased amounted to only 10%, with a few other payments of lesser percentages. From its own experience Colonial had reason to know that its competitors were being short-changed by Poss, and it cannot now reasonably contend that it was unaware of facts that gave more than fair warning.

THE "CLEAN BILL OF HEALTH" PROVISION

Colonial's final argument is that, conceding it was aware of facts placing it under a duty to inquire about the legality of the payments, it nevertheless satisfied that duty by requiring both Tradewinds and Poss to sign written representations (see note 11, *supra*) that similar payments were being offered to competitors on a proportionally equal basis. We think the FTC justifiably concluded that the inducement of this self-serving declaration was entitled to no evidentiary weight whatever under the circumstances.

[15] In the first place the forms were not signed by Tradewinds until nearly a month after, nor by Poss until more than a month after, the Sword in the Stone promotion began (CX 25, 61). Consequently their ex post facto character limits if not precludes the possibility of their being considered as evidence of precautions taken by Colonial *before* the promotional agreement was reached.

Even more significant, however, the requirement that a supplier sign such a representation is simply not sufficient, by itself, to offset actual knowledge of facts strongly suggesting, if not establishing, that despite disclaimers to the contrary the supplier is not offering proportionally equal payments to competitiors. A written agreement, which by its nature is to be treated as a substitute for inquiry, cannot take the place of an independent investigation if, as found by the Commission, there are ample grounds for believing that the other party may not be complying with the requirements of the law.[28] And while the exigencies of the trade may make such painstaking verification difficult, the obvious answer—in this case, at least—is that any sort of inquiry would have confirmed what there was already good reason for suspecting. It would surely have confirmed what the facts were, leaving perhaps some uncertainty as to their legal consequences. But on that score no amount of written statements, disclaimers, protestations of clean health, noble purpose or purity of heart made by another could exculpate the recipient from bearing what the law imposes. When the warning signs are so clear, the recipient must either devise some practicable method for allaying its doubts—and thereby satisfying its duty of inquiry—or it must forego entirely the opportunity to solicit a lucrative but highly suspect promotional arrangement. An alternative, of course, is to risk a disastrous engagement with the FTC and, as here, to lose.

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[26] Mr. Mueller testified that a supplier "obviously" could not make proportionally equal offers to all competitors if the total payment to any one retailer amounted to 7% of sales during the period in which the promotion was to run (App. 205). Yet that is precisely what happened here.

[27] In its brief Colonial strenuously contends that there is no rational justification for computing the percentage of purchases solely upon the basis of one size of one Poss product purchased during one three-month period. But Poss' brochure advertising related only to that product (the 24-ounce size Brunswick stew), and the ad ran only for the first quarter of 1964. Even taking into account purchases of all Poss products during the relevant period, the Sword in the Stone payment still amounted to almost 19% of their value, and even then it is relatively clear that no supplier would have given an advertising allowance on unadvertised products.

The order of the Commission is affirmed and enforced in its entirety.

Affirmed and enforced.

ORLAN A. SAUCKE v. FEDERAL TRADE COMMISSION*

Civ. A. No. 15091—F.T.C. File No. 99-114

(United States District Court, N.D. Georgia. Oct. 22, 1971)

1. PLAINTIFF'S EVICTION FROM HIS RESIDENCE AND OTHER DIFFICULTIES DO NOT STATE A CLAIM UPON WHICH A FEDERAL COURT CAN GRANT RELIEF

Mandamus petitions growing out of plaintiff's personal financial affairs and relating to plaintiff's eviction from his former residence and subsequent inability to find suitable housing through federal agency did not invoke jurisdiction of federal court and did not state claim upon which federal court could grant relief.

2. ENFORCEMENT POWERS OF COMMISSION ARE DISCRETIONARY AND APPLICABLE ONLY IN CASES OF PUBLIC INTEREST

Exercise of enforcement powers by FTC is discretionary and is applicable only in cases of public interest.

3. FTC INVESTIGATIVE POWERS DO NOT INCLUDE MANDAMUS TO COMPEL SEIZURE OF PLAINTIFF'S FINANCIAL RECORDS

Mandamus was not available to compel exercise of FTC investigative powers, particularly where plaintiff sought to have FTC seize certain records relevant to plaintiff's financial status.

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[28] Naturally a written representation may be treated by the FTC as having some utility under other circumstances, such as when the factual question of whether the recipient had reason to know of actual discrimination is a very close one. All depends upon the unique state of the evidence in each case. *Automatic Canteen Co. of America* v. *F.T.C., supra,* 346 U.S. at 80, n. 24, 73 S.Ct. at 1017, 97 L.Ed. at 1467; *Utah Pie Co.* v. *Continental Baking Co.* 1967, 386 U.S. 685, 695, n. 10, 87 S.Ct. 1326, 18 L.Ed.2d 406, 415. But when on credited findings that reason to know is undeniably present, reliance upon the supplier's declarations will not suffice.

*Reported in 333 F. Supp. 1197 (1971).

(The syllabus, with substituted captions, is taken from 333 F. Supp. 1197)

In a mandamus action requiring Commission to seize certain records relating to plaintiff's financial affairs court held it did not have jurisdiction and dismissed action.

Orlan A. Saucke, pro se.

John W. Stokes, Jr., U.S. Atty., *Julian M. Longley, Jr.*, Asst. U.S. Atty., Atlanta, Ga., *Joseph Martin, Jr.*, Gen. Counsel, *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, *Robert E. Duncan*, Atty., F.T.C., Washington, D.C., for F.T.C.

ORDER

EDENFIELD, *District Judge.*

[1] This is the first of four pro se mandamus petitions which have been filed by plaintiff. Two of the petitions relate to problems growing out of plaintiff's personal financial affairs.[1] The other petitions relate to plaintiff's eviction from his former residence [2] and his subsequent inability to find suitable housing through a federal agency.[3] While plaintiff may in fact have some serious legal problem, the complaints presented to this court simply do not invoke the jurisdiction of a federal court, nor do they state any claim upon which a federal court could grant relief.

In this action plaintiff requests mandamus relief requiring the Federal Trade Commission to seize certain records relevant to plaintiff's financial status. These records are in the possession of various credit bureaus in Georgia, Iowa, Minnesota, and Wisconsin, and allegedly contain erroneous credit information which is damaging to plaintiff. The FTC has moved to dismiss the petition.[4]

[2, 3] It is well settled that an action in the nature of mandamus requires the existence of a specific duty owed to plaintiff. *E.g.*, In re

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[1] This action and Civil Action No. 15669.

[2] Civil Action No. 15591.

[3] Civil Action No. 15670.

[4] Subsequent to the filing of defendant's motion to dismiss plaintiff informally contacted the court regarding his cases and was advised that his petitions did not appear to set forth a federal cause of action. The court informed plaintiff that prior to any ruling on the sufficiency of his petitions, he would be given an opportunity to obtain counsel and file any additional documents which he wished the court to consider. Plaintiff has responded by requesting appointment of counsel and filing an amendment. The request for appointment of counsel is denied and the amendment fails to cure plaintiff's fatally defective petition. The amendment contains a vague allegation that plaintiff is under the jurisdiction of a federal agency. While the purpose of this allegation is unclear, it clearly does not establish federal jurisdiction. Furthermore, even assuming that the amendment states a claim under subchapter III of the Consumer Credit Protection Act (15 U.S.C. § 1681 *et seq.*), such an action may not be maintained against the FTC, which is the only named defendant.

Wingreen Co., 412 F. 2d 1048 (5th Cir. 1969). No such duty is alleged in this action and it clearly appears that no such duty exists. The exercise of enforcement powers by the FTC is not only discretionary but is applicable only in cases of public interest. 15 U.S.C. §§ 45, 46, and 1681s. Such being the case, mandamus is not available to compel the exercise of FTC investigative powers particularly where plaintiff seeks to have the FTC assist him in his personal financial affairs. *FTC* v. *Klesner*, 280 U.S. 19, 50 S. Ct. 1, 74 L. Ed. 138 (1929); *Stancato* v. *Department of Justice and FTC*, Civil Action No. 69–1378 (D. C. Cal., Aug. 14, 1969).

Therefore, defendant's motion to dismiss is granted and the Clerk is directed to dismiss plaintiff's petition for failure to state a claim upon which relief can be granted.

It is so ordered.

FEDERAL TRADE COMMISSION v. EMANUEL GLADSTONE*

No. 71–1672—F.T.C. Docket 8882

(Court of Appeals, Fifth Circuit. Nov. 4, 1971)

1. FINDING IN CRIMINAL CONTEMPT PROCEEDING THAT DEFENDANT'S EXPLANATION FOR DESTRUCTION OF HIS FILES WAS UNBELIEVABLE HELD NOT ERRONEOUS

   Finding in proceeding to hold defendant in criminal contempt of Federal Trade Commission subpoena duces tecum, that defendant's explanation for his destruction of papers in subpoenaed files was unbelievable, was not erroneous.

2. EVEN IF SPECIFICATION WAS OVERBROAD DEFENDANT REMOVING FILES SUBJECT TO FTC SUBPOENA WAS GUILTY OF CONTEMPT

   Defendant who removed from files, which were subject of Federal Trade Commission subpoena requiring production of all files and all documents in those files, all documents except those of certain types, was guilty of contempt.

3. DEFENDANT NOT CONFUSED BY OMISSION OF WORD "CRIMINAL" WHERE HE WAS ACCORDED ALL PROCEDURAL RIGHTS IN CRIMINAL CONTEMPT PROCEEDINGS

   Omission of word "criminal" in notice of criminal contempt proceeding was not fatal where notice fully described conduct charged, there was no indication that defendant was confused as to nature of proceeding, and defendant was accorded all procedural rights due defendants in criminal contempt proceedings.

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*Reported in 450 F. 2d 913 (1971). For case before the Commission, see 83 F.T.C. 1126. See also p. 6 herein.

4. **FEDERAL IMMUNITY STATUTES DO NOT RELATE BACK TO CONVICTIONS OBTAINED PRIOR TO GRANTING OF IMMUNITY**

   Immunity granted under federal immunity statutes does not relate back to convictions obtained prior to granting of immunity.

5. **IMMUNITY PROVISION OF FTC ACT AT DATE OF HEARING RATHER THAN PROVISION REPEALED GOVERNED SCOPE OF IMMUNITY**

   Federal Trade Commission Act immunity provision in effect at date of hearing governed scope of immunity, rather than provision repealed before hearing but after date of order requiring witness to appear.

6. **WITNESS NOT ENTITLED TO IMMUNITY FROM PROSECUTION OR TO CLAIM THAT IT RELATED BACK TO PRIOR CONVICTION**

   Witness at Federal Trade Commission hearing was not entitled to immunity from prosecution, or to claim that immunity related back to prior conviction, where he never refused to testify.

(The syllabus, with substituted captions, is taken from 450 F.2d 913)

In criminal contempt proceeding court held that defendant who removed certain documents from files subpoenaed by FTC was guilty of contempt even though specification was overbroad. Affirmed.

Martin M. Pollock, *James B. Gurley*, Atlanta, Ga., for respondent-appellant.

Harland F. Leathers, Chief, General Litigation Sect., Civil Div., Dept. of Justice, Washington, D.C., *John W. Stokes, Jr.*, U.S. Atty., Atlanta, Ga., *Jos. Martin, Jr.*, Gen. Counsel, *Harold C. Rhynedance, Jr.*, Asst. Gen. Counsel, *Charles C. Moore, Jr.*, Atty., FTC, Washington, D.C., for petitioner-appellee.

Before THORNBERRY, MORGAN and CLARK, *Circuit Judges.*

LEWIS R. MORGAN, *Circuit Judge:*

Emanuel Gladstone, President of the Southern Cross Discount Company, Inc., appeals from a judgment of the District Court for the Northern District of Georgia holding him in willful criminal contempt of court and sentencing him to imprisonment for ten days. We affirm the judgment of the district court.

I.

This criminal contempt conviction grows out of an investigation of activities of Southern Cross by the Federal Trade Commission. In the course of that investigation, the Federal Trade Commission issued a subpoena *duces tecum* to Gladstone requiring that he appear at the Commission's Atlanta office on November 19, 1969, to testify and that he produce documents described in the fifteen specifications attached to the subpoena. Gladstone failed to appear and to produce the requested documents on the specified date, whereupon the Commission petitioned the district court for an order enforcing the subpoena.

The district court held two hearings on the enforcement petition. At these hearings Gladstone objected to enforcement principally on the ground that compliance would be expensive to his company and requested reimbursement from the government for the costs of compliance. After the close of the hearing, the district court issued an order requiring that Gladstone produce the material described in the specifications. Gladstone neither appealed this order nor sought a stay pending appeal.

During the next three days, Gladstone, assisted by Southern Cross employees and by temporary employees from Manpower, Inc., removed numerous documents from the subpoenaed files and destroyed them. Upon learning of this removal and destruction of documents, the Commission filed a "Motion for Show Cause Hearing for Contempt Citation". After the hearing, the court concluded that Gladstone had wilfully violated the court's order by destroying subpoenaed documents and sentenced him to 10 days imprisonment for criminal contempt.

II.

Appellant's initial argument on appeal is that the district court erred by placing an unreasonable interpretation upon the meaning of specifications 8 and 9 of the subpoena *duces tecum*. Gladstone contends that under a proper interpretation of the subpoena, he complied with its terms and should not have been held in contempt.

Specifications 8 and 9 of the subpoena required the production of:

> 8. All files showing all contracts, credit applications, promissory notes, mortgages and other documents on customers who purchased the aluminum siding, swimming pool and carpeting at the advertised prices of Southern Cross Discount Company, Inc. during that period of time from January 1, 1968, to the date upon which return is made to this subpoena.
>
> 9. The originals or, in lieu thereof, copies of all contracts, credit applications, promissory notes and mortgages relating to every job done by or for Southern Cross Discount Company, Inc., during the period of April 1, 1968 to September 30, 1968.

The district court interpreted specification 8 as requiring the production of *all* documents in the customer files. Relying on the language of the specification requiring the production of "*all files* showing all contracts, credit applications, promissory notes, mortgages and *other documents* on customers," the court ruled that the removal of any item from the files in question amounted to a violation of its order.

It is uncontroverted that Gladstone ordered the removal of numerous documents from these files. At the contempt hearing, Gladstone testified that he hired men from Manpower, Inc., and instructed them to go through the files removing all of their contents except three items—credit applications, worksheets, and contracts. A Manpower, Inc., employee testified that Gladstone taped examples of these three items on the wall where the men were working to guide them.

The principal documents which appear to have been removed from the files were so-called "Contract Adjustment Memos". These were documents which recorded modifications of customer contracts with respect to price. The Federal Trade Commission also alleges that customer promissory notes were removed from the files. By Gladstone's own admission, there is no way of knowing precisely which documents were in fact removed. We know only that substantial quantities of documents were removed and that Gladstone's employees were instructed to leave three particular types of documents in the files.

Gladstone does not dispute these facts. However, he does contend that the removal of these documents was in no way inconsistent with a good faith effort on his part to comply with the subpoena. Gladstone asserts that his purpose in removing the Contract Adjustment Memos was to rid the files of intra-office memoranda which he did not believe to be subpoenaed and which duplicated information already contained on the file jacket.[1] With respect to the promissory notes, Gladstone concedes that, even though specifically subpoenaed, they were not one of the forms which he taped on the wall with instructions that they be left in the files. His explanation for this omission is that the promissory notes would not ordinarily have been in these files anyway since in the normal course of his business, the notes would be sent to the finance company which discounted them. However, evidence was presented by the Federal Trade Commission which indicates that at least a few promissory notes were torn from the files. Such removal would constitute a violation of the court's order even if, as appellant asserts, most files did not contain promissory notes. Certainly the fact that most promissory notes were not kept in the files would not justify the destruction of those promissory notes which were in fact contained in the files.

[1,2] The district court rejected Gladstone's explanations for the removal of large quantities of documents from the files. The court, in its findings of fact, determined that Gladstone's explanation that he merely sought to remove unsubpoenaed documents and avoid duplica-

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[1] The FTC disputes the classification of the Contract Adjustment Memos as intra-office memoranda. These documents reflected agreements to modify customer contracts and bore the legend, "Attach to original contract". The FTC argues that these Memos were part of the customer contracts and as such were subpoenaed under the language of specification 8 requiring the production of "all contracts". The dispute is inconsequential, however, since in any event the memos were subpoenaed under the "other documents" language of the specification.

tion was "unbelievable". Viewing the record in its entirety we cannot conclude that this finding was erroneous. The plain, unambiguous language of specification 8 required the production of all files and all documents in those files. Arguably the specification was overbroad since it requested all documents within the files including ones with no conceivable relevance to the Federal Trade Commission's investigation. If this were the case, however, the appropriate remedy was a petition to the district court for clarification of its order or an appeal from the order of this court. Instead, Gladstone chose to take matters into his own hands. Moreover, it should be noted that Gladstone did not merely remove from the files those documents which he believed to be irrelevant to the Federal Trade Commission's investigation. He chose instead to destroy the documents, thus placing the information irretrievably beyond the Federal Trade Commission's reach. In our view, this destruction of the documents was itself inconsistent with any claimed good faith compliance with the court's order.

III.

We turn now to Gladstone's second contention on appeal which is that the conviction is invalid because of a failure by the court to comply with the notice requirements of Rule 42(b) of the Federal Rules of Criminal Procedure. That rule requires that criminal contempts be prosecuted only on notice and that the notice "state the essential facts constituting the criminal contempt charged and describe it as such * * *".

Gladstone attacks the sufficiency of the notice given him for its failure to clearly designate that he was to be prosecuted for "criminal" contempt. The contempt prosecution was initiated by a motion from the Federal Trade Commission requesting a show cause hearing. The motion alleged that Gladstone had caused "a large portion of the books and records ordered to be produced" to be "destroyed * * * in direct and contumacious disobedience" to the court's order. Upon receipt of the motion, the district court issued an order requiring that Gladstone appear and show cause "why he should not be adjudged in contempt of court". The court's order did not, however, use the word "criminal". Gladstone contends that this omission made the notice defective under Rule 42(b).

[3] Prior cases construing the requirements of Rule 42(b) make it clear that this argument must be rejected. The same issue was raised in the leading case of *United States* v. *United Mine Workers of America*, 330 U.S. 258, 67 S. Ct. 677, 91 L. Ed. 884 (1947), in which the Supreme Court held that Rule 42(b) does not impose a rigorous requirement that the word "criminal" always be included in the notice given the contemnor. In that case, as in the one at bar, the motion and

the order to show cause fully described the events which formed the basis of the contempt charge, but failed to use the word "criminal". The court concluded that notice was sufficient under Rule 42(b). Similarly, in *Stewart* v. *Dunn*, 5 Cir., 1966, 363 F. 2d 591, this court rejected the argument that reversal is required solely because the notice given the contemnor omits the word "criminal". *See also Yates* v. *United States*, 10 Cir., 1963, 316 F. 2d 718; but see 3 C. Wright, Federal Practice & Procedures, § 710, at 174 (1969).

The *Mine Workers* case teaches that reversal is required only where there is a showing that there was prejudice to the contemnor as a result of the failure to clearly designate the nature of the contempt proceeding. In the case at bar, we entertain no serious belief that Gladstone was prejudiced. The notice given Gladstone fully described the conduct which formed the basis of the contempt charge. There is no indication in the record that Gladstone was confused as to the nature of the contempt proceeding. Certainly it must have been plain to Gladstone and his lawyers that the contempt hearing was not a civil proceeding for the purpose of coercing production of the records. The records had already been destroyed. The only conceivable purpose for the hearing was to determine whether Gladstone should be punished for destroying the documents. At the hearing, Gladstone raised no objection to the notice given him. During the hearing, Gladstone was accorded all the procedural rights due the defendant in a criminal contempt hearing.[2] In light of all these factors, we conclude that no prejudice resulted.

IV.

On February 26, 1971, shortly after Gladstone's contempt conviction in the court below, he received a notice from the Federal Trade Commission requiring that he once again appear before the Commission to testify. This notice was issued pursuant to an order of the district court dated August 25, 1970. Gladstone appeared before the Federal Trade Commission on March 16, 1971. When called to testify, he stated, through his counsel, that he was appearing under compulsory process and insisted upon all immunities from prosecution granted to him under Section 9 of the Federal Trade Commission Act.[3] Gladstone was then questioned and testified. A portion of his testimony concerned the transaction from which Gladstone's contempt conviction arose.

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[2] We have considered and rejected Gladstone's contention that the district court improperly placed the burden upon Gladstone to prove his innocence of the charges against him. A reading of the record in its entirety reveals that no such burden was placed upon Gladstone.

[3] 38 Stat. 722 (repealed by P.L. 91–452, 84 Stat. 922).

Subsequent to this hearing, Gladstone made a motion to this court that his conviction be set aside on the ground that his testimony at the March 16th hearing entitles him to immunity from prosecution under Section 9 of the Federal Trade Commission Act and that this immunity relates back to his earlier conviction. Gladstone relies on the case of *Frank* v. *United States*, 120 U.S. App. D.C. 392, 1965, 347 F. 2d 486, *cert. dis.* 382 U.S. 923, 86 S. Ct. 317, 15 L.Ed. 2d 338, vacated and remanded on other grounds, 384 U.S. 882, 86 S. Ct. 1912, 16 L. Ed. 2d 994 which held that where testimony, concerning a particular transaction is compelled under a grant of immunity, that immunity is retrospective as well as prospective and requires that even convictions obtained prior to the granting of immunity be vacated.

[4–6] Gladstone's motion must be denied for two reasons. First, it is clear that *Frank* is no longer good law. In *Katz* v. *United States*, 389 U.S. 348, 349, n. 3, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), the Supreme Court considered and rejected the argument that immunity granted under federal immunity statutes similar to Section 9 of the Federal Trade Commission Act relates back to convictions obtained prior to the granting of immunity. Secondly, the statute under which Gladstone claims to have been granted immunity was repealed prior to the March 16, 1971, hearing.[4] That immunity provision was replaced by a new federal immunity statute which authorizes the Government to convey to a prospective witness a grant of immunity only after the witness has first refused to testify and invoked his Fifth Amendment privilege against self-incrimination.[5] Gladstone concededly never refused to testify about the events giving rise to his contempt conviction and thus is in no position to assert that he is immune from prosecution with respect to that transaction, much less to assert that the immunity relates back to the prior conviction from which he appeals.

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[4] Despite its repeal, Gladstone argues that his testimony is governed by the immunity provision of section 9 of the Federal Trade Commission Act because that provision had not been repealed as of August 25, 1970, the date of the district court's order requiring that Gladstone appear and testify before the FTC at a time and place designated by the Commission. This argument is erroneous. Section 260 of P.L. 91–452 provides:

> The provision [repealing various federal immunity statutes including section 9 of the Federal Trade Commission Act] shall take effect on the sixtieth day following the date of enactment of this Act [December 14, 1970]. No amendment to or repeal of any provision of law under title II of this Act shall affect any immunity to which any individual is entitled under such provision *by reason of any testimony or other information given before such day.* (Emphasis added.)

Thus, congressional intent is clear. The date of the giving of the testimony, not the date of the issuance of court orders or other compulsory process is determinative. Testimony actually given subsequent to the effective date of the statute is governed by the new immunity provisions regardless of the date of the court's order.

In this case, the court's order was dated August 25, 1970, but Gladstone did not testify until March 16, 1971, long after the February 14, 1971, effective date of the statute.

[5] Section 211 of the Organized Crime Control Act of 1970, 84 Stat. 929, 18 U.S.C. §§ 6001 et seq. provides as follows:

> § 6002. *Immunity generally*
>
> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House.

In summary, Gladstone's motion to set aside his conviction is denied and his conviction is in all respects affirmed.

Affirmed.

MARCO SALES COMPANY, ET AL. v. FEDERAL TRADE COMMISSION*

No. 188, Docket 71-1451—F.T.C. Docket 8870

(Court of Appeals, Second Circuit, Dec. 16, 1971)

1. COMMISSION'S ABSOLUTE PROHIBITION OF GAMES AND PUNCH BOARDS IN RETAILING FOOD AND GASOLINE WHERE NO DECEPTION PROVEN WAS IMPROPER

In light of Federal Trade Commission's regulation of games, including punch boards, employed to lure customers in food retailing and gasoline industries by eliminating aspects deemed to be receptive, Commission's absolute prohibition of their use for purpose of selling merchandise offered as prizes where there was no deception or fraud practiced at all and where Commission made no findings and articulated no reasons for its disparate treatment of petitioners was improper.

2. FTC HAS NO POWER TO DESTROY ONE OF MANY VIOLATORS

Federal Trade Commission does not have unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry.

3. FTC TOTALLY FAILED TO EXPLAIN ITS RIGID STANCE TOWARD PETITIONERS HERE AND ITS FLEXIBLE TOLERANCE TOWARD OTHER MEMBERS OF INDUSTRY

Federal Trade Commission acted arbitrarily in totally failing to even advert to, much less explain, its reason for rigid ad hoc adjudicatory stance adopted toward petitioners and flexible tolerance its industry regulation displayed to those utilizing same or similar devices.

4. WHEN DECISION IS APPARENTLY INCONSISTENT WITH DECLARED RULE ADMINISTRATIVE PROCEDURE ACT REQUIRES AGENCY TO INCLUDE ITS FINDINGS AND CONCLUSIONS

Requirement under Administrative Procedure Act that agency included in its decision its findings and conclusions as well as reasons or basis therefor takes on added importance when decision is apparently inconsistent with a virtually contemporaneously declared rule.

5. PETITIONERS MUST BE PROVIDED WITH AN EXPLANATION OF DIFFERENCES IN TREATMENT BY AN ADMINISTRATIVE AGENCY

An administrative agency is obligated to provide petitioners with an explanation for difference in their treatment.

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*Reported in 453 F. 2d 1. For case before the Commission see 78 F.T.C. 454.

6. **GROCERY AND GASOLINE GAMES OF CHANCE USED SOLELY FOR SELLING MERCHANDISE OFFERED AS PRIZES HELD NOT TO BE DECEPTIVE**

   Claim that grocery and gasoline station games of chance were sales promotions to attract traffic while petitioners' plan, though not deceptive, was used solely for purpose of selling merchandise offered as prizes was not such an obvious distinction as to remove need for any consideration as to petitioners of Federal Trade Commission's regulation of games, including punch boards, employed to lure customers in food retailing and gasoline industries by eliminating aspects deemed to be deceptive.

7. **ABSENCE OF CONSIDERATION IN SELLING PETITIONER'S MERCHANDISE DID NOT REMOVE NEED FOR CONSIDERATION IN FTC'S CASE AGAINST RESPONDENT**

   Claim that retail store games of chance did not involve element of consideration as did petitioners' plan used for purpose of selling merchandise offered as prizes did not remove need for consideration as to petitioners of Federal Trade Commission's regulation of games, including punch boards, employed to lure customers in food retailing and gasoline industries by eliminating aspects deemed to be deceptive.

(The syllabus, with substituted captions, is taken from 453 F.2d 1)

Held by the court, that where method of using games, including punch boards, to sell food and gasoline had no aspects deemed to be deceptive, the Commission's finding practice deceptive was improper. Reversed and remanded.

Willis Hagen and *Charles Rowan*, Milwaukee, Wis., for petitioners.
Nicholas S. Reynolds, Atty. *Ronald M. Dietrich*, Gen. Counsel, *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, Federal Trade Commission, Washington, D.C., for respondent.

Before MOORE, HAYS and MULLIGAN, *Circuit Judges.*

MULLIGAN, *Circuit Judge:*

This is a petition to review a cease and desist order issued by the Federal Trade Commission at the completion of an administrative proceeding initiated by a complaint charging petitioners with engaging in unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.[1] In April, 1967 the Commission held an investigational hearing and on November 27, 1968, issued its complaint against the petitioners, Marco Sales Company (Marco), an Illinois corporation and Marvin O. Baer, individually, as an officer controlling the acts and practices of the corporation. After a two-day evidentiary hearing in Chicago, Illinois, on April 15 and 16, 1969, the examiner issued his initial decision and order on June 30, 1969. Cross appeals were taken to the Commission, which heard oral argument on October 16, 1969 with four members sitting. No decision was rendered, and the Chairman of the Commission requested petitioners' permission to participate in the decision. The case was reargued before the full Commission on February 3, 1971 which issued a final order to cease and desist on February 25, 1971 in the form initially recommended by the examiner. The petition for review is granted. We reverse the order and remand to the Federal Trade Commission for further consideration consistent with this opinion.

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[1] The pertinent provisions of the Act are as follows:
Sec. 5 (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful. (15 U.S.C. § 45(a) (1)).
Sec. 5 (a) (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. (15 U.S.C. § 45(a) (6)).

Marco's method of conducting business is not in dispute. Marco sells articles by means of a lottery or game of chance in interstate commerce in various states including Connecticut, New York and Vermont. Marco sends literature through the mail to the public, describing merchandise which is sold through the device of push or punch cards. Typical merchandise includes such items as electric toasters, skillets, percolators, cameras, clocks, flower desk sets, Happy Twin dolls, Jack & Jill dolls, stuffed dogs and thermal blankets. A typical push card bears some 23 masculine and feminine names with columns on the back of the card for writing the name of the purchaser of the push corresponding to the masculine or feminine name selected. Each such card has 23 partially perforated disks which bear one of the names corresponding to those on the list. Concealed within each disk is a number which is disclosed only when the customer pushes the disk from the card. The card depicts a doll or stuffed dog or whatever the prize is, describes it and indicates the cost of each number punched out. The cost ranges from free to a maximum of 39 cents.

The push card also has a master seal under which is one of the names—this seal is not to be removed until the entire card is sold. The operator of the push cards sells the chances or pushes to his friends, family or fellow workers, and when all have been purchased, he remits the total amount to Marco which sends back two prizes—one for the lucky winner and the other for the operator. The amount received by Marco is equivalent to the selling price of the two articles. There is no claim at all that Marco is engaged in any skulduggery in its operation. The goods are delivered as represented. Marco culls its prospective customers from sales lists which it purchases. It concedes that infants may be on the list, but the Commission concedes that Marco is not deliberately cultivating the youth market. At the hearing the Commission was able to produce a 20 year old male who admitted taking one chance and winning a doll (sex not disclosed). He also confessed to selling a chance to his 13 year old sister-in-law. His wife also testified that she sold some of his chances to minors. There was other evidence to indicate that a few 13 to 15 year olds had been enticed to take pushes or punches.

In its defense, Marco produced two professors from the University of Wisconsin who testified generally that the punch board operation provided a psychological outlet or release from tension which accounted for the widespread popularity of games of chance as marketing devices employed by a great number of giant national corporations. Marco's answer urged that its practices were consistent with the standards of fair dealing of the contemporary economic environment of the United States and therefore not in violation of Section 5 of the Federal Trade Commission Act, that the Commission's action constituted an unreasonably discriminatory application of the Act, depriving them of their liberty and property without due process in violation of the fifth amendment of the Constitution of the United States and further that it constituted an invalid exercise of police power by the Commission in violation of the fifth, ninth and tenth amendments to the Constitution of the United States. Essentially, the same points are raised in this petition for review of the order of the Commission, which directed petitioner to cease and desist from:

> Supplying to or placing in the hands of others, push cards or any other device designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, lottery scheme, chance, or gaming device.
>
> Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, lottery scheme, chance, or gaming device.

If this were a question of first impression we would be extremely reluctant to find that the distribution of punch boards as a method of selling dolls, skillets and blankets to teenagers, constitutes an unfair trade practice and is prejudicial to the public interest. In fact, one's faith in American youth is renewed when we find that some small segment at least is still titillated at the prospect of pushing or even punching a board where the maximum damage per punch is 39 cents and the prize is a percolator or even an electric blanket. With so many other profane, vulgar and addictive diversions made readily available to our youth, one finds it difficult to be dismayed at the survival of the bucolic pastime of punching cards. However, this is largely the business of the Federal Trade Commission, and it has pursued with relentless vigor this type of lottery over the years with the complete support of the federal bench. The basic case is *FTC* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 54 S. Ct. 423, 78 L. Ed. 2d 814 (1934) where the Supreme Court found that a "break and take" candy operation was a lottery or gambling device and constituted an unfair practice. It should be noted that in this initial case the lottery was specifically directed to children, that some forty other candy manufacturers employed similar devices and the effects of the practice were felt throughout the "straight" penny candy industry. *FTC* v. *R. F. Keppel & Bro.*, *supra*, 291 U.S. at 307–309, 54 S. Ct. 423, 78 L. Ed. 814. In any event, the basic proposition that selling merchandise by lottery constitutes an unfair practice has been supported by courts of appeals in every circuit[2] except the First where the issue has apparently not been raised.[3] Cease and desist orders by the Federal Trade Commission, enjoining push card lotteries substantially similar to that in issue here, have been upheld by this court.[4] It has also been held that the Commission need not establish any loss of business by competitors of the seller or public injury. Where an unfair practice is established the diversion of trade from competitors, who do not employ such practices, is inferred. *Deer* v. *FTC*, 152 F. 2d 65, 66 (2d Cir. 1945).

The argument that public morals have changed, that public attitudes toward gambling particularly have radically altered with various state legislatures granting absolution for such public cathartic exercises as betting on dog and horse races, jai alai, bingo and lotto, has also failed to impress courts of appeals which have adhered rigidly to the *Keppel* proscription. *Bear Sales Co.* v. *FTC*, 362 F. 2d 96 (7th Cir.), *cert. denied*, 385 U.S. 933, 87 S. Ct. 293, 17 L. Ed. 2d 214 (1966); *Dandy Products, Inc.* v. *FTC*, 332 F. 2d 985, 986 (7th Cir. 1964).

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[2] See *Bear Sales Co.* v. *FTC*, 362 F. 2d 96 (7th Cir.), *cert. denied*, 385 U.S. 933, 87 S. Ct. 293, 17 L. Ed. 2d 214 (1966); *Dandy Products, Inc.* v. *FTC*, 332 F. 2d 985 (7th Cir. 1964), *cert. denied*, 379 U.S. 961, 85 S. Ct. 648, 13 L. Ed. 2d 555 (1965); *Gerson* v. *FTC*, 325 F. 2d 93 (7th Cir. 1963); *Wren Sales Co.* v. *FTC*, 296 F. 2d 456 (7th Cir. 1961); *Peerless Products, Inc.* v. *FTC*, 284 F. 2d 825 (7th Cir. 1960), *cert. denied*, 365 U.S. 844, 81 S. Ct. 804, 5 L. Ed. 2d 809 (1961); *Goldberg* v. *FTC*, 283 F. 2d 299 (7th Cir. 1960); *Surf Sales Co.* v. *FTC*, 259 F. 2d 744 (7th Cir. 1958); *James* v. *FTC*, 253 F. 2d 78 (7th Cir.), *cert. denied*, 358 U.S. 821, 79 S. Ct. 34, 3 L. Ed. 2d 62 (1958); *Drath* v. *FTC*, 99 U.S. App. D.C. 289, 239 F. 2d 452 (1956), *cert. denied*, 353 U.S. 917, 77 S. Ct. 666, 1 L. Ed. 2d 664 (1957); *Seymour Sales Co.* v. *FTC*, 94 U.S. App. D.C. 403, 216 F. 2d 633 (1954), *cert. denied*, 348 U.S. 928, 75 S. Ct. 340, 99 L. Ed. 727 (1955); *United States Printing & Novelty Co., Inc.* v. *FTC*, 92 U.S. App. D.C. 298, 204 F. 2d 737, *cert. denied*, 346 U.S. 830, 74 S. Ct. 52, 98 L. Ed. 354 (1953); *Gay Games, Inc.* v. *FTC*, 204 F. 2d 197 (10th Cir. 1953); *Zitserman* v. *FTC*, 200 F. 2d 519 (8th Cir. 1952); *Consolidated Mfg. Co.* v. *FTC*, 199 F. 2d 417 (4th Cir. 1952); *Lichtenstein* v. *FTC*, 194 F. 2d 607 (9th Cir.), *cert. denied*, 344 U.S. 819, 73 S. Ct. 15, 97 L. Ed. 638 (1952); *Hamilton Mfg. Co.* v. *FTC*, 90 U.S. App. D.C. 169, 194 F. 2d 346 (1952); *Globe Cardboard Novelty Co., Inc.* v. *FTC*, 192 F. 2d 444 (3d Cir. 1951); *Chas. A. Brewer & Sons* v. *FTC*, 158 F. 2d 74 (6th Cir. 1946); *Modernistic Candies, Inc.* v. *FTC*, 145 F. 2d 454 (7th Cir. 1944); *Jaffe* v. *FTC*, 139 F. 2d 112 (7th Cir. 1943); *cert. denied*, 321 U.S. 791. 64 S. Ct. 790, 88 L. Ed. 1081 (1944); *Wolf* v. *FTC*, 135 F. 2d 564 (7th Cir. 1943); *Hill* v. *FTC*, 124 F. 2d 104 (5th Cir. 1941); *Helen Ardelle, Inc.* v. *FTC*, 101 F. 2d 718 (9th Cir. 1939); *FTC* v. *F. A. Martoccio Co.*, 87 F. 2d 561 (8th Cir.), *cert. denied*, 301 U.S. 691, 57 S. Ct. 794, 81 L. Ed. 1347 (1937); *Hofeller* v. *FTC*, 82 F. 2d 647 (7th Cir.), *cert. denied*, 299 U.S. 557, 57 S. Ct. 19, 81 L. Ed. 410 (1936).

[3] Had it been raised, there doesn't seem to be much doubt of its resolution. For a classic illustration of the traditional New England attitude toward gambling see *Amory* v. *Gilman*, 2 Mass. 1, 10–11 (1806), citing, 1 Marshall, A. Treatise on the Law of Insurance, 95 (1st Amer. ed. 1805): "The practice of gaming, by nourishing a constant hope of gain, excites in the mind an interest which engrosses the attention, and withdraws the exertions of men from useful pursuits. * * * it produces a contempt for the moderate, but certain, profits of sober industry. It perverts the activity of the mind, taints the heart, and depraves the affections. By frequent and great reverses of fortune, it becomes not only the source of great private misery, but suggests constant temptations to fraud, and the perpetration of atrocious crimes."

[4] See *Rosten* v. *FTC*, 263 F. 2d 620 (2d Cir. 1959); *Colon* v. *FTC*, 193 F. 2d 179 (2d Cir.), *cert. denied*, 344 U.S. 823, 73 S. Ct. 22. 97 L. Ed. 641 (1952); *Cinader* v. *FTC*, 141 F. 2d 1022 (2d Cir. 1944).

[1] All of this would undoubtedly have ended the saga adversely to petitioners had not the Federal Trade Commission in October, 1966 embarked upon an investigation of games of chance in the food retail and gasoline industries which resulted in the publication of an Economic Report[5] which, in turn, resulted in a Trade Regulation Rule Proceeding[6] culminating in the promulgation of a Trade Regulation Rule (16 C.F.R. § 419.1 (1971)); it was adopted on July 29, 1969, and bore an effective date of October 17, 1969.[7]

The FTC Economic Report developed *inter alia* that in 1966 some 52 different types of games were used in 55 major grocery markets to attract customers; more than half the games were derivatives of some type of gambling, including "punch cards." In 1966 there were some 39 game promoters in action with combined billings of $37.2 million. (Marco had a gross business of $150,000 in 1968.) The principal users of games were food retailers ($28.5 million) and petroleum companies ($8.5 million). The investigation revealed numerous deceptive practices including misrepresentation of the odds of winning. Retail prices were increased in some cases at least, and in some others the use of games prevented declines. In some cases the games were rigged. Many retailers claimed that they were economically coerced to utilize the games in order to effectively compete. In the course of the rule making proceedings testimony was taken, and some of the most vigorous opponents of the games, who sought their abolition rather than regulation, urged that they were "lotteries or illegal gambling devices." (See Statement of Basis, *supra* note 7, 34 Fed. Reg. at 13,308.) On the basis of its study the Commission concluded: "The proper function of a regulatory agency is to correct, by regulation if possible, unlawful activity rather than to prohibit the device altogether." *Id.* at 13,310. One of the devices thus regulated but not abolished was the punch board. The regulation generally prohibits misrepresentation of the odds of winning, ensures random distribution to retail outlets thus reducing the chances of rigging and requires posting of the names of the winners, the total number of game pieces distributed and the total number of prizes awarded.

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[5] FTC Staff Report to the Federal Trade Commission: Economic Report on the Use of Games of Chance in Food and Gasoline Retailing in Hearings Before the Subcomm. on Activities of Regulatory Agencies of the House Select Comm. on Small Business, 90th Cong., 2nd Sess. at 395 (1968).

[6] Notice of this proceeding, including two proposed rules, was published in the Federal Register on January 7, 1969. See 34 Fed. Reg. 218 (1969).

[7] See FTC, Promulgation of Trade Regulation Rule and Statement of Basis and Purpose, 34 Fed. Reg. 13,302 (1969).

The investigation of the Commission commenced two years before the complaint issued in this case. The initial decision of the Hearing Examiner on June 30, 1969 was adopted in all respects, without any further opinion, in the final order of the Commission dated February 25, 1971, some eighteen months after the adoption of the new rule.

It is at least anomalous, in our view, to regulate the games including punch boards employed to lure customers in the food retailing and gasoline industries by eliminating aspects deemed to be deceptive and to absolutely prohibit their use in the instant case where concededly there is no deception or fraud practiced at all. Marco's prizes were fully described and actually awarded; the odds are obvious, and certainly no operator was coerced into participation. It is particularly distressing that the Federal Trade Commission, in its final order, wrote no decision but merely adopted the initial decision of the Hearing Examiner which of course made no reference at all to the regulation. (The rule was not then in effect, having been adopted a month after the initial decision but some eighteen months before the final order herein.)

In argument before this court, the Commission relies substantially upon the Supreme Court's *Keppel* decision and its multi-circuit progeny, all of which were spawned long before the regulation was promulgated. The only arguments addressed to the claim of discrimination voiced by Marco are twofold: 1) the Federal Trade Commission has the sole discretion to determine how best to enforce its organic statute and 2) in any event, the "obvious" distinctions between Marco's practices and those employed by the food and gasoline retailers and the Commission's consistent policy toward and prosecution of the former practices, renders their comparison inapposite. We cannot agree at all with their position.

In support of its first contention the Commission relies on two cases, *Moog Indus., Inc.* v. *FTC*, 355 U.S. 411, 78 S. Ct. 377, 2 L. Ed. 2d 370 (1958) and *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 87 S. Ct. 1622, 18 L. Ed. 2d 749 (1967). Both of these cases involve adjudicatory proceedings and stand for the proposition that even if all of a petitioner's competitors were engaged in the same practice, it is no defense to the petitioner that the cease and desist order is directed to him alone. Obviously, the Commission cannot be expected to bring simultaneous proceedings against all of those engaged in identical practices. These cases would be in point if Marco were urging that others, engaged in identical practices competing with him, were not similarly pursued by the Commission. Petitioners here do not so argue. They argue rather that those engaged in the same activity are regulated while Marco is annihilated. In short, it is not that the Commission has failed to act against others but that it has adopted a positive regulatory approach to them totally inconsistent with its approach toward petitioners.

[2] There is ample authority to support the petitioners' position. As the Supreme Court pointed out in *FTC* v. *Universal-Rundle*, *supra*, 387 U.S. at 251, 87 S. Ct. at 1627, "[o]n the other hand, as the *Moog Industries* case also indicates, the Federal Trade Commission does not have unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry."

[3] The arbitrary character of the Commission's action here consists of its total failure to even advert to, much less explain, its reason for the rigid ad hoc adjudicatory stance it adopted toward the petitioner and the flexible tolerance its industry regulation displayed to those utilizing the same or similar devices. As Circuit Judge John R. Brown pointed out in his concurring opinion in *Mary Carter Paint Co.* v. *FTC*, 333 F. 2d 654, 660 (5th Cir. 1964), *rev'd* on other grounds, 382 U.S. 46, 86 S. Ct. 219, 15 L. Ed. 2d 128 (1965): "Our complex society now demands administrative agencies. The variety of problems dealt with make absolute consistency, perfect symmetry, impossible. And the law reflects its good sense by not exacting it. But law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case."[8] To the same effect, see *Marriott In-Flite Services Division of Marriott Corp.* v. *NLRB*, 417 F. 2d 563, 565–566, (5th Cir. 1969), *cert. denied Local 300 United Ind. etc.* v. *Marriott In-Flite etc.*, 397 U.S. 920, 90 S. Ct. 929, 25 L. Ed. 2d 101 (1970); *Rayonier, Inc.* v. *NLRB*, 380 F. 2d 187, 189–190 (5th Cir. 1967); *HC & D Moving & Storage Co.* v. *United States*, 298 F. Supp. 746, 751 (D. Hawaii 1969).

[4, 5] Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 557(c)) requires an agency in any case to include in its decision its findings and conclusions as well as the reasons or basis therefor. This requirement takes on added importance when the decision is apparently inconsistent with a virtually contemporaneously declared rule. See *Rayonier, Inc.* v. *NLRB*, *supra*, 380 F. 2d at 189. That an administrative agency is obligated to provide petitioner with an explanation for the difference in their treatment, is well established.

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[8] Although the Supreme Court reversed this decision, it did not attack the principle ennunciated but rather its application to the facts.

Secretary of Agriculture v. *United States*, 347 U.S. 645, 652–655, 74 S. Ct. 826, 98 L. Ed. 1015 (1954); *FTC* v. *Crowther*, 139 U.S. App. D.C. 137, 430 F. 2d 510, 514–515 (1970); *ABC Freight Co.* v. *CAB*, 391 F. 2d 295, 300–303 (2d Cir. 1968); *Burinskas* v. *NLRB*, 123 U.S. App. D.C. 143, 357 F. 2d 822, 827 (1966); *Melody Music, Inc.* v. *FCC*, 120 U.S. App. D.C. 241, 345 F. 2d 730 (1965); *City of Lawrence, Mass.* v. *CAB*, 343 F. 2d 583, 588 (1st Cir. 1965). See also Friendly, Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders, 1969 Duke L. J. 199, 206–209.

As we have already indicated, the Commission has made no findings and has articulated no reasons for its disparate treatment of petitioner in light of its comprehensive rule making procedure involving investigation and hearings relating to lotteries which culminated in a determination certainly contrary to its previously consistent approach illustrated by *Keppel* and its descendants.

[6] In its brief in this court and in oral colloquy in the initial hearing, but not in its opinion, the Commission suggests two distinctions between petitioner's game and those used by the food and gasoline industries, which are allegedly so obvious as to remove the need for any consideration of its new rule in this case. We find the distinctions unconvincing. The first is that the grocery and gasoline station games of chance are sales promotions to attract traffic, while petitioner's plan, though not deceptive, is used solely for the purpose of selling the merchandise offered as prizes. While this is in fact accurate, there is no effort at all made in the entire proceeding to explain how this difference has any trade regulatory significance. The *ratio decidendi* of *Keppel* was that the lottery was an illegal gambling device particularly obnoxious since aimed at children (this factor was also relied on by the Commission in the instant case) and also utilized to attract customers from the "straight" penny candy vendors. Since the gambling aspect is apparently no longer objectionable even where children are concerned, since children obviously shop in supermarkets and, unfortunately perhaps, are permitted to purchase gasoline, the two practices seem identical except that Marco is running a clean game. The Commission's investigation amply demonstrates that the reason for the adoption of sales gimmicks by retailers of food and gasoline was obviously not to satisfy the psychological wants of the clientele but to sell more cornflakes and gasoline than their competitors, who did not employ such methods. Marco is doing the very same thing—attempting to sell more kewpie dolls than those who use more conventional merchandising techniques. From a trade regulatory viewpoint, the economic effect on horizontal competition among competing retailers

seems to be the same. In any event, the question deserves study and elucidation.

[7] The second distinction suggested orally on appeal and on argument before the Commission is that the petitioner's game is a lottery since it combines the three elements (1) distribution of prizes, (2) by chance, (3) for a consideration. The retail stores schemes, however, do not involve the element of consideration, the argument runs, since the chances are free, while petitioner's game requires payment for each chance except those few which are free. Again, we are unable to appreciate the trade regulatory significance of the distinction. Obviously the Federal Trade Commission's jurisdiction is not limited to strict lotteries since it has seen fit to regulate these non-lottery operations. We read nothing in *Keppel* which indicates that its decision depended upon the presence or absence of "consideration". On the contrary, the Court did say, "Neither the language nor the history of the act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories." *FTC* v. *R. F. Keppel & Bro.*, *supra*, 291 U.S. at 310, 54 S. Ct. at 425. If the evil is gambling, which purportedly leads to indolence or worse by holding out the expectation of largess, the prospect of winning an electric toaster for a maximum consideration of 39 cents per chance would seem far less seductive than the expectation of winning a thousand dollars for nothing. The modest exactions of cash required by petitioner can hardly be the basis for any claim of economic gouging.

It may well be that consideration could be found in the food and gasoline retail cases in any event. While the customer pays no separate consideration for the chances, the customer does go to the store presumably to get the opportunity to win the big prize. He does change his position and incurs a detriment at the invitation of the retailer. Moreover, the retailer at least in some cases passes on the cost of the game by increasing the cost of the merchandise sold. Hence we are not persuaded on the basis of the record before us that the regulated games are in fact at all differentiated by the claim of lack of consideration. See Comment, Examination of Games of Chance and Referral Selling as Sales Promotional Devices, 17 Kan. L. Rev. 668, 669–71 (1969); 31 Ohio St. L. J. 610, 616 (1970). See also *Ollendorff Watch Co.* v. *Pink*, 279 N.Y. 32, 17 N. E. 2d 676 (1938).

The Commission has promulgated a rule which it announced it would restudy in eighteen months. We believe it is appropriate to reverse the order and remand this matter for reconsideration in light of the new regulation, to study and explain the differences, if any, between petitioners' practices and those presently regulated in so far as they have relevance under the Federal Trade Commission Act.

Reversed and remanded.

HAYS, *Circuit Judge* (concurring in the result):

I concur on the ground that the Commission has failed to explain the difference, for the purposes of trade regulation, between the scheme condemned in the present case and the schemes approved in the Commission's Trade Regulation Rule 19 C.F.R. 419.1 (1971).

IN CASES INSTITUTED AGAINST OR BY THE COMMISSION

UNITED STATES v. WILLIAM N. BOSTIC*

Civ. A. No. 70–1135—F.T.C. Docket 8634

(United States District Court, D. South Carolina, Jan. 6, 1972)

1. **ORDER NAMING CORPORATION AND INDIVIDUAL OFFICER WHO SOLD ALUMINUM PRODUCTS ALSO COVERED SALE OF SWIMMING POOLS BY RESPONDENT**

   Federal Trade Commission's order that named corporation and named defendant, individually and as officer of corporation, in connection with offering for sale aluminum carports, aluminum patio covers, or any other products in commerce, cease using any advertising, sales plan, scheme or device wherein false, or deceptive statements or representations were made to obtain leads or prospects for sale covered all products sold by defendant at time of execution of order or in the future, and covered sale of swimming pools by defendant.

2. **DEFENDANT DELIBERATELY FLOUTED COMMISSION ORDER AGAINST SALE OF ANY PRODUCT BY "BAIT AND SWITCH" SALES APPROACH**

   Government established that defendant had deliberately flouted Federal Trade Commission's cease and desist order directed against sale of any product by defendant or his representative by use of "bait and switch" sales approach.

3. **EFFORTS TO DISREGARD FTC ORDER BY SETTING UP A "FRONT" CORPORATION WITH HIS SISTER WARRANTED AN INJUNCTION AGAINST DEFENDANT**

   Defendant's callous disregard of cease and desist order of Federal Trade Commission and his effort to disguise his interstate activities by setting up corporation with his sister as a "front" warranted an injunction against defendant.

4. **JENCKS ACT LIMITED EFFECT OF SUPREME COURT DECISION INVOLVING RIGHT OF ACCUSED TO OBTAIN DOCUMENT WHICH FORMED BASIS OF GOVERNMENT WITNESS' TESTIMONY**

   Jencks Act was legislated to limit the effect of Supreme Court decision in Jencks *v.* United States involving right of an accused to receive, for purposes of impeachment, a document which formed basis of government witness' testimony.

5. **ADMINISTRATIVE HEARINGS ARE SUBJECT TO PRINCIPLE OF JENCKS CASE**

   Principle of Jencks case applies to administrative hearings.

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*Reported in 336 F. Supp. 1312 (1972), 4th Cir., 473 F. 2d 1388 (1972), *cert. denied*, 411 U.S. 966 (1973). For case before the Commission, see 67 F.T.C. 1.

6. JENCKS ACT ENABLES DEFENSE COUNSEL TO OBTAIN AND USE PRIOR STATEMENTS OF A GOVERNMENT WITNESS FOR IMPEACHMENT PURPOSES

   Object of Jencks Act provision that, after witness called by United States has testified on direct examination, court shall, on motion of defendant, order United States to produce any statement of witness in possession of the United States which relates to subject matter as to which witness has testified, is to enable defense counsel to use prior statements of a witness for impeachment purposes.

7. WHERE DEFENDANT HAD 60 DAYS AFTER RECEIVING COPIES OF WITNESSES' STATEMENTS AND MADE NO EFFORT TO IMPEACH WITNESSES THERE WAS NO DEPRIVATION OF DUE PROCESS UNDER JENCKS ACT

   Where there was no conflict as to central issue before court in action for violations of Federal Trade Commission's cease and desist order, no conflict in testimony of various government witnesses, government produced copies of witnesses' statements two months before trial, defendant had 60 days after receiving copies to reexamine the witnesses but did not and defense made no effort to contradict or impeach witnesses, defendant was not deprived of due process under Jencks Act.

8. COMMISSION ORDER PROHIBITING "BAIT AND SWITCH" TACTICS WAS NOT TOO BROAD OR GENERAL

   Federal Trade Commission's cease and desist order which prohibited defendant from using "bait and switch" [1313] methods in offering for sale, selling or distributing products in commerce and which covered any products which defendant might in the future offer for sale, sell or distribute in commerce was not too broad or general.

9. DEFENDANT'S BLATANT NATURE IN DISREGARDING COMMISSION'S "BAIT AND SWITCH" ORDER WARRANTED IMPOSITION OF $4,000 FINES FOR EACH OF 20 VIOLATIONS

   Blatant nature of defendant's disregard for Federal Trade Commission's cease and desist order prohibiting him from using "bait and switch" methods in offering for sale products in commerce warranted imposition of penalty and fine of $4,000 for each of the 20 violations.

(The syllabus, with substituted captions, is taken from 336 F. Supp. 1312.)

Court held that respondent had violated order against "bait and switch" and imposed penalty of $4,000 for each of 20 violations.

John K. Grisso, U.S. Atty., Columbia, S.C., *Kathryn Casey,* F.T.C., *Robert E. Duncan,* office of Gen. Counsel, F.T.C., Washington, D.C., for plaintiff.

W. Ray Berry, Columbia, S.C., *Joseph J. Lyman,* Washington, D.C., for defendant.

ORDER

CHAPLAIN, *District Judge.*

On January 7, 1965, the Federal Trade Commission issued its Cease and Desist Order in Docket No. 8634, which Order was based on a consent agreement by the defendant, William N. Bostic, and directed that he and certain corporations controlled by him cease engaging in certain unfair and deceptive acts and practices in violation of Section 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. Section 45(a) (1). The Order became final by operation of law on March 8, 1965, and was in effect at all times mentioned in the complaint and referred to by witnesses in this proceeding.

The January 7, 1965, Order provided as follows:

> It is ordered that the respondents Aluminum Industries, Inc., a corporation, and its officers, and William N. Bostic, individually and as an officer of said corporation, and doing business as Southern Patio Company, Southern Aluminum Sales, and under any other trade name, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of aluminum carports, aluminum patio covers, aluminum siding, or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:
>
> 1. Using, in any manner, any advertising, sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of products or services.
> 2. Discouraging the purchase of, or disparaging, any products or services which are advertised or offered for sale.
> 3. Representing directly or by implication, that any products or services are offered for sale when such offer is not a bona fide offer to sell such products or services.

The complaint contained twenty separate counts of alleged violations of the Order. Defendant's answer contained a general denial and also alleged that the complaint did not state facts sufficient upon which relief could be granted. At various times during the proceedings the defendant contended that the Order was too vague, general and all inclusive to be enforceable and that it was in violation of the constitutional guarantee of due process because of this overbreadth and vagueness. Defendant also contended that the Federal Trade Commission had not complied with its own rules and regualtions in certifying the facts to the Attorney General and in failing to advise the defendant that he was not in compliance with the Order and discussed such non-compliance with him and given **[1314]** defendant an opportunity to submit his views respecting the alleged violations.

The Court finds that these allegations of defendant are without merit. The letter of Caspar W. Weinberger, Chairman of the Federal Trade Commission, addressed to the Attorney General of the United States under date of June 15, 1970, certifies the facts of the violations by the defendant and requests the institution of appropriate proceedings for recovery of civil penalties and for a permanent injunction. The testimony of George Zervas and Joel Thwaites, together with the correspondence between the Federal Trade Commission and the defendant and his attorney certainly indicate that the defendant was advised that he was not in compliance with the order and was given ample opportunity to determine the specifics of the allegations of non-compliance and to bring himself within the provisions of the Order, if he had really desired to do so.

[1] At one point the defendant contended that the sale of swimming pools was not covered by the terms of the Order. However, it is obvious from the wording of the Order that it is intended to cover all products sold by the defendant at the time of the execution of such Order, and in the future, and covers any product in commerce. The actual thrust of the Order is directed against a deceitful and unlawful sales technique and therefore covers any product the defendant or his representative might sell using the "bait and switch" sales approach.

[2, 3] The Government carried its burden of proof overwhelmingly on each count and is entitled to recover penalties thereon. The defendant has deliberately flouted the provisions of the Cease and Desist Order. His callous disregard of the Order, which approaches contempt, and his efforts to disguise his interstate activities, by setting up a corporation in North Carolina with his sister as a "front," all lead this Court to the conclusion that an injunction should also be issued against the defendant.

The defendant relies upon the Jencks Act, 18 U.S.C. § 3500 to support his motion to strike the depositions of Donald Lee Allen, Mr. and Mrs. Garland Duncan, Roy L. Good, Edward P. Greene and Gwyn Allen Miller. When these depositions were taken in the State of North Carolina in early July 1971, defense counsel requested copies of statements of these individuals, and the request was denied by counsel for the plaintiff on the grounds of privilege and work product of attorneys for the plaintiff. On September 7 depositions were taken of Mrs. Lois Reno Guy and Sergeant and Mrs. Musselwhite and defense counsel demanded copies of statements given by these witnesses. On July 31, 1971, defendant filed a motion under Rule 37(a) of the Federal Rules of Civil Procedure, for an Order compelling the plaintiff to answer certain interrogatories, which demanded copies of all signed and unsigned statements in the possession of the plaintiff. This motion was granted by the Court after a hearing on September 14, 1971. The statements were thereafter furnished to defense counsel on September 22, 1971. The defendant first raised the question of denial of due process under the Jencks Act after the trial had begun on November 22, 1971.

[4, 5] The Jencks Act was legislated to limit the effect of the case of *Jencks* v. *United States,* 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103, which involved the right of an accused to have for purposes of impeachment a document prepared by a Government witness which formed the basis of the witness' testimony. The principle of the Jencks case has been applied to administrative hearings, and justice requires no less. Section (b) of the Statute reads:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as [1315] to which the witness has testified. If the entire contents of such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

[6] The object of this provision is to enable defense counsel to use prior statements of a witness for impeachment purposes. This is inherent in the language and context of the above provision.

[7] In the present action the defense counsel made no effort on cross examination of the witnesses to question them regarding their signed statements and never attempted to attack the veracity of the witness. The defendant relies upon the case of *Harvey Aluminum* v. *National Labor Relations Board,* 335 F.2d 749 (9th C.A.1964). The Court feels that the cases are not analogous. In *Harvey* the N.L.R.B. charged the company with engaging in an unfair labor practice by employing undercover agents (employees of a detective firm) to maintain surveillance of union activities. The company admitted surveillance but insisted that its object was to prevent pilferage. There was a conflict in testimony of employees of the detective agency as to the nature of their duties and the Court was faced with the question of fact as to which witnesses to believe. In the *Harvey* case the prior statements were sought for the purpose of attacking the credibility of the witnesses. Subpoenas *duces tecum,* addressed to the Secretary of Labor and the Attorney General were issued but later revoked; and petitioners then sought to have the Board ask the Secretary of Labor and the Attorney General to make the statements available, under 29 U.S.C.A. § 161(6). This request was denied. The present proceeding is unlike Harvey Aluminum, since there is no conflict as to the

central issue, there is no conflict in the testimony of the various Government witnesses, and the Government did produce the copies of statements, at the direction of the Court, and two months before the trial of the case. The present defendant was aware as early as July 7, 1971, that the Government objected to furnishing copies of the witnesses' statements, but did not invoke the Jenck Act until the trial. The defendant also had sixty days after receiving copies of the witnesses' statements to re-examine any witness to determine credibility, but he did nothing. Two witnesses were deposed after the statements were delivered to the defendant, but defense counsel were not present at these depositions. Three witnesses, who had been deposed, were present and gave testimony at the trial, but the defense counsel made no effort to contradict or impeach them with the statements.

No effort was made by the defendant to call as a witness any of the salesmen or agents to testify as to what sales pitch was used or to attempt to contradict the testimony of the various consumers. The defendant stipulated that the depositions of persons not present at the trial would be admissible, knowing full well that he had not cross-examined these witnesses as to prior statements, and knowing that he would not take further depositions based on information he had received from the prior statements. He cannot complain that he has been deprived of due process in light of his own refusal to take any protective steps when he had ample opportunity to do so prior to the trial date.

After considering all the evidence the Court makes the following:

FINDINGS OF FACT

1. Defendant William N. Bostic is a resident of the State of South Carolina and is charged with violating the provisions of a Cease and Desist Order (entered into and accepted by the defendant), issued by the Federal Trade Commission on January 7, 1965, which directed him to refrain from certain sales practices, more particularly set forth above.

2. Under the language of this Order defendant was prohibited from engaging [1316] in any of the practices enumerated, in connection with the offering for sale, sale or distribution of any product in commerce, and the effect of the Order was not limited to products being sold at the time it was issued, but extended to any and all products which defendant might thereafter sell, offer to sell or distribute in commerce.

3. At all times mentioned in the complaint, the defendant was

engaged in the offering for sale, sale and distribution of swimming pools in commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act (15 U.S.C. Section 44).

4. The advertisements, identified in Exhibits D through Q to the complaint, each appeared repeatedly, on various dates, in the publications enumerated in Counts 1 through 8 of the complaint and constituted a sales plan, scheme or device of the type contemplated and prohibited by Paragraph 1 of the Federal Trade Commission's Order.

5. This sales plan, commonly referred to as a "bait and switch" operation was used in essentially the following manner:

a. An advertisement was inserted in a newspaper or magazine offering to sell a completely installed swimming pool for a price of under $1,000. In some instances the offer included a "free portable TV," or a ten year warranty, or both; and in some instances the advertisement contained reference to a much higher "regular price." The advertisements contained a post office box number, as well as a telephone number, for prospective purchasers to contact.

b. When the prospect responded (usually by telephone) an appointment was set up and one of defendant's agents and salesmen would go to the prospect's home, stating he was there because of the prospect's response to the advertisement.

c. If the prospect confirmed his interest in the pool, the agent wrote out a contract for the pool described in the advertisement (known as ADV pool), at the price stated in the ad. This contract would be signed by the prospect and the salesman and the prospect would be advised that it was a binding contract from which neither party could withdraw.

d. After obtaining the execution of the contract for the ADV pool and advising the prospect that neither party could withdraw from the contract, the agent, after a brief casual social conversation, would begin to call attention to the various disadvantages of the ADV pool, such as: cost of maintenance on a wooden pool, necessity of periodic painting of the pool, problem with wood rotting on pool, difficulty in emptying all water from the pool. All of this was intended to and did make the prospect quite apprehensive about the desirability of the ADV pool which he had just contracted to buy.

e. The agent would then advise the prospect that the company had a larger pool, which was a new product and not yet in general production or availability for sale. This pool was known as the PRO pool by the defendant and his salesmen, but usually called the Dolphin or some aquatic name in talking with the prospect. The agent would produce a model of the pool from his automobile, which model was complete with walkways, deck patio, landscaping, shrubbery, diving board, ladders and other accessories to improve its appearance. He would call attention to the indestructibility of the pool, the safety features, the superior quality of the lining and the fact that it was "maintenance free" and required no painting.

f. When the prospect raised the question of the price of the PRO pool he was advised that it was normally priced from five to eight thousand [1317] dollars, but because the prospect was the first person in his area to whom the pool had been shown, the price would be lowered. At this point a bargaining process usually began and the price was lowered from time to time and usually culminated in a telephone call from the salesman to his "boss" for permission to sell the pool at a very low price. In the bargaining process the free television, poolside furniture, shrubbery and other extras were removed to reduce the price. The price finally agreed upon varied from a low of two thousand dollars to as high as thirty-five hundred dollars. As an additional inducement the prospect was told that he would receive fifty dollars for each person who saw his pool, and then purchased one from the company, if he would allow his pool to be used as a neighborhood demonstrator and would allow a small sign to be erected near the pool.

g. If the prospect purchased the PRO pool, the contract for the ADV pool was mutually cancelled. If the prospect did not purchase the PRO pool, the ADV pool was never delivered.

6. All the purchasers who appeared as witnesses, in person or by deposition, stated that the initial contact with defendant's agent was the direct result of having read one of the advertisements referred to in Finding No. 4, and which defendant through his attorney admitted having been inserted by him in the publications outlined in Counts 1 through 8 of the complaint.

7. About April 1967, Sergeant and Mrs. Leon W. Ohls saw the advertisement in *TV Guide*. The Ohls called the telephone number given in the advertisement and were later contacted by the defendant's agent at their home in Augusta, Georgia. The sales technique was basically as described in Finding No. 5. At one time during the bargaining over the price, a telephone call was made to the defendant and Ohls discussed the matter with him by telephone. Thereafter the PRO pool was purchased, rather than the pool as advertised. Sometime later the defendant Bostic actually called by the home of the Ohls family in Augusta, Georgia, to correct some problem in the operation of the pool. The witness Ohls

identified the defendant Bostic in the courtroom as having come by his house on that occasion.

8. Sometime in the Spring of 1967 Mr. and Mrs. Donald L. Allen of Kingsport, Tennessee, answered an ad in *TV Guide,* which showed a swimming pool priced at around $800. They called the telephone number indicated and Raymond W. Fowler, an agent for the defendant, called at their home and went through the sales technique outlined in Finding No. 5, whereby the Allens signed a contract for the ADV pool, but after Fowler made certain observations and disparaging comments about the pool, they purchased the PRO pool for approximately $2,500.

9. In April 1967, Mr. Roy L. Good saw an advertisement by Family Pools, Inc., which showed a swimming pool priced at $895 and called to arrange for one of defendant's agent to come to his home in Hickory, North Carolina. The agent, whose name was Fowler, showed Mr. Good and his wife the ADV pool and after they had signed the contract for the pool he brought out the model for the more expensive PRO pool and generally followed the "bait and switch" approach. The Goods voided the contract on the ADV pool and purchased a PRO pool for approximately $3,300.

10. Sometime prior to April 21, 1967, Sergeant and Mrs. Smitty Musselwhite of Fayetteville, North Carolina, saw an advertisement in *TV Guide,* which showed a swimming pool advertised at approximately $800. They called the local number and one of defendant's agents, by the name of Hayden, called at their home about April 21, 1967. The "bait and switch" sales approach was used and the Musselwhites signed a contract **[1318]** for the ADV pool, after they were shown the model of the PRO pool and were persuaded to void the ADV contract and sign the contract for a PRO pool.

11. In May 1967, Mrs. Lois Guy saw an advertisement in either the Fayetteville, North Carolina *Observer* or *TV Guide* which showed a swimming pool priced at around $800. She called the telephone number given and one of the defendant's agents called at her home in Fayetteville, North Carolina. The "bait and switch" sales scheme was used and Mrs. Guy signed a contract for the ADV pool after which she was advised of the cost of maintenance, problems with wood rot and other shortcomings of the pool. She was thereafter persuaded to purchase a PRO pool and void the contract for the ADV pool.

12. In May 1967, Mr. and Mrs. Billy Gene Rushing answered an advertisement in the Winston Salem, North Carolina *Journal-Sentinal.* Thereafter one of defendant's agents called at their home in Winston Salem, North Carolina, at which time Mr. Rushing

signed a contract for an ADV pool to be delivered in two weeks and made a deposit of $200. Thereafter the defendant's agent began to disparage the pool and used the "bait and switch" tactic, but Mr. Rushing would not agree to purchase the PRO pool or to cancel the contract on the ADV pool. His ADV pool has never been delivered and his deposit has not been returned.

13. In about June 1967, Mr. James W. Cudworth saw an advertisement in the Greensboro, North Carolina *Record* showing a swimming pool priced at $639. After answering the advertisement defendant's agent called on Mr. Cudworth at his home and an ADV pool contract was signed for $639.

Thereafter the "bait and switch" scheme was initiated, but Mr. Cudworth insisted on the ADV pool and made a deposit thereon. In spite of repeated attempts to secure delivery of the pool, including a visit to Columbia, South Carolina, Mr. Cudworth never received delivery of his pool and finally cancelled his order. His deposit was returned after he enlisted the aid of the Columbia Better Business Bureau.

14. Sometime in May 1967 Mr. and Mrs. Edward P. Greene saw an advertisement in *TV Guide* showing a swimming pool priced at approximately $800 to $900. An agent called on them in response to their answer to the ad, and on June 7, 1967, they signed a contract for an ADV pool. Thereafter the agent brought a model of the more elaborate and expensive PRO swimming pool into the home, advising them that it was not yet on the market. The agent pointed out the poor qualities of the ADV pool and generally followed the "bait and switch" scheme outlined in Finding No. 5, resulting in a contract for the PRO pool being signed for $2,495.

15. Sometime prior to July 10, 1967, Mr. Gwyn Allen Miller saw an advertisement for a square swimming pool, and responded to the ad by calling a telephone number in Columbia, South Carolina. Thereafter an agent of defendant called on Mr. Miller at his home in Connelly Springs, North Carolina, and a contract for the ADV pool was signed at a price of approximately $900. The agent then brought in a model of the more elaborate and expensive PRO pool and the usual "baith and switch" scheme was used, resulting in cancellation of the contract for the ADV pool and execution of the contract for the PRO pool.

16. Sometime prior to July 28, 1967, Mr. and Mrs. Frank Powers saw an advertisement in the Greensboro, North Carolina *Record* showing a swimming pool priced at approximately $639. In response to a telephone call one of defendant's agents, Mr.

Floyd Sigmon, called at the Powers home in Greensboro, North Carolina. The "bait and switch" tactic was used and the Powers signed a contract for the PRO pool at a price of $2,995.

17. Approximately four months prior to July 1967, Mr. and Mrs. Garland Duncan answered an advertisement in *TV Guide* showing a swimming pool priced [1319] at about $895. On or about July 14, defendant's agent, Mr. Charles Rush, called the Duncan home in Elizabethtown, Tennessee, introduced himself as from Family Pools of Columbia, South Carolina. After the Duncans had signed a contract for the ADV pool the model of the more expensive and elaborate PRO pool was brought into the home. The "bait and switch" sales approach was used and the Duncans cancelled the first contract and signed a contract for the PRO pool at a price of $2,500. Said contract was made out on the form headed "Family Pools, Inc., Post Office Box 5412, Columbia, South Carolina".

18. Sometime prior to August 3, 1967, Mrs. Lois Williams and her daughter, Miss Judy Williams, saw an advertisement in either the Anderson *Independent* or in the *Daily Mail,* both newspapers published in Anderson, South Carolina. Upon answering this advertisement defendant's agent Mr. Raymond Fowler called at the Williams home in Toccoa, Georgia. The usual "bait and switch" game was used and the Williams signed the contract for the ADV pool, thereafter changing to the PRO pool. The contract form used carried the name of Family Pools, Inc. with an address as Post Office Box 5412, Columbia, South Carolina.

19. Sometime in February 1967, Miss Jenny Waters, Manager of Services Unlimited, Winston Salem, North Carolina, (a telephone answering, mobile communications and patrons service organization) received a telephone call from an individual identifying himself as Mr. E. K. Webster of Columbia, South Carolina. Mr. Webster told Miss Waters he wanted to use the facilities of her answering service to handle telephone calls resulting in advertisements inserted by Family Pools, Inc. in *TV Guide.* He instructed Miss Waters to mail any leads or names of prospective customers to him at Family Pools, Inc., P. O. Box 435, Columbia, South Carolina. The name "Webster" was proved to be a code name used by the defendant to identify prospective customers answering advertisements.

20. Sometime prior to March 3, 1967, Mr. Jim Hinshaw, who operates a telephone answering service in Greensboro, Burlington, and Winston Salem, North Carolina, was contacted by an individual who identified himself as either Mr. E. K. Webster or Mr.

Bostic, and made arrangements to have telephone calls resulting from advertisements by Family Pools, Inc. handled by Mr. Hinshaw's organization. Leads or prospective customers names were to be forwarded to Post Office Box 435, Columbia, South Carolina. According to Mr. Hinshaw the advertising referred to generated a great many calls and records of these calls were forwarded as instructed. The service was furnished from March 3 to September 15, 1967.

21. Mrs. Mary Swallows Koucky was employed by defendant as office manager in the office of Family Pools, Inc., Columbia, South Carolina, for a period of approximately eight months from the summer of 1967 until March 1968. Part of her duties involved the placing of swimming pool contracts with various finance companies. If the purchaser's credit rating was not sufficient to place the contract with an independent finance company, it was placed with the Carolina Fund, Columbia, South Carolina, which was operated by the defendant.

Mrs. Koucky testified to sales of pools to purchasers in North Carolina, Georgia and Tennessee. All pool contracts were entered on a record book as they were received, showing the date and the name of the purchaser. A ledger card was made out for each purchaser, and an individual file made up for each sale, arranged alphabetically in a file cabinet.

When Mr. Joel S. Thwaites, Federal Trade Commission Attorney from Atlanta, Georgia, came to the office of Family Pools, Inc. in 1967 to interview the defendant as to his failure to file compliance reports required on the Commission's Order in Docket 8634, the defendant directed that the office door be [1320] locked, and while Mr. Thwaites waited outside, defendant directed that the files on all out of state sales be removed from the file cabinets and hidden, and the names of all out of state purchasers of swimming pools be erased from the record book.

Mrs. Koucky testified that defendant explained to her the "bait and switch" sales method used in the sale of the pools. Mrs. Koucky also stated that during her employment by the defendant, he had in his possession a check book for Family Pools, Inc. of Rockingham, North Carolina, filled with blank checks signed by Mrs. Rushing.

22. About February 1967, defendant William N. Bostic asked his sister, Martha Rushing, and her husband, H. Bryce Rushing of Hoffman, North Carolina, to set up Family Pools, Inc. of Rockingham, North Carolina, as a corporation chartered under the laws of the State of North Carolina, for the purpose of selling swim-

ming pools in North Carolina. Defendant designated Mr. Rushing as President and Mrs. Rushing as Secretary-Treasurer. Mrs. Rushing opened a bank account in the Carolina Bank for the North Carolina corporation, with funds supplied by the defendant, and as directed by the defendant forwarded all mail received by the corporation, as well as all bank statements to Family Pools, Inc. to Columbia, South Carolina. Mr. Rushing performed no duties in connection with his position as President. No organizational meeting was held, no by-laws were prepared, and no minutes of directors or stockholders meetings were available, since such meetings were not held. There were no salesmen employed by the Rushings and they maintained no record or copies of contracts. Mr. and Mrs. Rushing did not attempt to sell swimming pools.

The only checks on the bank account of Family Pools, Inc. of Rockingham, North Carolina, which Mrs. Rushing made up were those covering the incorporation fee and her salary. She sent the book of blank checks, signed by her, to the defendant in Columbia, South Carolina, and she identified the handwriting on several checks as that of the defendant's wife, Phyllis Bostic. Mrs. Rushing also disavowed the writing of certain letters, which were prepared by the defendant and brought to her for execution only. When Mr. and Mrs. Rushing had an interview with Mr. Joel Thwaites and realized that swimming pools were being sold in other states, and certain questions arose regarding the activities of the corporation, they cancelled the charter of Family Pools, Inc of Rockingham, North Carolina, and dissolved the corporation on advice of their attorney.

23. The testimony of all the witnesses clearly shows that the defendant continued to follow the same "bait and switch" scheme of selling and pattern of conduct which the Federal Trade Commission had prohibited by its Order of January 7, 1965, and by doing so repeatedly violated said Order.

From the foregoing facts, the Court makes the following:

CONCLUSIONS OF LAW

1. The Federal Trade Commission's Order in Docket 8634, issued January 7, 1965, prohibiting the defendant from using "bait and switch" methods in offering for sale, selling or distributing products in commerce, became effective and enforceable on March 8, 1965, and has been in full force and effect at all times since.

[8] 2. The language of said Order is clear and unambiguous, and covers not only those products then being offered for sale, sold or distributed in commerce, but "any other products, which de-

fendant might offer for sale, sell or distribute in commerce, in the future." The Order is not too broad or general. See *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F.2d 337, 342–343, 7th Cir. 1960, rehearing denied June 8, 1960, in which the Court stated:

> Finally, petitioners contend that the order of the Commission is too broad and should, therefore, be set aside or [1321] modified. The findings of unfair and deceptive practices against the petitioners were confined to their advertising and sale of the cooker-fryer, while the order of the Commission enjoins the use of like advertising by petitioners in conjunction with the sale of the fryer or any other product. Petitioners contend that the order must be restricted to their advertisement and sale of the cooker-fryer alone.
>
> We do not agree with that contention. The Commission has a large discretion in its choice of a remedy which it deems necessary to cope with the unlawful practices found, and courts may interfere with the Commission's choice only if the remedy selected bears no reasonable relationship to such unlawful practices. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 429, 77 S.Ct. 502, 1 L.Ed.2d 438; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473, 72 S.Ct. 800, 96 L.Ed. 1081. Commission orders are not designed to punish for past transgressions, but are designed as a means to prevent illegal practices in the future. *Federal Trade Commission* v. *Ruberoid Co., supra* page 473, 72 S.Ct. 800. To the end that the Commission may achieve that purpose, its orders may prohibit not only the further use of the precise practice found to have existed in the past, but also, future use of related and similar practices. Ibid. Petitioners marketed a large number of products in commerce. They stand adjudged guilty of the use of illegal practices in the advertisement and sale of one product. We think it is entirely reasonable for the Commission to frame its order broadly enough to prohibit petitioners' use of identical legal practices for any purpose, or in conjunction with the sale of any and all products.

3. The evidence is clear that defendant deliberately attempted to evade the prohibitions of the Commission's Order by arranging to set up a corporation in North Carolina, which was controlled and directed by him, in spite of his efforts to conceal such ownership and control.

4. On the twenty occasions mentioned in the Findings of Fact, defendant William N. Bostic has flagrantly and repeatedly violated Paragraphs 1, 2 and 3 of Commission's Order of January 7, 1965.

[9] 5. The blatant nature of defendant's disregard for the Order of the Federal Trade Commission warrants the imposition of a sizable penalty and a fine of Four Thousand and No/100 ($4,000.00) Dollars for each violation is hereby imposed making a total fine against the defendant of Eighty Thousand and no/100 ($80,000.00) Dollars.

6. The course of action pursued by the defendant in intentionally violating the provisions of the Commission's Order, and his evident purpose to continue to engage in the same "bait and

switch" sales method, has convinced this Court that future violations of the Order can be prevented only by issuance of an injunction under the equitable powers vested in the United States Courts. See *United States* v. *Vitasafe Corporation*, 234 F.Supp. 710 (S.D. N.Y.1964) *affirmed per curiam* 2 Cir., 352 F.2d 62 and *Hecht Co.* v. *Bowles*, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754.

It is, therefore, ordered that the plaintiff, United States of America, have judgment against the defendant, William N. Bostic, in the amount of Eighty Thousand and No/100 ($80,000.00) Dollars.

It is further ordered that defendant, William N. Bostic, his representatives, agents and employees directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of any goods in interstate commerce, is hereby permanently enjoined from:

1. Using, in any manner, any advertising, sales plan, scheme or device wherein false, misleading or deceptive statements or misrepresentations are [1322] made in order to obtain leads or prospects for the sale of products or services.

2. Discouraging the purchase of, or disparaging any product or services which are advertised or offered for sale.

3. Representing, directly or by implication, that any products or services are offered for sale when such offer is not a bona fide offer to sell such products or services.

It is further ordered that the defendant is continually enjoined and required to serve a copy of this Decree on all present and future sales representatives, agents and employees of any corporate or other business enterprise owned, operated or controlled, or which may be in the future owned, operated, controlled or acquired by him and operated by him or at his direction, whether by proxy or by instructions given to members of his immediate family.

MISSISSIPPI RIVER CORPORATION v. FEDERAL TRADE COMMISSION *

No. 19844—F.T.C. Docket 8657

(Court of Appeals, Eighth Circuit, Jan. 26, 1972)

1. **Acquisition to Be Examined as to Adverse Effect on Competition**

To find a violation of section of the Clayton Act intended to arrest in their [1084] incipiency restraints in a relevant market, an acquisition is to be examined as to its adverse effect on competition.

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* Reported in 464 F.2d 1083 (1972). Motion by petitioner for stay of mandate granted until April 25, 1972. Affirmed: U.S. Court of Appeals, Eighth Circuit, April 26, 1972. For case before Commission, see 75 F.T.C. 813.

2. Evidence Supports Commission's Findings That Entry Into Market Not Achieved by Internal Expansion and if Acquisition Part of Overall Plan, It Falls Within Scope of Clayton Act

Evidence supported Federal Trade Commission's findings that fuel corporation's entry into cement market was not achieved by internal expansion, even though its cement plant went on stream subsequent to its purchase of ready-mixed concrete companies, in that the acquisitions were part of an overall plan, and that the acquisitions therefore fell within the scope of section of Clayton Act prohibiting the acquisitions by one corporation of stock of another which tends to create a monopoly.

3. Clayton Act Does Not Exempt Transactions by Small Companies or New Entrants to Market, Although Size of Acquiring Company May Be Element of Competitive Impact

Although size of acquiring company may be an element of competitive impact of an acquisition, section of Clayton Act prohibiting the acquisition by one corporation of stock of another which tends to create a monopoly does not exempt from its scope transactions by companies which may be considered small, or new entrants in a market or markets.

4. A New Entity in a Market is Only One Factor to Be Weighed in Determining Violation of Clayton Act.

Although fact that a new entity in a market has been created may be relevant in assessing the competitive effect of a corporate acquisition, it is only one factor to be weighted by Federal Trade Commission in detemining whether the acquisition has violated section of Clayton Act prohibiting the acquisition by one corporation of stock of another which tends to create a monopoly.

5. Acquisition of Cement Companies by Fuel Company Fell Within Scope of Clayton Act Even Though Acquiring Corporation Unranked Financially

Fuel company's acquisition of cement companies fell within scope of section of Clayton Act prohibiting the acquisition by one corporation of stock of another which tends to create a monopoly, even though the acquiring corporation was unranked financially, where the acquiring corporation was not incapable of marshalling enormous capital with which it could likely obtain a high rank in the cement industry as well as in total financial strength.

6. Acquisition Within Scope of Clayton Act Even if Market Was Oligopolistic Prior to Acquisition

Fuel company's acquisition of cement companies fell within scope of section of Clayton Act prohibiting the acquisition by one corporation of stock of another which tends to create a monopoly even if the cement market was oligoplistic prior to the acquisition.

7. Anticompetitive Effects of Acquisition in One Market Cannot Be Justified by Procompetitive Effects in Another

Although a corporate acquisition of stock of another corporation is to be measured functionally within the market structure of the particular market, the anticompetitive effects of an acquisition in one market cannot be justified by procompetitive effects in another market.

8. INTENTIONS, PURPOSES AND BENEFITS NOT A DEFENSE TO VIOLATIONS OF LAW

Honest intentions, business purposes and economic benefits are not a defense to violations of an antimerger law.

9. COVERT DE FACTO INTEGRATION OF MARKET NOT VALID DEFENSE TO ALLEGED VIOLATION OF CLAYTON ACT

Acquiring corporation's contention that the market it entered was so saturated with covert de facto integration that the acquiring corporation's entry was procompetitive to counteract such integration was not a valid defense to an alleged violation of section of Clayton Act prohibiting the acquisition by one corporation of stock of another which tends to create a monopoly in light of finding that the acquiring corporation could have entered the market short of complete acquisition.

10. CONTRARY RESULTS OF HEARING EXAMINER'S FINDINGS DOES NOT DEPRIVE COMMISSION OF RIGHT TO MAKE FACT FINDINGS SUPPORTED BY RECORD

Fact that hearing examiner reached result contrary to that of Commission does not deprive the Commission of its right to make fact findings which are [1085] supported by substancial evidence on the record as a whole.

11. EVIDENCE SUPPORTED COMMISSION'S CONCLUSIONS THAT ACQUISITIONS HAD ANTICOMPETITIVE AND OTHER EFFECTS

Evidence, in action against acquiring corporation for alleged violation of antimerger law, supported Federal Trade Commission's conclusions that the acquisitions had an anticompetitive effect, that they foreclosed substantial portion of the market in area of each acquisition, that the purpose of the acquisitions was to ensure that acquiring corporation would have captive market, that the acquisitions had an adverse effect on local business, that they intensified concentration in the market, that there was a trend toward vertical ties in the industry, and that the acquisitions constituted a substantial new barrier to entry into an industry already characterized as having substantial barriers.

12. EVIDENCE TO BE MEASURED ACCORDING TO RELEVANT PRODUCT AND GEOGRAPHIC MARKETS AND STRUCTURE OF INDUSTRY

Substantiality of evidence on which divestiture order is based is to be measured according to the relevant product and geographic markets and to the structure of the industry in the markets involved.

13. RELEVANT MARKET DETERMINED ACCORDING TO AREA IN WHICH SELLER COMPETES

Relevant market in which to measure, for purpose of divestiture order, competitive effect of acquisitions is determined according to area in which the seller competes.

14. FACTORS OF COMPETITIVE EFFECT INCLUDE FORECLOSURE OF COMPETITORS, PURPOSE OF MERGER, LIKELY EFFECTS ON BUSINESS, TREND TOWARD CONCENTRATION AND VERTICAL INTEGRATION, AND BARRIER TO ENTRY

Factors indicative of competitive effect of vertical merger, for the purpose of determining the applicability of a divestiture order, include foreclosure of competitors from a segment of the market, the purpose of the merger, likely adverse effects on local business, trend toward concentration, trend toward vertical integration, and barrier to entry by new firms.

15. PRIMARY VICE OF VERTICAL ACQUISITION IS TYING OF CUSTOMER TO SUPPLIER

Primary vice of vertical acquisition is tying of a customer to a supplier on a permanent basis.

16. EXAMINATION OF NATURE AND PURPOSES OF ACQUISITION RELEVANT IN EXAMINING ALLEGED VIOLATION OF CLAYTON ACT

In examining an alleged violation of section of Clayton Act prohibiting the acquisition by one corporation of stock of another which tends to create a monopoly, examination of the nature and purposes of the acquisition is relevant.

17. ONE PURPOSE OF CLAYTON ACT IS TO REVERSE TRENDS TOWARD VERTICAL INTEGRATION

One of the purposes of section of Clayton Act prohibiting the acquisition by one corporation of stock of another which tends to create a monopoly is to reverse trends toward vertical integrations.

18. ACQUIRED COMPANY ENGAGED IN INTERSTATE COMMERCE AND FELL WITHIN F.T.C. JURISDICTION

Acquired Ohio ready-mixed concrete company, which delivered concrete to contractor in Ohio who then transported it to Kentucky, and which regularly purchased portland cement in interstate commerce, was engaged in interstate commerce and Federal Trade Commission had jurisdiction over the acquired company in proceeding against acquiring company for alleged violation of antimerger law.

19. COMMISSION RULING THAT WITNESS COULD NOT CONFER WITH CORPORATION COUNSEL DURING RECESS WAS NOT UNFAIR OR PREJUDICIAL TO RESPONDENT

Federal Trade Commission's ruling that subpoenaed officer of acquiring corporation in proceeding for alleged violation of antimerger law, could not confer during recess with the corporation's counsel was not unfair or prejudicial to the acquiring corporation where neither the witness nor the corporation's counsel advised that counsel for the corporation represented the witness, and the witness was thereafter produced by the corporation which had full opportunity to present additional testimony of the witness.

20. ERROR RELIED UPON ASSERTED IN OPENING BRIEF—NEW ISSUES CANNOT BE RAISED IN REPLY BRIEF

Proper judicial administration requires that error relied upon be asserted [1086] in appellant's opening brief, and new issues cannot ordinarily be raised by reply brief.

21. RESPONDENT'S CONTENTION THAT COMMISSION ALLOWED MORE LIBERAL DISCOVERY IN SUBSEQUENT CASE DID NOT REQUIRE REVERSAL OF DIVESTITURE ORDER

Contention of acquiring corporation, in proceeding for alleged violation of antimerger law, that the Federal Trade Commission, in subsequent case, allowed the respondent a more liberal discovery than it allowed the acquiring corporation did not require reversal of divestiture order where the Commission's order in the subsequent case was vacated and on remand the Commission, in substance, reinstated the same procedure as had been afforded the acquiring corporation.

(The syllabus, with substituted captions, was taken from 454 F.2d 1083.)

On petition to review a divestiture order, the Court held that acquisition had anticompetitive effect, that purpose of acquisition was to insure a captive market, that there was a trend toward vertical ties, and that the acquisitions constituted a substantial new barrier to entry into an already saturated industry. Affirmed.

William R. McDowell, Dallas, Tex., *Cleon L. Burt, T. M. Armstrong,* St. Louis, Mo., for petitioner.

Frederick H. Mayer, Atty., *Joseph Martin, Jr.,* Gen. Counsel, *Harold D. Rhynedance, Jr.,* Asst. Gen. Counsel, *Thomas F. Howder,* Atty., F.T.C., for the Federal Trade Commission.

Before VAN OOSTERHOUT, HEANEY and ROSS, *Circuit Judges.*

VAN OOSTERHOUT, *Circuit Judge.*

This is a timely petition to review a Divestiture Order by the Federal Trade Commission pursuant to Section 7 of the Clayton Act, as amended, 15 U.S.C.A. § 18. The jurisdiction of this court is provided by 15 U.S.C.A. § 21(c) and (d).

On January 22, 1965, the Federal Trade Commission (Commission) issued a complaint charging that the acquisition of the stock of Stewart Sand and Material Company (Stewart), the assets of Richter Concrete Corporation and Richter Transfer Company (Richter), and a majority interest in John A. Denie's Sons Company (Denie's) by Mississippi River Fuel Corporation (Mississippi) violated Section 7 of the Clayton Act. Mississippi, in 1965, changed its name to Mississippi River Corporation. On January 29, 1968, a Hearing Examiner concluded that Complaint Counsel had not proven a violation and the complaint should be dismissed. On appeal the Commission on May 20, 1969, vacated the order of the Examiner and ordered divestiture. The appeal to this Court followed.

Mississippi bases this appeal on five main contentions:

I. The Commission's order is contra to the purposes of the Clayton Act.

II. Mississippi's entry into the cement industry is procompetitive rather than anticompetitive.

III. The conclusion of the Commission is not based on substantial evidence.

IV. The Commission lacked jurisdiction over Richter.

V. Mississippi's Vice President was denied his right to counsel and due process of law in violation of the Administrative Procedure Act and the Fifth Amendment by a Hearing Examiner's ruling.

We affirm the order of the Federal Trade Commission for the reasons hereinafter set out.

BASIC FACTS

Mississippi. The acquiring company, organized in 1928, is incorporated and exists under the laws of the State of Delaware with its principal place of business in St. Louis, Missouri. Mississippi is new to the cement industry. Until Mississippi decided to diversify, the company and its subsidiaries were primarily engaged in the exploration, production, transportation, and sale of natural gas and oil, and in the operation of the Missouri Pacific Railroad. In 1963 (the year the acquisitions were authorized by Mississippi's Board) Mississippi had total assets of $151.9 million, revenues of $72.3 million, and net income of $9.06 million. By 1966 Mississippi's total assets equaled $190.8 million, revenue equaled $107.95 million and net income equaled $10.1 million. The total earnings figures do not include those of the Missouri Pacific Railroad except to the extent of dividends received by Mississippi **[1087]** on its stock in the Railroad. In 1950 Mississippi bought a tract of land (the Selma tract) consisting of 4,500 acres along the Missouri River located at Festus, Missouri. About 1,000 acres of the tract were utilized for the construction of a nitrate plant which later was sold to a fertilizer company. The remaining 3,500 acres contained valuable deposits of limestone and silica sand. Mississippi later decided to use this tract for the production of portland cement, the main ingredient in the production of ready-mixed cement. The effect of this decision will be dealt with later in this opinion.

Stewart. This acquired company is a corporation organized and existing under the laws of Missouri principally based at Kansas City, Missouri. At the time of the acquisition Stewart was principally engaged in the production and sale of ready-mixed concrete and mineral aggregates in the States of Missouri and Kansas. For 1962 Stewart had net sales of $6.87 million and net (after tax) profits of $275,540. Prior to the acquisition Stewart was the largest purchaser of portland cement and the largest producer of ready-mixed concrete in the Kansas City area.

Denie's. This acquisition is a corporation organized and existing under the laws of the State of Tennessee with its principal office located in Memphis, Tenn. Denie's was engaged in the production and sale of ready-mixed concrete and other allied businesses.

For 1962 Denie's had a total income of $7.24 million, net income (before Federal Income taxes) of $308,756.00 and assets of $4.59 million. Prior to September 1963 Denie's was one of the two largest purchasers of portland cement and manufacturers of ready-mixed concrete in the Memphis area.

Richter. This vertical acquisition also involves a series of horizontal acquisitions. In 1964 Stewart organized a corporation by the name of Richter (Richter '64) under the laws of Ohio with principal offices in Cincinnati, Ohio. Richter '64 then acquired all the assets of Richter Concrete Corporation, an Ohio corporation formed in 1933 (Richter '33), and trucks and vehicles formerly owned by Richter Transfer Company, another Ohio corporation. Richter '33 was principally engaged in the production and sale of ready-mixed concrete and Richter Transfer Company in the hauling business. Richter '33 and Richter Transfer were owned and operated as family owned businesses under a common direction and control with essentially the same personnel. For present purposes it is not necessary to distinguish the three companies and "Richter" will be used to refer to the entire business enterprise. Richter is a wholly owned subsidiary of Stewart. Prior to the 1964 acquisitions, Richter was the largest purchaser of portland cement and the largest producer of ready-mixed concrete in the Cincinnati area.

Background of Acquisitions. In 1959 Mississippi began investigating development of the 3,500 acre tract previously referred to for the production of portland cement. Attempts were made to engage in a joint venture with an already established portland cement company. When those attempts failed, Mississippi embarked upon a program of developing a facility of its own. Mississippi on the basis of surveys in 1961 and 1962 concluded that the best outlets for its product would be the St. Louis and Kansas City, Missouri, Memphis, Tennessee, and Cincinnati, Ohio, markets. It was felt by Mississippi's board that these markets were so rigidly controlled by "covert" methods of tying customers that captive outlets were essential for entry. Further investigations made by Mississippi in early 1963 served to reinforce that conclusion. Simultaneous with the award of the contract for engineering and planning the design of the portland cement plant, Mississippi's board approved the acquisitions of Stewart and Denie's. These acquisitions were made in late 1963. In January 1964 the Richter arrangements were made. When all the acquisitions were completed, the first **[1088]** contracts for the construction of the cement plant were awarded. The plant began operation in 1965.

I.

The first issue raised by Mississippi takes issue more with the application of Section 7 than with the findings of fact of both the Examiner and the Commission. Mississippi contends that since it is a relatively small company its attempt to add to the economic growth of St. Louis, Missouri, by adding a new entity to the cement industry through internal expansion and acquisitions does not fall within the scope of Section 7. This contention raises the issue of the scope of Section 7.

Section 7, as amended, was intended to "arrest in their incipiency restraints * * * in a relevent market." *United States* v. *E. I. DuPont De Nemours & Co.*, 353 U.S. 586, 589, 77 S.Ct. 872, 875, 1L.Ed.2d 1057. As the Supreme Court said of vertical integrations in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 324, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510:

> The arrangement may act as a 'clog on competition,' Standard Oil Co. of California [and Standard Stations] *v.* United States, 337 U.S. 293, 314, [69 S.Ct. 1051, 1062, 93 L.Ed. 1371], which 'deprive[s] * * * rivals of a fair opportunity to compete.' H.R.Rep.No. 1191, 81st Cong., 1st Sess.

[1] It is further recognized that not all vertical mergers violate the Act. Section 7 proscribes vertical acquisitions whose effect "may be substantially to lessen competition in any line of commerce in any section of the country." To find a violation of the Act an acquisition is to be examined as to its adverse effect on competition.

[2] Both the Examiner and the Commission found that Mississippi's entry into the cement market was not achieved by internal expansion. We find substantial evidence in the record to support that finding. An internal expansion presupposes a company doing business in one of the markets and then expanding internally either forward or backward into the other market. Mississippi relies greatly on the fact that the cement plant went on stream subsequent to the purchase of the ready-mixed companies. Therefore, Mississippi contends that this situation involves an established ready-mixed chain building its own cement plant. The record clearly supports the finding that the acquisitions were part of an overall plan. Mississippi's President testified that they would not have entered the markets without the assurance of a captive buyer for the product. .The decision to produce portland cement did not arise out of the established ready-mixed business, but was conceived before entering the ready-mixed business. This is a case of an established corporation entering two markets in essentially one

series of transactions utilizing the device of vertical acquisition. Each transaction was dependent upon the other to effect entry into the market. If the acquisitions meet the criteria discussed in Part III of this opinion, the transactions are violative of the Act.

[3–5] While Mississippi may be unranked financially, it has proven by these acquisitions that it is not incapable of marshalling enormous capital with which it may likely obtain a high rank in the cement industry as well as in total financial strength. While the size of the acquiring company may be an element of the competitive impact of an acquisition, the Act does not exempt from its scope transactions by companies which may be considered small. Nor does the Act exempt new entrants in a market or markets from its scope. Again, the fact that a new entity has been created may be relevant in assessing the competitive effect of an acquisition, but it is only one factor to be weighed by the Commission.

[6] Missippi makes much under each issue of the contention that the cement market is so oligopolistic that the market could not be entered in any other way. In the context of the scope issue Mississippi argues that finding a violation of the Act in this situation serves to insulate an entrenched oligopoly, which **[1089]** is counteractive of the intent of Section 7. The structure of the markets would not exempt Mississippi from the scope of Section 7. The Act is intended to abort concentration, not ignore possible increases in concentration because the market may already be oligopolistic.

II.

Mississippi contends that the cement markets in Kansas City, Memphis and Cincinnati were so saturated with covert de facto integration that its entry is procompetitive to counteract that integration. Mississippi offers the contention as a defense to an alleged Section 7 violation.

[7,8] While an acquisition is to be measured functionally within the market, *United States* v. *Columbia Steel Co.,* 334 U.S. 495, 527, 68 S.Ct. 1107, 92 L.Ed. 1533; *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 321–322, 82 S.Ct. 1502, the anticompetitive effects of an acquisition in one market cannot be justified by procompetitive effects in another market. Honest intentions, business purposes and economic benefits are not a defense to violations of an antimerger law. *United States* v. *E. I. DuPont De Nemours & Co., supra,* 353 U.S. at 607, 77 S.Ct. 872; *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915.

[9] At this point it is not necessary to comment fully on the factual findings concerning the structure of the markets. The Com-

mission did find, however, that Mississippi could have entered the markets short of complete acquisition. The distinction between the alleged covert tying methods alleged by Mississippi and outright acquisition lies in the permanency of the relationship. The short term effects of loans to ready-mixed companies by portland cement producers are more competitive than the effects of merging.

III.

[10] Mississippi's contention that the Commission's determination and order are not supported by substantial evidence lacks merit. The fact that the Hearing Examiner reached a result contrary to that of the Commission does not deprive the Commission of its right to make fact findings which are supported by substantial evidence on the record as a whole. As pointed out in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456, the duty of the appellate court is to determine the substantiality of the evidence to support the Commission's findings on the basis of the record as a whole. The findings of the Trial Examiner constitute part of such record. *Universal Camera* thus states the ruling:

> We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case.

* * * 340 U.S. 474, 496, 71 S.Ct. 456, 469, 95 L.Ed. 456.

[11] The Commission points out in its decision and order that it is in agreement with the Examiner's detailed findings of fact. The Commission in its opinion filed May 20, 1969, determines that its difference with the Examiner arises out of the application of Section 7 standards to the facts of the case. The Commission also points out in detail in its opinion the evidence it relies upon in finding the violations. We are satisfied that the Commission's order is supported **[1090]** by substantial evidence on the basis of the record as a whole.

[12] The substantiality of the evidence upon which the devistiture order is based is to be measured according to the relevant product and geographic markets and to the structure of the industry in the markets involved. *Brown Shoe Co.* v. *United States, supra; United States* v. *Columbia Steel Co., supra.*

PRODUCT MARKETS: The Commission found that portland cement and ready-mixed concrete are the relevant product markets in this situation. Portland cement is the main ingredient to which water is added to make concrete. There is no practical substitute for portland cement. Ready-mixed concrete is concrete delivered to a consumer in an unhardened state. Companies in the ready-mixed business are the nation's principal users of portland cement. Petitioners do not contest the Commission's findings.

[13] GEOGRAPHIC MARKETS: The Commission found that the metropolitan areas of Kansas City, Cincinnati and Memphis comprise the relevant areas in which to measure the competitive effect of the acquisitions. Those areas are defined according to the "Standard Metropolitan Statistical Areas" deivsed by the Bureau of the Budget. Relevant geographic markets are not "susceptible to a precise metes and bounds definition." The relevant market is determined according to the area in which the seller competes. *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 327, 331, 81 S.Ct. 623, 5 L.Ed.2d 580. Within the broad general areas, well defined sub-markets may exist which constitute geographic markets for antitrust purposes. See *Brown Shoe, supra,* 370 U.S. at 325, 82 S.Ct. 1502. Petitioners do not challenge the Commission's findings for the ready-mixed market, contending mainly that the findings are incorrect as to the portland cement market. However, Mississippi did conduct its own surveys using the designated areas to decide whether or not to enter the cement industry. The use of metropolitan areas in the cement industry was accepted by the Sixth Circuit in *United States Steel Corp.* v. *F.T.C.,* 426 F.2d 592, 596. We are persuaded to follow the designation adopted by that court.

STRUCTURE OF THE CEMENT INDUSTRY IN THE RELEVANT MARKETS: The Commission found and the parties do not contest the fact that the three delineated markets were the subject of concentration. In 1963 the Kansas City market was served by nine portland cement suppliers. Two firms accounted for 53% of all shipments of cement into the area and the top four firms accounted for 81%. Fifteen ready-mixed companies operated in the area with Stewart's consuming 31.3% of the cement shipped to ready-mixed companies and 23.5% of all cement shipped to the area. Stewart's sales of ready-mixed concrete totaled 30.4% of the concrete sold in the Kansas City market. Stewart's sales more than doubled that of the second largest concrete firm.

Seven cement producers served the Memphis area in 1963. The top two firms accounted for 79% of the sales and the top four firms accounted for 96%. The twelve ready-mixed companies bought over 60% of the portland cement sold in the area. Denie's accounted for 29% of the purchases for ready-mix production and 20% of the total portland cement purchases. Denie's accounted for 27% of the ready-mixed concrete sales. The top four ready-mixed companies accounted for over 78% of the sales.

The Cincinnati area consists of twenty-three ready-mixed companies served by nine cement companies. The top three portland cement purchasers account for 52% of the total sales and the top four account for 66%. Richter bought 37% of the cement sold to ready-mixed companies and 24% of the total cement sold. Richter sold 33.5% of the ready-mixed concrete in the area and the second top seller combined with Richter to total 54%.

[1091] [14] THE ANTICOMPETITIVE EFFECT: The United States Supreme Court has looked to several functional factors as indicia of the competitive effect of vertical mergers. The factors include: (1) foreclosure of the competitors at either level from a segment of the market; (2) the purpose of the merger; (3) likely adverse effects on local business; (4) the trend toward concentration; (5) the trend toward vertical integration; and (6) the barriers to entry by new firms. *F.T.C.* v. *Consolidated Foods,* 380 U.S. 592, 85 S.Ct. 1220, 14 L.Ed.2d 95; *United States* v. *Kennecott Copper Corp.,* 231 F.Supp. 95 (SDNY) *aff'd per curiam,* 381 U.S. 414, 85 S.Ct. 1575, 14 L.Ed.2d 692; *Brown Shoe Co.* v. *United States, supra; United States Steel Corporation* v. *F.T.C., supra.* The Commission found anticompetitive effects in each of the factors and we are satisfied that the conclusions of the Commission are based upon substantial evidence.

[15] FORECLOSURE. By these acquisitions Mississippi was able to foreclose a substantial portion of the portland cement market in the area of each acquisition. The primary vice of a vertical acquisition is the tying of a customer to a supplier on a permanent basis. *United States Steel Corporation* v. *F.T.C., supra,* 426 F.2d at 599. Mississippi was able to insure sales of portland cement to at least 23.5% of the Kansas City market, at least 20% of the Memphis market, and at least 24% of the Cincinnati market. Even though there is some testimony from some portland cement companies serving the area that they were not affected by the arrangement, there is substantial basis in fact for the Commission's findings. Many cement companies showed concern over the acquisitions and the record shows increased attempts of other companies to guarantee a market.

Mississippi contends that the Commission erred in using the standard metropolitan statistical areas established by the Bureau of the Budget as the relevant geographical areas. The Trial Examiner, at findings 71 to 75, conceded that some modified variation from such standards might be justifiable in determining the relevant geographical area but determined:

> The inconsistencies and anomalies disclosed by the record, which result from the fact that the defined areas do not precisely describe the whole areas and the only areas of possible competitive impact, however, are not of such magnitude as materially to impair their validity as appropriate areas for consideration in this proceeding. And the availability of alternative concepts of market area difinitions does nót render improper the concept which was adopted.

We agree. See *United States Steel Corporation* v. *F.T.C., supra,* p. 596 of 426 F.2d.

Mississippi contends that if the lines of the geographic markets were properly drawn their market control would be 3.7% for Stewart, 1.3% for Denie's and 1.3% for Richter. The record affords no basis for enlarging the geographical area to such an extent as to reduce the market control to the percentages claimed by Mississippi.

The Court in *United States Steel Corporation* v. *F.T.C., supra,* found that the merger there in question foreclosed 1.8%, 2.1% and 1.7% of the northeast United States market for the years 1962–64. Based on *Brown Shoe Co.* v. *United States, supra,* where the foreclosure was as low as 1.5%, the Sixth Circuit found the foreclosure to be well within the prohibited zone. We, likewise, find the foreclosure by Mississippi to fall into the prohibited zone even if the wider market lines were to be drawn. Under Section 7, as amended, the Commission has only to find a *probability* of lessening of competition. *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 323, 82 S.Ct. 1502, 8 L.Ed.2d 510; *F.T.C.* v. *Procter & Gamble Co.,* 386 U.S. 568, 577, 87 S.Ct. 1224, 18 L.Ed.2d 303. That finding is supported by the record.

[1092] [16] PURPOSE. In examining an alleged Section 7 violation, examination of the nature and purposes of the acquisition is relevant. *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 329, 82 S.Ct. 1502. There is no question in this situation that the purpose of the acquisition is to insure that Mississippi would have a captive market with no competition for a large share in each market.

Mississippi contends that the purpose of the acquisitions was to enable it to enter an otherwise closed market. There is substantial evidence to show that Mississippi could have entered the markets with measures short of acquisition. There is no evidence that Mississippi attempted to sell competitively or made an attempt to contract for sales before acquiring the ready-mixed companies. Even if we *assume* that Mississippi could have entered in no other way, the anticompetitive effects of the entry show a violation of Section 7, as amended. The antitrust laws do not excuse further concentration because a market is already concentrated. Mississippi contends throughout that by establishing a new competitive entity they have increased competition. However, the challenged establishment, in reality, removes over 25% of the markets from competition before adding to the competition for the remaining 75% of the market.

EFFECT ON LOCAL BUSINESS. The adverse effect of the acquisitions was immediately felt by other companies. United States Steel was forced to close a Cincinnati terminal in 1967 after three years of operation because of the loss of Richter's business. The record also shows that a series of vertical mergers followed Mississippi's actions. Mississippi was effectively able to control a large portion of each market without fear of competition. Mississippi's action then left approximately 75% of the market open to competition. Eliminating a large portion of the market in this manner has the effect of squeezing the remaining firms.

TREND TOWARD CONCENTRATION. The finding by the Commission that there is a trend toward concentration in the designated markets as well as in the industry as a whole is not contested, and is relied upon by Mississippi in is defense. The percentages of concentration previously referred to in these markets have been held to be unduly high in previous antitrust cases. *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 363–366, 83 S.Ct. 1715, 10 L.Ed.2d 915; *United States* v. *Aluminum Company of America,* 377 U.S. 271, 278–279, 84 S.Ct. 1283, 12 L.Ed.2d 314. Mississippi's acquisitions serve to intensify that concentration making its elimination an even more difficult task.

[17] TREND TOWARD INTEGRATION. The Commission found a trend toward vertical ties in the industry in the relevant markets as well as in the nation as a whole.[1] That finding is based on substantial evidence. See *United States Steel Corporation* v. *F.T.C., supra.* One of the purposes of Section 7, as amended, is to reverse trends toward vertical integrations. The United States Supreme Court has stated: "[R]emaining vigor cannot immunize a merger

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[1] See F.T.C. Staff Report, 1966, Economic Report on Mergers & Vertical Integration in the Cement Industry.

in the trend in that industry is toward oligopoly [or vertical integration]." 370 U.S., at 333, 82 S.Ct., at 1528.

BARRIERS TO ENTRY. Barriers to entry in a market strengthen the market power of existing firms allowing the use of oligopolistic power with relative safety from new competition. Any new barriers make a strong market position even stronger. *F.T.C.* v. *Procter & Gamble Co., supra,* 386 U.S. at 578–581, 87 S.Ct. 1224; *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158, 173–174, 84 S.Ct. 1710, 12 L.Ed.2d 775. The Commission found that the challenged mergers constitute a substantial new barrier to entry in an industry already characterized as having substantial barriers. Testimony of Mississippi's Vice President characterized the cement industry [**1093**] as one requiring large amounts of capital to enter. Mississippi further felt that barriers to entry were so high already that merger was the only way to enter. The business of the acquired companies is now foreclosed to new entrants on top of the previously existing barriers. Mississippi contends that its merger activity did not raise the barriers to entry. However, the formidable barriers Mississippi found (none of which were vertical mergers then) are enlarged by Mississippi's action of eliminating a large portion of the market from any possibility of competition from a new entrant.

IV.

[18] Both the Hearing Examiner and the Commission found that the Commission had jurisdiction over Richter on the basis that Richter, as the acquired company, was engaged in interstate commerce.

In 1963 Richter sold and delivered 121 cubic yards of ready-mixed concrete from Ohio into Kentucky. Being notified that it did not have a license to sell concrete in Kentucky, Richter then delivered approximately 4,000 cubic yards of concrete to the contractor who accepted delivery in Ohio and then transported it to Kentucky.

The record shows that Richter regularly purchased materials in interstate commerce. We do not find that changing the character of portland cement by adding water and delivering it in an unhardened state causes the product to lose its interstate character. See *Foremost Dairies, Inc.* v. *F.T.C.,* 5 Cir., 348 F.2d 674.

V.

Five U.S.C.A. § 555(b) provides: "a person compelled to appear in person before an agency * * * is entitled to be accompanied, represented, and advised by counsel. * * *" Mr. Manley, Vice President of Mississippi River Corporation and President of the cement subsidiaries, was subpoenaed to testify by the complaint counsel. Upon completion of direct examination a short recess was called. Mr. Manley was then told by the Examiner that he could not confer, either during recess or lunch, with counsel for respondent about his testimony. Mississippi contends that the ruling violates the Statute and taints the whole proceeding to such a degree that this Court should remand the entire case. The Commission upheld the Examiner's ruling on the basis that no unfairness had been shown. We agree.

[19] Neither Mr. Manley nor respondents counsel advised the Examiner that counsel for Mississippi represented Mr. Manley. The Statute relied upon appears to be designed for the protection of the witnesses, not for the benefit of the litigants. In any event, Mississippi has failed to demonstrate that it has been prejudiced by the ruling. See 5 U.S.C.A. § 706; see also *United States* v. *Bensinger Co.,* 8 Cir., 430 F.2d 584, 591–592. Some thirty days after the incident above referred to, Mississippi produced Mr. Manley as a witness and had a full opportunity to present additional testimony of the witness.

Mississippi in its reply brief for the first time raises the issue that the Commission in the subsequent case of *Lehigh Portland Cement Company,* FTC Docket No. 8680, allowed a respondent a more liberal discovery than is allowed Mississippi. The Commission's order was vacated with remand to the Commission in *F.T.C.* v. *Crowther,* 139 U.S.App.D.C. 137, 430 F.2d 510. On remand, the F.T.C. on July 31, 1970, in substance reinstated the Mississippi procedure.

[20, 21] Proper judicial administration requires that error relied upon should be asserted in appellant's opening brief. See Rule 28(a), FRAP. New issues cannot ordinarily be raised by reply brief. See *Smith* v. *American Guild of Variety Artists,* 8 Cir., 368 F.2d 511, 514, and cases there cited. In any event, we find the contention to be without merit. Mississippi has not demonstrated that it **[1094]** was in any way prejudiced by the ruling of which it now complains.

A review of the entire record satisfies us that Mississippi has had a fair hearing before the Trial Examiner and the Commission and that the Commission has applied proper legal standards, and that its order is supported by substantial evidence.

The decision and order of the Commission is affirmed and enforced.

OKC CORP. v. FEDERAL TRADE COMMISSION *

No. 705–70—F.T.C. Docket 8802

(Court of Appeals, Tenth Circuit. Feb. 14, 1972)

1. FINDINGS AND CONCLUSIONS OF EXAMINER ARE NOT SACROSANCT OR NECESSARILY BINDING ON COMMISSION OR COURT BUT ARE PART OF RECORD ON REVIEW

   [1160] In making determination as to sufficiency of evidence to support an order of the Federal Trade Commission the Court of Appeals must consider the record as a whole, including the findings and conclusions of the examiner, but the findings and conclusions of the examiner are not sacrosanct and are not necessarily binding either on the Commission or the Court of Appeals; they represent but a part of the entire record to be considered on review.

2. EXAMINER'S FINDINGS ON REVIEW SHOULD BE GIVEN WEIGHT THEY MERIT BUT SUBSTANTIAL EVIDENCE STANDARD IS NOT MODIFIED

   Where the Federal Trade Commission and the examiner are in disagreement, the examiner's findings on review should be considered and given such weight as in reason and in light of judicial experience they merit, but the substantial evidence standard is not modified.

3. DIVESTITURE FOUND ESSENTIAL TO RESTORATION OF COMPETITION IN CEMENT AND READY-MIX CONCRETE INDUSTRIES IN NEW ORLEANS AREA

   Substantial evidence supported the final order of Federal Trade Commission finding violation of Clayton Act and directing the acquiring corporation to totally divest itself of stock of acquired corporation on ground that divestiture was essential to restoration of competition in relevant cement and ready-mix concrete industries in the New Orleans metropolitan area.

4. TOTAL DIVESTITURE IS APPROPRIATE EVEN THOUGH ANTITRUST VIOLATION RELATES ONLY TO ONE ASPECT OF ACQUIRED COMPANY

   Total divestiture of stock of acquired corporation by acquiring corporation is not necessarily inappropriate even though the antitrust violation found relates to but one aspect of the company thus acquired, especially where total divestiture is deemed necessary to restore effective competition.

(The syllabus, with substituted captions, is taken from 455 F.2d 1159.)

On petition for review, the Court affirmed the order directing total divestiture of acquired company on grounds that this was essential to restoration of competition in the concrete industries in the New Orleans area.

Robert G. Sugarman, New York City (*Sullivan & Cromwell,*

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* Reported in 455 F.2d 1159 (1972). Preliminary injunction dissolved on motion of F.T.C. by U.S. Court of Appeals, Fifth Circuit, June 30, 1972; see 8 S.&D. 1220. For case before Commission, see 77 F.T.C. 1342.

John F. Arning, New York City and *Charles P. Russ, III,* of counsel, on the brief), for petitioner.

Montgomery K. Hyun, Washington, D.C. (*Joseph Martin, Jr.,* Gen. Counsel, *Harold D. Rhyndance, Jr.,* Asst. Gen. Counsel, and *Frederick H. Mayer* and *Thomas F. Howder,* Washington, D.C., on the brief), for respondent.

Before LEWIS, PHILLIPS and MCWILLIAMS, *Circuit Judges.*

MCWILLIAMS, *Circuit Judge*

The issue here to be determined is whether there is substantial evidence to support a final order of the Federal Trade Commission finding a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and directing the acquiring corporation to *totally* divest itself of the stock of the acquired corporation, the Commission deeming total divestiture essential to a restoration of competition in the relevant cement and ready-mix concrete industries in the New Orleans metropolitan area. Our study of the record leads us to conclude that there is such supporting evidence and we therefore affirm the Commission's order.

OKC Corp., formerly the Oklahoma Cement Company and hereinafter referred to as OKC, has its headquarters in Dallas, Texas, and prior to the acquisition in question was principally engaged in the manufacture and sale of portland cement, asphalt, automotive gasoline, fuel oil and various other petroleum products. OKC operates two cement manufacturing plants, one in Pryor, Oklahoma, having an annual capacity of two million barrels, and the other in New Orleans, Louisiana, with a 1.7 million barrel annual capacity. Since it completed its New Orleans plant in 1964, OKC has become the third largest supplier of portland cement in the New Orleans area. In 1968 this plant shipped 966,916 barrels valued at $3.77 million within the New Orleans area, which accounted for 23 per cent of the total shipments of portland cement made into the area. OKC's principal customers **[1161]** for its portland cement are ready-mix firms, oil well servicing companies, public works projects and oil field pipecoating companies, with ready-mix firms being the largest purchasers of portland cement.

Jahncke Service, Incorporated, hereinafter referred to as Jahncke, is a conglomerate based in New Orleans which engages in various and distinct enterprises, including marine hydraulic dredging of rivers and harbors, the dredging and sale of marine shell and the production and sale of ready-mix concrete. Jahncke has been a well-recognized, highly successful, and independent business enterprise in New Orleans for nearly 100 years and has engaged in the ready-mix business for the past 30 years. Prior to its acquisition by OKC, Jahncke operated as an integrated business unit under a single centralized management, with two principal operating departments (hydraulic dredging and building materials) which were more or less organized along functional and product lines. During 1965–68, sales of merchandise by the building material department, including ready-mix sales, accounted for about 60 per cent of Jahncke's total revenues. Revenues from dredging operations, short-line railroad operations, joint venture construction projects and other sources constituted the remaining 40 per cent.

During 1968 and 1969, OKC acquired a majority stock interest in Jahncke and for practical purposes assumed control of that company. It was this stock acquisition which precipitated the filing of a formal complaint with the Commission charging OKC with a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, such acquisition allegedly tending to lessen competition and create a monopoly in the production and sale of portland cement, ready-mixed concrete, shells and construction aggregates in the New Orleans area. Hearings were later held before an examiner who in due time issued an initial decision in which he found, among other things, that OKC's acquisition of the stock of Jahncke violated Section 7 of the Clayton Act in that the acquisition did tend to substantially lessen competition in the sale of cement and concrete in the New Orleans area and the examiner ordered OKC to divest itself of Jahncke's ready-mix concrete business.

On cross-appeals, the Commission adopted the examiners findings with respect to the portland cement and ready-mix concrete product markets and the New Orleans geographic area, as well as his conclusion that OKC's acquisition of the stock of Jahncke violated Section 7 of the Clayton Act. But contrary to the examiner's divestiture order, the Commission concluded that the entire Jahncke enterprise, not simply the ready-mix portion, should be divested as a unit in order to insure that the ready-mix business of Jahncke would survive as a viable, independent, local competitive entity and that there be a restoration of competition in the relevant cement and ready-mix industries in the New Orleans metropolitan area. Accordingly, the Commission ordered a divestiture of all Jahncke stock held by OKC within six months after its order becomes final.

OKC has now filed with this court a petition for review wherein it does not challenge the findings of an antitrust violation, but limits its petition to the question of the propriety of the Commission's order that there be a total—as opposed to a partial—divestiture.

In ordering OKC to totally divest itself of its stockholdings in Jahncke, the Commission found that there was an "insufficient basis" for the examiner's conclusion that the ready-mix business of Jahncke, "if severed from the entire enterprise, could survive as a viable, independent competitive entity." As concerns the nature of the remedy, *i.e.*, total divestiture as opposed to partial divestiture, the Commission summarized as follows:

> In sum, we are convinced that competition would suffer from the elimination [1162] of Jahncke as an independent ready-mix producer in the New Orleans market. We know from the long history of this organization that it is capable of maintaining its independence in the ready-mix line if it remains unchanged. On the other hand, we are far from persuaded that this would be true if the ready-mix business would be severed from the remainder of the enterprise. Consequently, we cannot agree with the hearing examiner that the market structure would be adequately restored by divestiture of only the ready-mix unit. The holding that partial divestiture would afford complete relief is at best conjectural. It is therefore rejected.

Both parties agree that the ultimate issue is whether the record contains "substantial evidence" to support the order of the Commission directing total divestiture. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L. Ed. 456 (1951). The Commission argues that the record contains such supporting evidence; whereas, OKC's position is that it is the examiner's order, and not that of the Commission, that finds substantial support in the record. Before considering the evidence bearing on the issue of total versus partial divestiture, we would first consider the effect on our decisional process of the fact that the examiner and the Commission differed in their respective conclusions as to the proper remedy for the particular antitrust violation here in question.

[1, 2] In making our determination as to the sufficiency of the evidence, we are to consider the record as a whole, including the findings and conclusions of the examiner. 5 U.S.C. § 706 and *Universal Camera, supra*. However, the findings and conclusions of the examiner are not sacrosanct and are not necessarily binding either on the Commission or us. They represent but a part of the entire record to be considered by us on review. *United States Retail Credit Association, Inc.* v. *F.T.C.*, 300 F. 2d 212 (4th Cir. 1962). In *American Fed. of Television & Radio Artists* v. *NLRB* 129 U.S. App.D.C. 399, 395 F.2d 622 (1968) substantial evidence was found

to support the administrative agency's findings even though the case was close on the facts and even though there was perhaps substantial evidence to suport the examiner's contrary finding on the issue there in question. *See also* K. Davis, Administrative Law § 10.04 (Supp.1970) for a discussion of the weight to be given an examiner's report by a reviewing court. And so, where the Commission and the examiner be in disagreement, the examiner's findings on review should be considered and given such weight as in reason and in the light of judicial experience they merit. However, even though the Commission and the examiner be in disagreement, the " 'substantial evidence' standard is not modified in any way * * *." *Universal Camera, supra.*

Universal Camera also held that the "significance of his [the examiner's] report, of course, depends largely on the importance of credibility in the particular case." In our view, the instant case is essentially one where the examiner and the Commission simply drew different conclusions from the same evidence as to the viability of Jahncke's ready-mix business if it were to be cut adrift from the conglomerate. In this regard the examiner concluded that the ready-mix business could stand on its own two feet; whereas, the Commission found, as above indicated, an insufficient basis for concluding that the ready-mix unit of Jahncke, if severed from the entire enterprise, could survive as a viable, independent competitive entity.

[3] This conclusion of the Commission in our view does find substantial support in the record. The evidence on this matter as might be expected was in some degree of conflict. Needless to say, conflicting inferences could with propriety be drawn from that evidence which was not in dispute. The fact of the matter is that the ready-mix operation of Jahncke had been operating at a **[1163]** loss for some time both before and after OKC acquired Jahncke's stock. Certain witnesses did express an *opinion* that assuming certain changed circumstances Jahncke's ready-mix business could be turned into a profitable operation. This opinion was controverted by other opinion testimony to the effect that the ready-mix business could not stand alone. Indeed, an officer of OKC testified that Jahncke's ready-mix business had been losing money and, being an uneconomical business, OKC desired to divest itself of the ready-mix operations, though OKC at the same time wanted to keep the other Jahncke enterprises which operated at a profit. There was other testimony that historically the financial resources of the entire Jahncke company had been of aid to the ready-mix operation. Without going into further detail, it is sufficient to say

that our study of the record, including the examiner's initial decision, leads us to conclude that there is substantial evidence to support the Commission's order.

[4] Total divestiture is not necessarily inappropriate even though the antitrust violation found relates to but one aspect of the company thus acquired, especially where, as here, total divestiture is deemed necessary to restore effective competition. In a somewhat analogous situation, the United States Supreme Court in *United States* v. *Du Pont & Co.*, 366 U.S. 316, 81 S.Ct. 1243, 6 L.Ed. 2d 318 (1961), ordered total divestiture, and in so doing observed as follows:

> It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7. That statute is specific and 'narrowly directed.' Standard Oil Co. *v.* United States, 337 U.S. 293, 312, [69 S.Ct. 1051, 93 L.Ed. 1371] (1949), and it outlaws a particular form of economic control—stock acquisitions which tend to create a monopoly of any line of commerce. The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. Divestiture of dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when § 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved. Of the very few litigated § 7 cases which have been reported, most decreed divestiture as a matter of course. Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found.

Order affirmed.

SYDNEY N. FLOERSHEIM v. CASPAR N. WEINBURGER, ET AL.*

Civ. A. No. 2048—70—F.T.C. Docket 8721

(United States District Court, District of Columbia, Feb. 29, 1972)

1. **That Reports of Compliance Be Signed Could Be Read as Directory Rather Than Mandatory**
   Requirement of Federal Trade Commission regulation that reports of compliance be signed could be read as directory rather than mandatory.

2. **For Purposes of Judicial Review Commission's Rejection of Compliance Report Is Final**
   Federal Trade Commission's rejection of report of compliance is, for purposes of judicial review, final agency action.

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* Reported in 346 F. Supp. 950 (1972). Appeal by plaintiff filed with U.S. Court of Appeals for The District of Columbia, April 10, 1972. For case before Commission, see 73 F.T.C. 134.

3. **WHERE COMMISSION FORMALLY REJECTED PLAINTIFF'S REPORT OF COMPLIANCE AND SOLE ISSUE WAS CONTINUING IMPROPRIETY OF BUSINESS, A PREENFORCEMENT JUDICIAL REVIEW WAS APPROPRIATE**

   Where letter from Federal Trade Commission formally rejecting plaintiff's proposed report of compliance was last required decision by highest authority responsible for determination of compliance, and cease and desist order had been preceded by exhausted study of all factual and technical issues and sole issue was alleged continuing impropriety of business which Commission had already examined, preenforcement judicial review was appropriate.

4. **PROVISION OF F.T.C. REGULATION ON PENALTY LIABILITY IN CASE OF FAILURE OF FULL COMPLIANCE ACCURATELY REFLECTS INTENT OF STATUTE WITH RESPECT TO FINALITY FOR ASSESSING PENALTIES**

   Federal Trade Commission regulation providing that person against whom cease and desist order has become final becomes liable, in case of failure of full compliance, for penalties notwithstanding filing of "Report of Compliance" accurately reflects intent of statute with respect to what constitutes finality for purposes of assessing penalties.

5. **JUDICIAL REVIEW OF F.T.C. REJECTION OF COMPLIANCE REPORT TAKEN AT PETITIONER'S RISK; POSSIBLE PENALTIES NOT STAYED PENDING SUCH LITIGATION**

   Judicial review of Federal Trade Commission's rejection of report of compliance must be taken at petitioner's own risk; strong public interest in this area requires that possible penalties not be stayed pending such litigation in order to avoid encouraging frivolous suits for purposes of delay.

6. **IN ASSESSING PENALTIES COURT MAY CONSIDER PLAINTIFF'S GOOD FAITH AND OTHER BASES FOR HIS FAILURE TO COMPLY**

   Court administrative delays and plaintiff's good faith or unreasonableness or frivolousness of his grounds for review are facts which court may consider in assessing penalties for failure to comply with cease and desist order of Federal Trade Commission.

7. **ADVISORY OPINION OF COMMISSION NOT REVIEWABLE BY COURT WHEN SUBJECT WAS PREVIOUSLY TREATED BY A COMMISSION ORDER**

   Court could not properly review advisory opinion of Federal Trade Commission where same or substantially same course of action which was subject of advisory opinion was subject of cease and [951] desist order issued by Commission.

8. **COMMISSION CORRECTLY REFUSED TO COMMENT BECAUSE OF INSUFFICIENT INFORMATION**

   Where, following Federal Trade Commission's issuance of cease and desist order, plaintiff's modified forms proposed in letter merely described alleged changes and no actual sample was supplied to Commission, and most crucial factor in evaluating proposed forms was their visual impact, Commission correctly refused to comment because of insufficient information.

9. **DISTRICT COURT CANNOT INQUIRE INTO MERITS OF AN ORDER WHICH HAD BEEN AFFIRMED AND ENFORCED BY APPROPRIATE COURT OF APPEALS; REVIEW CONFINED TO WHETHER EVIDENCE SUPPORTED RESPONSE**

   In action for declaratory judgment that certain forms revised in al-

leged compliance with order of Federal Trade Commission were not unfair or deceptive in violation of Federal Trade Commission Act, court could not inquire into merits of cease and desist order which had been affirmed and enforced by appropriate Court of Appeals, and review was confined to determination whether substantial evidence on entire record supported Commission's response to report of compliance so that response could not be said to have been arbitrary or clearly wrong.

10. **IF ITEM OR PRACTICE IS CAPABLE TO TWO MEANINGS, ONE OF WHICH IS FALSE, IT IS MISLEADING AND PROHIBITIVE; IT IS OVERALL IMPRESSION ON CONSUMER WHICH IS CRUCIAL**

If item or practice questioned by Federal Trade Commission is capable of two meanings, one of which is false, it is misleading and prohibitive even though term might have performed different and lawful function; it is overall impression on consumer which is crucial.

11. **F.T.C. ACT WAS INTENDED TO PROTECT THE IGNORANT, UNTHINKING AND CREDULOUS AS WELL AS THE SOPHISTICATED**

Federal Trade Commission Act was intended to protect not just the sophisticated, but rather the vast multitude which includes the ignorant, unthinking and credulous, who, in making purchases, do not stop to analyze but are governed by appearances and general impressions.

(The syllabus, with substituted captions, is taken from 346 F. Supp. 950.)

Court held that Commission's rejection of compliance report was final agency action, that plaintiff's grounds for review were frivolous, and motion for summary judgment granted.

Marion Edwyn Harrison, Washington, D.C., for plaintiff.

Harold A. Titus, Jr., U.S. Atty., United States District Court, Washington, D.C., for defendants.

MEMORANDUM OPINION

PARKER, *District Judge.*

Plaintiff Sydney N. Floersheim, doing business as Floersheim Sales Company and National Research Company, seeks a declaratory judgment that certain forms *revised* in alleged compliance with an order of the Federal Trade Commission (FTC or Commission) are not unfair or deceptive in violation of the Federal Trade Commission Act,[1] 15 U.S.C. § 41, *et seq.* and, therefore, not subject to suppression by the Commission. These forms are sold by the plaintiff to third parties who in turn use them in the collection of delinquent debts and to obtain information about delinquent debtors. The plaintiff also seeks a similar determination as to certain forms intended to be used in plaintiff's own *proposed* debt collection business. He further seeks a preliminary stay of the penalty provisions of 15 U.S.C. § 45 (*l*) during the pendency of this litigation The defendants are the individual commissioners of the FTC and the United States of America (Government).

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[1] 15 U.S.C. § 45(a)(1).

Defendants have moved to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted, or, in the alternative for summary judgment. Opposition has been filed by the plaintiff to the motion to dismiss together with a cross-motion for summary judgment.

For the reasons set forth the Court concludes that the defendants' motion to [952] dismiss should be denied as to the *revised* forms and granted as to the *proposed* forms; that the plaintiff's motion for a stay of penalties *pendente lite* should be denied; that the defendants' motion for summary judgment should be granted with regard to the *revised* forms for the plaintiff's existing business; and that the plaintiff's cross-motion for summary judgment should be denied.

Plaintiff's business, conceded to be virtually nationwide,

> is that of selling to creditors and to debt collection agencies certain forms—cards and envelopes—for the use of the purchaser in either (1) attempting to trace allegedly delinquent debtors (commonly called "skip-tracer" forms) or (2) attempting to induce allegedly delinquent debtors to pay their debts * * *.[3]

On February 5, 1968, the Commission issued an Opinion and a Cease and Desist Order against Floersheim in Docket No. 8721. Floersheim was found to have used and sold forms demanding the payments of debts as well as forms to secure information concerning the delinquent debtors, that were deceptive and misleading in appearance "creating the impression that they came from the Government or some other official source or third-party, rather than from the creditor." Envelopes used and sent to debtors were found to simulate those used for official purposes by the United States Government. Skip-tracer forms were found to be deceptive because of their general appearance and similarity to Government checks. The features of other forms used by Floersheim, all set out in the opinion, were regarded as concealing their true nature and were misleading and deceptive.

On review the United States Court of Appeals upheld the Commission's findings, concluding that there was substantial evidence to support the findings that the materials were deceptive. Floersheim's contentions that the Cease and Desist Order was unreasonable, arbitrary, and capricious, amounting to a denial of due process and extending beyond what was reasonably necessary to prevent the deceptions, were rejected. The Court held that the sanctions were justified in view of the past and immediate activities of Floersheim. Judgment was entered affirming the action of the Commission and Floersheim was required to obey and comply with the Cease and Desist Order. *Floersheim* v. *Federal Trade Commission,* 411 F.2d 874, 876–878 (9th Cir. 1969), *cert. denied* 396 U.S. 1002, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970).

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[3] Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss, at 3.

[1] Two related series of incidents give rise to the present litigation. The genesis of the first occurred when the plaintiff, pursuant to 16 C.F.R. § 3.61(a), filed a Report of Compliance alleging in detail the manner and form of his compliance with the Commission's Final Order of February 5, 1968. The cards, forms and envelopes described in and enclosed with the Report of Compliance (the *revised* forms) were intended to be used in plaintiff's *existing* business.[3] The FTC's Division of Compliance, Bureau of Deceptive Practices responded to the Report of Compliance with critical comments. Following an exchange of correspondence the FTC on April 10, 1970 formally rejected the Report of Compliance, based primarily on the objections noted by its Division of Compliance, and also for failure of the plaintiff to sign the report in accordance with the requirements of the Commission's regulations.[4] A Commission letter of April 16, 1970 expressly warned that

> [953] * * * Any use of the materials rejected by the Commission or any other materials violative of the order may subject Mr. Floersheim to a suit for civil penalties.[5]

The second problem arises from the plaintiff's October 23, 1969 request,[6] pursuant to 16 C.F.R. § 3.61(c), for an advisory opinion concerning whether certain forms (the *proposed* forms)[7] intended to be used in the plaintiff's own *proposed* debt collection business would comply with the Order in Docket No. 8721. On March 9,

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[3] Plaintiff's Exhibits D, D1–D9 attached to the Complaint.

[4] There is no denial that the Report, contrary to the express provisions of 16 C.F.R. § 3.61(a), was not signed by the plaintiff. But in accordance with the long-standing test in the *District of Columbia, Kraft* v. *Board of Education for District of Columbia,* 247 F.Supp. 21 (D.D.C.1965), *cert. denied* 386 U.S. 958, 87 S.Ct. 1026, 18 L.Ed.2d 106 (1967); *United States ex rel. Holzendorf* v. *Hay,* 20 App.D.C. 576, 579 (1902), the context and apparent intent of the regulation may be read to be directory, rather than mandatory, in this instance. The plantiff, through his attorney, has submitted the report as part of the court record. Also, the Commission proceeded to consider in detail the merits of the proposed report; the failure to sign was merely a secondary basis for rejection of the report.

[5] Plaintiff's Exhibit K1 attached to the Complaint.

[6] Plaintiff's Exhibit B attached to the Complaint.

[7] Plaintiff's Exhibits B, B1–B3 attached to the Complaint.

1970, following several contacts regarding this request, the Commission, through its Secretary, formally and with particularity advised plaintiff that the *proposed* forms failed to comply with the order in numerous respects. * * *"

Plaintiff then further modified these *proposed* forms and requested reconsideration of the FTC advisory comments. But, significantly, the revisions were merely descriptive; true copies of the samples were not supplied to the Commission. The Commission therefore declined to comment indicating it had "insufficient information on which to base any change in its vews on the forms respondent [Floersheim] proposes to use as those views are stated in its letter dated April 10, 1970 * * *." [8]

Because of the FTC's response, plaintiff has not embarked on the proposed business venture.

Plaintiff contends that the response to the Report of Compliance concerning the *revised* forms and the advisory opinion regarding the *proposed* forms, although both prior to any actual actions or enforcement proceedings, are final agency actions subject to and ripe for judicial review.

REPORT OF COMPLIANCE (THE REVISED FORMS)

[2] The Court agrees with the plaintiff that the FTC's rejection of a Report of Compliance is, for purposes of judicial review, final agency action.

[3] The issue of pre-enforcement judicial review was recently and extensively discussed by the United States Court of Appeals for the District of Columbia in *National Automatic Laundry and Cleaning Council* v. *Shultz,* 143 U.S.App.D.C. 274, 443 F.2d 689 (1971), Circuit Judge Leventhal writing for a unanimous bench. In that case a national trade association representing several thousand members of the coin-operated laundry and dry cleaning industry sought a judgment declaring invalid a ruling of the Administrator of the Wage and Hour Division of the Department of Labor. In response to a querry from the trade association which set forth three typical fact situations prevailing in that industry the Administrator indicated his opinion that the Fair Labor Standards Amendments of 1966 made the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, as amended, applicable to coin-operated laundries.

In reversing the District Court's dismissal of the action for lack of jurisdiction, the Court of Appeals concluded that

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[8] Letter of May 5, 1970, Plaintiff's Exhibit J attached to the Complaint.

> * * * We find no threshold obstacle that requires dismissal of the action before us merely because it seeks judicial review of the "agency action" of interpretation prior to the institution of an agency action for enforcement. 443 F.2d at 704.
>
> * * * The ultimate question is whether the problems generated by pre-enforcement review are of such a [954] nature that, taken together, they outweigh the hardship and interest of plaintiff's members and establish that judicial review of the interpretative ruling should be deferred. To some extent a balancing is involved. 443 F.2d at 702.

The Court proceeded to examine the pertinent aspects of "ripeness" and "finality" with respect to the actual facts before it. It found that "with the authoritative interpretative ruling by the Administrator heading the Wage and Hour Division the agency's interpretative action has come to an end," 443 F.2d at 701; that "[t]he authoritative interpretation of an executive official has the legal consequences, if it is reasonable and not inconsistent with ascertainable legislative intent, of commanding deference from a court that itself might have reached a different view if it had been free to consider the issue on a blank slate," 443 F.2d at 697; and that "the Administrator's interpretation, * * *, has the characteristic not only of securing 'expected compliance' * * *, but of possibly stimulating double damage suits by employees who need not fear that they would be at odds with the Government officials involved." 443 F.2d at 697.[9] Proceeding from those findings the Court concluded that "the sound course is to accept the ruling of a board or commission, or the head of an agency, as presumptively final," 443 F.2d at 701; and that pre-enforcement judicial review of the Administrator's ruling was appropriate.

Judge Leventhal cautioned that

> The general presumption of judicial reviewability, and the modern rulings implementing that approach, are not to be understood as projecting a doctrine of judicial intervention as to administrative rulings or declarations on problems that are hypothetical rather than actual. 443 F.2d at 699.

But he distinguished the facts before him, observing that

> * * * The plaintiff Association did not present to the Administrator a hypothetical set of facts, rather it set out the actual and present operations of its members. It did not seek to learn whether a proposed course of conduct would violate the law. 433 F.2d at 699.

The facts presented in this case, considered in light of the balancing approach adopted in *Shultz,* and "pragmatic considerations, particularly those relating to the institutional relationships between the courts and the administrative agencies," *Medical Committee for Human Rights* v. *Securities and Exchange Commission*, 139 U.S. App.D.C. 226, 234, 432 F.2d 659, 667 (1970), are sufficiently within the ambit of the *Shultz* criteria to make pre-enforcement judicial reviews appropriate and necessary.[10] The Commission's April 10, 1970 letter formally rejecting plaintiff's proposed Report of Compliance was the last required decision by the highest authority responsible for determination of compliance.[11] Conformity with the Commission's ruling is expected, and if penalties are sought to be assessed they are considered to have begun accruing once the Cease and Desist Order became statutorily final, 15 U.S.C. § 45 (*l*), and after the expiration of the period granted by the Commission to remove the offending items from the marketplace Courts should not be "powerless if * * * an order * * * **[955]** still is considered to be so arbitrary as to be unlawful and the Government pursues a policy of accumulating penalties while avoiding a judicial test by refusing to bring action to recover them." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 654, 70 S.Ct. 357, 369, 94 L.Ed. 401 (1950). See also, *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 226, 227, 82 S.Ct. 289, 7 L.Ed. 2d 240 (1961).

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[9] The Court also found that the opinion rendered by the Administrator "was rendered on a broad legal question affecting an entire industry group * * *." 443 F.2d at 702. But that factor is not exclusively controlling.

Admittedly, the merits of the issues present a situation that looks to the future. But the situation is not so hypothetical or so speculative as to be inappropriate for judicial review. *Helco Products Co., Inc.* v. *McNutt*, 78 U.S.App.D.C. 71, 137 F.2d 681 (1943), relied upon by the defendants and discussed in *Shultz*, is distinguishable. In *Helco*, the plaintiff sought an advisory opinion from the Food and Drug Administration of the Federal Security Agency whether its proposed shipments in interstate commerce of white poppy seeds dyed blue would constitute an illegal adulteration within the provisions of the Federal Food, Drug, and Cosmetic Act, 21 U.S. C.A. § 301 *et seq.* The Commissioner of Food and Drugs indicated that such action would be a violation, and judicial review was subsequently denied. But in that case the question had not been submitted to the Commissioner's superior, the Federal Security Administrator; and there had been no hearing at which all the factual and technical as well as legal aspects could be examined.

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[10] It might also be argued that at the Report of Compliance state of its concern, the FTC is so meaningfully involved in the plaintiff's decision that review is appropriate. *Independent Broker-Dealers' Trade Association, et al.* v. *Securities & Exchange Commission, et al.*, 142 U.S. App.D.C. 384, 442 F.2d 132 (March 4, 1971) as amended May 18, 1971, *cert. denied* 404 U.S. 828, 92 S.Ct. 63, 30, L.Ed.2d 57 (October 12, 1971).

[11] There are no allegations of changed conditions of law or fact or considerations of public interest which might form the basis for reopening the proceedings. 16 C.F.R. § 3.72.

On the other hand, in the case before this Court the sole issue is the alleged *continuing* impropriety of a business which the FTC has already examined. There has been an exhaustive study of all of the factual and technical issues culminating in the Cease and Desist Order. The Commissioners and their subordinates need make no further analysis to determine what qualities are deceptive in order to decide if the petitioner's offer of compliance avoids those elements. There is no possibility of premature judicial interference with administrative analysis or fact finding; the issue is simply the legal adequacy of the FTC's decision. *Abbott Laboratories et al* v. *Gardner et al.*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Frozen Food Express* v. *United States et al.*, 351 U.S. 40, 76 S.Ct. 569, 100 L.Ed. 910 (1956). The Commission, having completed all of its procedures except the technicality of seeking an enforcement order, has issued what may have the effect of a supplemental Cease and Desist Order without the benefit to the petitioner of judicial review. This is agency action for which there is no adequate remedy. Administrative Procedure Act, 5 U.S.C. § 704.[12]

This Court also believes that the public interest is more effectively served if introduction of deceptive devices and practices into the marketplace before their legality can be determined is discouraged. *Regina Corporation* v. *F.T.C.*, 322 F.2d 765, 768 (3rd Cir. 1963), *rehear. denied* 1963, as amended 1963. Thus if a petitioner can seek prompt judicial review of a rejected Report of Compliance delays in prosecution for contempt may be avoided; and failure of a petitioner to seek prompt judicial review would be evidence of bad faith in a proceeding for assessment of penalties.

[4–6] Nor are fears of overburdening the courts with requests for review of half-hearted attempts at compliance justified. 16 C.F.R. § 3.61(b) provides, in pertinent part,

> [956] * * * that * * * the filing of a report which does not evidence full compliance with the order, does not in any circumstances suspend or relieve a respondent from his obligation under the law with respect to compliance with such order. An order of the Commission to cease and desist becomes final on

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[12] *Reisman* v. *Caplin*, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964) and *Anheuser-Busch, Inc. et al.* v. *Federal Trade Commission*, 359 F.2d 487 (8th Cir. 1966), cited by the defendants, involved failures to comply with subpoenaes pursuant to section 10 of the FTC Act, 15 U.S.C. § 50. The courts found that there was an adequate remedy and penalties could be stayed pending litigation. Although the action question of pre-enforcement review of the rejection of a proffered FTC Letter of Compliance was not reached because no rejection had yet occurred, the opinion of Chief Judge Caleb M. Wright in *Continental Baking Company* v. *Dixon et al.*, 283 F.Supp. 285 (D.Del.1968) strongly suggests support of petitioner Floersheim's request for review.

the date and under the conditions provided in * * * the Federal Trade Commission Act * * * and * * * the Clayton Act, as amended. * * * Any person, partnership or corporation against which an order to cease and desist had been issued who is not in full compliance with such order on and after the date provided in these statutes for the order to become final is in violation of such order and is subject to an immediate action for civil penalties.

The Court believes that this regulation accurately reflects the intent of §§ 45(g) and (*l*)[13] of the Act with respect to what constitutes finality for purposes of assessing penalties. Thus judicial review of a rejected Report of Compliance must be taken at the petitioner's own risk. The strong public interest in this area requires that possible penalties not be stayed pending such litigation in order to avoid encouraging frivolous suits for purposes of delay. Of course court administrative delays and the plaintiff's good faith on the one hand, and, as in this case, the unreasonableness or frivolousness of plaintiff's grounds for review on the other hand, are factors which a court may consider in assessing penalties. *United States* v. *H. M. Prince Textiles, Inc.*, 262 F.Supp. 383 (S.D.N.Y. 1966).

This Court also notes that the administration of justice might be better served if, in the future, review of a rejection of a Report of Compliance were confined, when venue is obtainable, as a matter of judicial discretion to the jurisdiction which originally reviewed the cease and desist order. See *dicta* in *Continental Baking Company* v. *Dixon*, 283 F.Supp. 285, 288 (D.Del.1968). In fact that court of appeals has "*exclusive*" jurisdiction to "affirm, enforce, modify, or set aside orders of the Commission." 15 U.S.C. § 45(d) (Emphasis added.)

But our Circuit Court, *in dicta* in *Independent Broker-Dealers' Trade Association et al.* v. *SEC*, *supra*, considered a similar problem with regard to direct review by the court of appeals under the Securities Exchange Act, 15 U.S.C. §78(y) (1964). It was there indicated that review by the district court would be sustainable, *inter alia*, under the Administrative Procedure Act, providing for review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. §704 or "[i]f the Act should be given narrow reading [with exclusive jurisdiction in the courts of appeals], * * * by reference to the general equity jurisdiction of the District Court." 142 U.S.App.D.C., at 395 n. 18 442 F.2d at 143, n. 18. *The Elma Division of Drive-X Company, Inc.* v. *Dixon et al.*, 121 U.S.App.D.C. 113, 348 F.2d 342 (1965), *rehear. en banc denied* 1965. The same situation justifies review of the revised forms.

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[13] 15 U.S.C. §§45(g) and (e).

ADVISORY OPINION (THE PROPOSED FORMS)

[7, 8] FTC advisory opinions pursuant to 16 C.F.R. § 3.61(c) usually differ significantly from responses to Reports of Compliance since they are based only on requests "submitted in writing" and "other information available to the Commission." Neither hearings nor appeals to the Commission or to the courts of orders stemming from hearings are provided. It would be improper for this Court to review advisory opinions in such a context for it would be compelled to undertake the exhausive efforts reserved for administrative energies and expertise. Nor would an exception be appropriate for a case such as the present "where the same or substantially the same course of action * * * has been the subject of a current * * * order, [957] or decree initiated or obtained by the Commission. * * *"[14] Unlike the situation presented by Reports of Compliance, there are no factors to discourage overburdening Courts with frivolous actions. Indeed, as the facts of this case demonstrate, many ingenious guises can be developed to alter the form of a business without changing its substance, thus circumventing FTC scrutiny.[15] Accordingly, the motion of the defendants to dismiss the complaint should be granted as to the so-called *proposed* forms.

THE MERITS

[9] This Court's inquiry into the merits must be distinguished from review of the Cease and Desist Order. That Order has been affirmed and enforced by the appropriate court of appeals, *Floersheim* v. *Federal Trade Commission, supra.* Review here is confined to a determination whether substantial evidence on the entire record, *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951) ; *Giant Food Inc.* v. *Federal Trade Commission*, 116 U.S.App.D.C. 227, 233, 322 F.2d 977, 985 (1963), *petit. for rehear. en banc denied* 1963, *petit. for rehear. before the Division denied*, 1963, *dismissed* pursuant to Rule 60 of the Supreme Court, 376 U.S. 967, 84 S. Ct. 1121, 12 L.Ed.2d 82 (1964), supports the Commission's response to the

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[14] 16 C.F.R. § 3.61(c)(2). Additionally, plaintiff "conceded" that "even as to his proposed new business, the matter at issue was * * * within the jurisdiction of the FTC [cease and desist] Order." Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss, at 5.

[15] Even if this Court were to approve, as a general rule, review of FTC advisory opinions, such review would be appropriate only as to the Commission's letter of March 9, 1970 commenting unfavorably on the request of October 23, 1969. Plaintiff's modified forms proposed in the letter of March 24, 1970 merely described alleged changes with no actual samples supplied to the Commission. In this case the most crucial factor in evaluating the proposed forms is their *visual* impact. The Commission correctly refused to comment because of insufficient information.

Report of Compliance so that the response cannot be said to have been arbitrary or clearly wrong. *Giant Food Inc.*, v. *F.T.C.*, *supra; Kalwajtys* v. *F. T. C.*, 237 F.2d 654, 65 A.L.R.2d 220 (7th Cir. 1956), *cert denied*, 352 U.S. 1025, 77 S. Ct. 591, 1 L. Ed.2d 597 (1957).

[10, 11] In conducting such a review, several principles, particularly appropriate to this case, must be considered. If the questioned item or practice is capable of two meanings, one of which is false, it is misleading and prohibitive even though the term might have performed a different and lawful function. It is the over-all impression on the consumer that is crucial. *Giant Food Inc.* v. *F. T. C.*, *supra*, 116 U.S.App.D.C. at 231, 235, 322 F.2d at 981, 985; *Continental Wax Corporation et al.* v. *F. T. C.*, 330 F.2d 475, 477 (2d Cir. 1964); *Rhodes Pharmacal Co., Inc.* v. *Federal Trade Commission*, 208 F.2d 382, 387 (7th Cir. 1953), *rehear. denied* 1954, *rev'd in part*, 348 U.S. 940, 75 S.Ct. 361, 99 L.Ed 736 (1955). See also *United States* v. *Ninety-Five Barrels, etc. of Vinegar*, 265 U.S. 438, 443, 44 S.Ct. 529, 68 L.Ed. 1094 (1924). And the Federal Trade Commission Act was intended to protect not just the sophisticated, *Giant Food Inc.* v. *F. T. C.*, *supra*, 116 U.S.App.D.C. at 238, n. 13, 322 F.2d at 982, n. 13; *Helbros Watch Company, Inc. et al.* v. *Federal Trade Commission*, 114 U.S.App. D.C. 63, 64, n. 4, 310 F.2d 868, 869, n. 4 (1962), *cert. denied* 372 U.S. 976, 83 S.Ct. 1110, 10 L.Ed.2d 142 (1963), *rehear. denied* 374 U.S. 857, 83 S.Ct. 1866, 10 L.Ed.2d 1083 (1963); but rather "that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but are governed by appearances and general impressions." *Florence Mfg. Co.* v. *J. C. Dowd & Co.*, 178 F. 73, 75 (2d Cir. 1910); *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 116, 58 S.Ct. 113, 82 L.Ed. 141 [958] (1937); *Helbros Watch Company, Inc.* v. *F. T. C.*, *supra; Giant Food Inc.* v. *F. T. C.*, *supra.*

Furthermore, deference must be shown to the experience and expertise of an administrative agency when reviewing its application of relevant statutes. *Federal Trade Commission* v. *Colgate-Palmolive Co. et al.*, 380 U.S. 374, 385, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965); *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, 85 S.Ct. 1498, 14 L.Ed.2d 443 (1965).

The Commission's Final Order in this proceeding set forth in detail the various practices found to be deceptive.[16] Thereafter, petitioner filed his Report of Compliance[17] enclosing samples of revised forms and envelopes. Black and white xeroxed copies of these exhibits appear as Exhibits D1–D9 attached to the Complaint.

The Commission's Bureau of Deceptive Practices, Division of Compliance found only one exhibit acceptable.[18] That essentially negative response and grounds therefor were affirmed in later correspondence to the plaintiff from the Commission.[19]

Review of the sample forms and envelopes compels the conclusion that each of the negative responses of the Commission was more than justified. The immediate and dominant impression to this Court is that of mailings on behalf of or authorized by the Government. The color, shape, format, size and combination of type, and choice and arrangement of words all convey a single deceptive impression—that the Government or its authorized agency demands prompt payment of the debt. This is compounded by a subtle emphasis on the Washington, D. C. return address.

It appears unlikely that little less than the combined elimination of all of the offending characteristics can undo the prohibited effect. The Court has no doubt that a good faith effort could produce numerous reasonable alternatives, but the evidence in this record suggests, on the contrary, a deliberate attempt to circumvent and delay compliance with the orders of the Commission as enforced by the Federal Courts.

Accordingly, the motion of the defendants for summary judgment must be granted with regard to the so-called revised forms.

Counsel for defendants shall submit an appropriate order within five (5) days.

FEDERAL TRADE COMMISSION v. SPERRY AND HUTCHINSON COMPANY*

No. 70–70.—F.T.C. Docket 8671

(Supreme Court of the United States. March 1, 1972)

1. COMMISSION MAY DEFINE AND PROSCRIBE ANY UNFAIR COMPETITIVE PRACTICE EVEN THOUGH PRACTICE DOES NOT INFRINGE ON ANTITRUST LAWS

[899] Federal Trade Commission, under statute empowering it to prevent persons, partnerships or corporations from using unfair methods of

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[17] Plaintiff's Exhibit D attached to the Complaint.

[18] Plaintiff's Exhibit E attached to the Complaint.

[19] Plaintiff's Exhibit I attached to the Complaint.

* Reported in 405 U.S. 233 (1971), 92 Sp.Ct. 898 (1972). Decision before Court of Appeals, Fifth Circuit, reported in 432 F.2d 146 (1970). For case before Commission, see 73 F.T.C. 1099, 82 F.T.C. 388.

competition in commerce and unfair or deceptive acts or practices in commerce, may define and proscribe an unfair competitive practice even though the practice does not infringe either the letter or spirit of the antitrust laws.

2. **COMMISSION MAY PROSCRIBE PRACTICES AS UNFAIR OR DECEPTIVE IN THEIR EFFECT UPON CONSUMERS REGARDLESS OF THEIR EFFECT ON COMPETITION**

Federal Trade Commission, under statute empowering it to prevent persons, partnerships or corporations from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, may proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition.

3. **SUPREME COURT MUST LOOK TO THE OPINION OF THE COMMISSION AND NOT THE ARGUMENTS OF ITS COUNSEL**

Supreme Court must look to the opinion of the Federal Trade Commission, not to the arguments of its counsel, for the underpinnings of its order.

4. **OBSERVATION OF F.T.C. THAT RESPONDENT LIMITED FREEDOM OF CHOICE ON DISPOSING OF TRADING STAMPS DOES NOT ALONE SUPPORT CONCLUSION THAT STAMP COMPANY WAS GUILTY OF UNFAIR TRADE PRACTICES**

Observation of Federal Trade Commission in its opinion that conduct of country's largest trading stamp company limited "stamp collecting consumers' * * * freedom of choice in the disposition of trading stamps," would not alone support a conclusion that the Commission had found trading stamp company guilty of unfair practices because of damage to consumers, where there was no other indication in Commission's opinion that it found company's conduct to be unfair in its effect on competitors because of considerations other than those at the root of the antitrust laws.

5. **ORDER OF COMMISSION COULD NOT BE SUSTAINED WHERE THE COMMISSION DID NOT CHALLENGE APPELLATE COURT HOLDING THAT COMPANY'S CONDUCT VIOLATED NEITHER LETTER NOR SPIRIT OF ANTITRUST LAWS**

Order of Federal Trade Commission requiring largest trading stamp company in the country to cease and desist from unfairly attempting to suppress the operation of trading stamp exchanges and other "free and open" redemption of stamps could not be sustained where the Commission did not challenge holding of Court of Appeals that company's conduct violated neither the letter nor the spirit of the antitrust laws, where opinion of the Commission was barren of any attempt to rest its order on the unfairness of particular competitive practices or on considerations of consumer interests, and where the Commission did not articulate any standards by which such alternative assessments might be made.

6. **COURT CANNOT LABEL A PRACTICE "UNFAIR" UNDER THE STATUTE, BUT ONLY AFFIRM OR VACATE AN AGENCY'S JUDGMENT TO THAT EFFECT**

A court cannot label a practice "unfair," under statute declaring unlawful unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce; it can only affirm or vacate an agency's judgment to [900] that effect.

(The syllabus, with substituted captions, is taken from 92 Sp. Ct. 898)

Court held that order requiring trading stamp company to cease attempting to suppress exchange of trading stamps and other "free and open" redemption of stamps could not be sustained where the Commission did not challenge the Appellate Court holding and where company's conduct did not violate the letter or spirit of antitrust laws. Judgment modified and case remanded.

Richard W. McLaren, Washington, D.C., for petitioner.

Harold L. Russell, Atlanta, Ga., for respondent.

MR. JUSTICE WHITE delivered the opinion of the Court.

In June of 1968 the Federal Trade Commission held that the largest and oldest company in the trading stamp industry,[1] Sperry and Hutchinson (S&H), was violating § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1), in three respects. The Commission found that S&H improperly regulated the maximum rate at which trading stamps were dispensed by its retail licensees; that it combined with others to regulate the rate of stamp dispensation throughout the industry; and that it attempted (almost invariably successfully) **[901]** to suppress the operation of trading stamp exchanges and other "free and open" redemption of stamps. The Commission entered cease and desist orders accordingly.

S&H appealed only the third of these orders. Before the Fifth Circuit Court of Appeals it conceded that it acted as the Commission found, but argued that its conduct is beyond the reach of § 5 of the Trade Commission Act. That section provides, in pertinent part, that:

> The Commission is empowered and directed to prevent persons, partnerships or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. 15 U.S.C. § 45(a) (6).

As S&H sees it § 5 empowers the Commission to restrain only such practices as are either in violation of the antitrust laws, deceptive, or repugnant to public morals. In S&H's view, its practice of successfully prosecuting stamp exchanges in state and federal courts cannot be restrained under any of these theories.

The Court of Appeals for the Fifth Circuit agreed and reversed the Commission, Judge Wisdom dissenting. *Sperry and Hutchinson Co.* v. *FTC*, 432 F.2d 146 (1970). In the lower court's view:

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[1] On the nature of the industry, see generally Comment, Trading Stamps, 37 N.Y.U.L. Rev. 1090 (1962). The Trade Commission proceedings in the instant case are discussed in Comment, The Attack on Trading Stamps—An Expanded Use of Section 5 of the Federal Trade Commission Act, 57 Georgetown Law Journal 1082 (1969).

> To be the type of practice that the Commission has the power to declare "unfair" the act complained of must fall within one of the following types of violations: (1) a *per se* violation of anti-trust policy; (2) a violation of the letter of either the Sherman, Clayton, or Robinson-Patman Acts; or (3) a violation of the spirit of these Acts as recognized by the Supreme Court of the United States. *Id.*, at 150 (footnote omitted).

Holding that the FTC had not demonstrated that S&H's conduct violated either the letter or the spirit of the antitrust laws, the Court of Appeals vacated the Commission's order.

The FTC petitioned for review in this Court. We granted certiorari to determine the questions presented in the petition. 401 U.S. 992, 91 S.Ct. 1234, 28 L. Ed.2d 530 (1971).

I

THE CHALLENGED CONDUCT

S&H has been issuing trading stamps—small pieces of gummed paper about the size of postage stamps—since 1896. In 1964, the year from which data in this litigation is derived, the company had about 40% of the business in an industry which annually issued 400 billion stamps to more than 200,000 retail establishments for distribution in connection with retail sales of some 40 billion dollars. In 1964, more than 60% of all American consumers saved S&H Green Stamps.

In the normal course, the trading stamp business operates as follows. S&H sells its stamps to retailers, primarily to supermarkets and gas stations, at a cost of about $2.65 per 1200 stamps; retailers give the stamps to consumers (typically at a rate of one for each 10¢ worth of purchases) as a bonus for their patronage; consumers paste the stamps in books of 1,200 and exchange the books for "gifts" at any of 850 S&H Redemption Centers maintained around the country. Each book typically buys between $2.86 and $3.31 worth of merchandise depending on the location of the redemption center and type of goods purchased. Since its development of this cycle 75 years ago, S&H has sold over one trillion stamps and redeemed approximately 86% of them.

A cluster of factors relevant to this litigation tends to disrupt this cycle and, in S&H's view, to threaten its business. An incomplete book has no redemption value. Even a complete book is of limited value because most "gifts" may be obtained only on submission of more than one book. For these reasons a collector of another type of stamps who has acquired a small number of green stamps **[902]** may benefit by exchanging with a green stamp collector who has opposite holdings and preferences. Similarly, because of the seasonal usefulness or immediate utility [2] of an object sought, a collector may want to buy stamps outright and thus put himself in a position to secure redemption merchandise immediately though it is "priced" beyond his current stamp holdings. Or a collector may seek to sell his stamps in order to use the resulting cash to make more basic purchases (food, shoes, etc.) than redemption centers normally provide.

Periodically over the past 70 years professional exchanges have arisen to service this demand. Motivated by the prospect of profit realizable as a result of serving as middlemen in swaps, the exchanges will sell books of S&H stamps previously acquired from consumers, or, for a fee, will give a consumer another company's stamps for S&H's or vice versa. Further, some regular merchants have offered discounts on their own goods in return for S&H stamps. Retailers do this as a means of competing with merchants in the area who issue stamps. By offering a price-break in return for stamps, the redeeming merchant replaces the incentive to return to the issuing merchant (to secure more stamps so as to be able to obtain a gift at a redemption center) with the attraction of securing immediate benefit from the stamps by exchanging them for a discount at his store.[3]

S&H fears these activites because they are believed to reduce consumer proclivity to return to green stamp issuing stores and thus lower a store's incentive to buy and distribute stamps. The company attempts to pre-empt "trafficking" in its stamps by contractual provisions reflected in a notice on the inside cover of every S&H stamp book. The notice reads:

> Neither the stamps nor the books are sold to merchants, collectors, or any other persons, at all times the title thereto being expressly reserved in the Company. * * * The stamps are issued to you as evidence of cash payment to the merchants issuing the same. The only right which you acquire in said stamps is to paste them in books like this and present them to us for redemption. You must not dispose of them or make any further use of them without our consent in writing. We will in every case where application is made to us give you permission to turn over your stamps to any other bona-fide collector of S&H Green * * * Stamps; but if the stamps on the books are transferred without our consent, we reserve the right to restrain their use by, or take them from other parties. It is to your interest that you fill the book, and personally derive the benefits and advantages of redeeming it. (Reproduced at 2 App. 230.)

S&H makes no effort to enforce this condition when consumers casually exchange stamps with each other, though reportedly some

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[2] Often merchandise obtained by redemption is used as a gift.

[3] The efforts of some retailers to reissue S & H stamps are not involved in this case. The FTC explicitly left S & H free to seek injunction against reissuance. 1 App. 169.

20% of all the company's stamps change hands in this manner. But S&H vigorously moves against unauthorized commercial exchanges and redeemers. Between 1957 and 1965, by its own account the company filed for 43 injunctions against merchants who redeemed or exchanged its stamps without authorization and it sent letters threatening legal action to 140 stamp exchanges and 175 businesses which redeemed S&H stamps. In almost all instances the threat or the reality of suit forced the businessmen to abandon their unauthorized practices.

II

THE REACH OF SECTION 5

[903] The Commission presented two questions in its petition for certiorari, the first being "whether Section 5 of the Federal Trade Commission Act, which directs the Commission to prevent 'unfair methods of competition * * * and unfair or deceptive acts or practices,' is limited to conduct which violates the letter or spirit of the antitrust laws." The other issue relates to the significance of state court holdings that the practices challenged here are lawful.[4] Neither question requests review of the Court of Appeals' decision that the business conduct proscribed by the Commission violates neither the letter nor spirit of the antitrust laws. Accordingly, we intimate no opinion on that issue and turn to the question of the reach of § 5.

[1, 2] In reality, the question is a double one: First, does § 5 empower the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws? Second, does § 5 empower the Commission to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition? We think the statute, its legislative history and prior cases compel an affirmative answer to both questions.

When Congress created the Federal Trade Commission in 1914 and charted its power and responsibility under § 5, it explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase "unfair methods of competition" by tying the concept of unfairness to a common law or statutory standard or by enumerating the particular practices to which it was intended to apply. Senate Report No. 597, 63d Congress, 2d Session (1914), at p. 13, presents the reasoning which led the Senate Committee to avoid the temptations of precision when framing the Trade Commission Act:

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[4] Though the Court of Appeals referred to state and federal court decisions which approved S & H's practice, our reading of its opinion leaves no doubt that it did not reverse the FTC order on the erroneous theory that such determinations might foreclose a contrary FTC § 5 decision. We therefore put aside the Government's second question as irrelevant and focus on its first contention.

> The Committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration confirming unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing twenty of them into law it would be quite possible to invent others.

The House Conference Report was no less explicit. "It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin all over again. If Congress were to adopt the method of definition, it would undertake an endless task." H.R.Rep.No.1142, 63d Cong., 2d Sess., 18–19 (1914). See also Rublee, The Original Plan and Early History of the Federal Trade Commission, 11 Acad. Pol.Sci.Proc. 666, 667 (1926); E. Baker and D. Baum, Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition, 7 Villanova L. Rev. 517 (1962).

Since the sweep and flexibility of this approach was thus made crystal clear, there have twice been judicial attempts to fence in the grounds upon which the FTC might rest a finding of unfairness. In *FTC* v. *Gratz*, 253 U.S. 421, 40 S.Ct. 572, 64 L.Ed.993 (1920), the Court over [904] the strong dissent of Mr. Justice Brandeis (who had been involved in drafting the Trade Commission Act), wrote that while the "exact meaning" of the phrase "unfair method of competition * * * is in dispute," the only practices which were subject to this characterization were those that were "heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." *Id.*, at 427, 40 S.Ct. at 575. This view was reiterated in other opinions over the next decade. See *e. g.*, *FTC* v. *Curtis Publishing Co.*, 260 U.S. 568, 43 S.Ct. 210, 67 L.Ed. 408 (1923), and *FTC* v. *Sinclair Refining Co..*, 261 U.S. 463, at 475–476, 43 S.Ct. 450, at 453–454, 67 L.Ed. 746 (1923). The opinion of the Court of Appeals' majority, citing *Sinclair Oil* in support of its narrow view of the FTC's leeway, is in the tradition of these authorities.

In *FTC* v. *Raladam Co.*, 283 U.S. 643, 51 S.Ct. 587, 75 L.Ed. 1324 (1931), a unanimous Court held that: "the paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competion or the restriction of it in a substantial degree * * * Unfair trade methods are not *per se* unfair methods of *competition.*" (Italics in original.) "It is obvious," the Court continued

> that the word "competition" imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured. It is that condition of affairs which the Commission is given power to correct, and it is against that condition of affairs, and not some other, that the Commission is authorized to protect the public. * * * If broader powers be desirable, they must be conferred by Congress. *Id.*, at 647–649, 51 S.Ct. at 590.

Neither of these limiting interpretations survives to buttress the Court of Appeals' view of the instant case. Even if the first line of cases, *Gratz* and its progeny, stood unimpaired, their deference to action taken to constrain "deception, bad faith, fraud or oppression" would grant the FTC greater power to set right what it perceives as wrong than the panel of the Court of Appeals acknowledges. But frequent opportunity for reconsideration has consistently and emphatically led this Court to the view that the perspective of *Gratz* is too confined. As we recently unanimously observed: "Later cases of this Court * * have rejected the *Gratz* view and it is now recognized in line with the dissent of Mr. Justice Brandeis in *Gratz* that the Commission has broad powers to declare trade practices unfair." *Federal Trade Commission* v. *Brown Shoe Co.*, 384 U.S. 316, 320–321, 86 S.Ct. 1501, 1504, 16 L.Ed.2d 587 (1966).

The leading case which recognized a role for the FTC beyond that mapped out in *Gratz*, *FTC* v. *R. F. Keppel & Brothers, Inc.*, 291 U.S. 304, 54 S.Ct. 423, 78 L.Ed. 814 (1934), also brought *Raladam* into question; on both counts it sets the standard by which the range of FTC jurisdiction is to be measured today. Keppel and Brothers sold penny candies in "break and take" packs, a form of merchandising which induced children to buy lesser amounts of concededly inferior candy in the hope of by luck hitting on bonus packs containing extra candy and prizes.

The FTC issued a cease and desist order under § 5 on the theory that the popular marketing scheme contravened public policy insofar as it tempted children to gamble and compelled those who would successfully compete with Keppel to abandon their scruples by similarly tempting children.

The Court had no difficulty in sustaining the FTC's conclusion that the **[905]** practice was "unfair," though any competitor could maintain his position simply by adopting the challenged practice. "[H]ere," the Court said, "the competitive method is shown to exploit consumers, children, who are unable to protect themselves * * * . [I]t is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy." *Id.* at 313, 54 S.Ct., at 426.

En route to this result the Court met *Keppel's* arguments that absent an antitrust violation or at least incipient injury to competitors, *Gratz* and *Raladam* so straitjacketed the FTC that the Commission could not issue a cease and desist order proscribing even an immoral practice. It held:

> Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories. The common law afforded a definition of unfair competition and, before the enactment of the Federal Trade Commission Act, the Sherman Act had laid its inhibition upon combinations to restrain or monopolize interstate commerce which the courts had construed to include restraints upon competition in interstate commerce. It would not have been a difficult feat of draftsmanship to have restricted the operation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation. *Id.*, at 310, 54 S.Ct., at 425.

Henceforth, unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws; nor were unfair practices in commerce to be confined to purely competitive behavior.

The perspective of *Keppel*, displacing that of *Raladam*, was legislatively confirmed when Congress adopted the 1938 Wheeler-Lea Amendment, 52 Stat. 111, to § 5. The amendment added the phrase "unfair or deceptive acts or practices" to the section's original ban on "unfair methods of competition" and thus made it clear that Congress, through § 5, charged the FTC with protecting consumers as well as competitors. The House Report on the amendment summarized congressional thinking: "* * * this amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." H.R.Rep.No.1613, 75th Cong., 1st Sess., p. 3 (1937). See also S.Rep. No.1705, 74th Cong., 2d Sess., pp. 2–3 (1936).

Thus, legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.[5]

III

[906] The general conclusion just enunciated requires us to hold that the Court of Appeals erred in its construction of § 5 of the Federal Trade Commission Act. Ordinarily we would simply reverse the judgment of the Court of Appeals insofar as it limited the unfair practices proscribed by § 5 to those contrary to the letter and spirit of the antitrust laws and we would remand the case for consideration of whether the challenged practices, though posing no threat to competition within the precepts of the antitrust laws, are nevertheless either (1) unfair methods of competition or (2) unfair or deceptive acts or practices.

What we deem to be proper concerns about the interaction of administrative agencies and the courts, however, counsels another course in this case. In this Court the Commission argues that however correct the Court of Apeals may be in holding the challenged S&H practices beyond the reach of the letter or spirit of the antitrust laws, the Court of Appeals nevertheless erred in asserting that the FTC could measure and ban conduct only according to such narrow criteria. Proceeding from this premise, with which we agree, the Commission's major submission is that its order is sustainable as a proper exercise of its power to proscribe practices unfair to consumers. Its minor position is that it also properly found S&H's practices to be unfair competitive methods apart from their propriety under the antitrust laws.

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[5] The Commission has described the factors it considers in determining whether a practice which is neither in violation of the antitrust laws nor deceptive is nonetheless unfair:

"(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen). 'Statement of Basis and Purpose of Trade Regulation Rule 408 [Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking].' " 29 Fed. Reg. 8324, 8355 (1964).

S & H argues that a later portion of this statement commits the FTC to the view that misconduct in respect of the third of these criteria is not subject to constraint as "unfair" absent a concomitant showing of misconduct according to the first or second of these criteria. But all the FTC said in the statement referred to was that "The wide variety of decisions interpreting the elusive concept of unfairness *at least* makes clear that a method of selling violates Section 5 if it is exploitative or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or others." Statement of Basis, *supra*, at 8355 (1964) (emphasis added).

[3] The difficulty with the Commission's position is that we must look to its opinion, not to the arguments of its counsel, for the underpinnings of its order. "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Investment Co. Inst.* v. *Camp.* 401 U.S. 617, 628, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971). We cannot read the FTC opinion on which the challenged order rests as premised on anything other than the classic antitrust rationale of restraint of trade and injury to competition.

The Commission urges reversal of the Court of Appeals and approval of its own order because, in its words, "[t]he act gives the Commission comprehensive power to prevent trade practices which are deceptive or unfair to consumers, regardless of whether they also are anti-competitive." Brief for the FTC, p. 15. It says the Court of Appeals was "wrong in two ways: you can have an anti-competitive impact that is not a violation of the anti-trust laws and violate Section 5. You can also have an impact upon consumers without regard to competition and you can uphold a Section 5 violation on that ground." Transcript of Oral Argument in this Court, p. 18. Though completely accurate, these statements cannot be squared with the Commissions holding that "[i]t is essential in this matter, we believe, and as we have heretofor indicated, to determine whether or not there has been or may be an impairment of competition," Opinion of Commission, at 1 App. 175; its conclusion that "[r]espondent * * * prevents * * * competitive reaction[s] and thereby it has restrained trade. We believe this is an unfair method of competition and an unfair act and practice in violation of § 5 of the Federal Trade Commission Act and so hold," 1 App. 178; its observation that:

> Respondent's individual acts and its acts with others taken to suppress trading stamp exchanges and other stamp redemption activity are all part of a clearly defined restrictive policy pursued by the respondent. In the [907] circumstances surrounding this particular practice it is difficult to wholly separate the individual acts from the collective acts for the purpose of making an analysis of the consequences under the antitrust laws." 1 App. 179, and like statements throughout the opinion. See, *e.g.*, 1 App. 176–178, *passim.*

[4] There is no indication in the Commission's opinion that

it found S&H's conduct to be unfair in its effect on competitors because of considerations other than those at the root of the antitrust laws.[6] For its part, the theory that the FTC's decision is derived from its concern for consumers finds support in only one line of the Commission's opinion. The Commission's observation that S&H's conduct limited "stamp collecting consumers' * * * freedom of choice in the disposition of trading stamps," 1 App. 176, will not alone support a conclusion that the FTC has found S&H guilty of unfair practices because of damage to consumers.

[5] Arguably, the Commission's findings, in contrast to its opinion, go beyond concern with competition and address themselves to noncompetitive and consumer injury as well. It may also be that such findings would have evidentiary support in the record. But even if the findings were considered to be adequate foundation for an opinion and order resting on unfair consequences to consumer interests, they still fail to sustain the Commission action; for the Commission has not rendered an opinion which, by the route suggested links its findings and its conclusions. The opinion is barren of any attempt to rest the order on its assessment of particular competition practices or considerations of consumer interests independent of possible or actual effects on competition. Nor were any standards for doing so referred to or developed.

Our view is that "the considerations urged here in support of the Commission's order were not those upon which its action was based." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 92, 63 S.Ct. 454, 461,

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[6] The Commission did explicitly decline to assess S&H's conduct in light of one leading antitrust case. In *United States* v. *Arnold Schwinn and Co.,* 388 U.S. 365, 379, 87 S.Ct. 1856, 1865, 18 L.Ed.2d. 1249 (1967), this Court held that: "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. *White Motor* [White Motor Co. v. United States, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963)]; *Dr. Miles* [Dr. Miles Medical Co. v. U. Parkland Sons Co., 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911)] Such restraints are obviously destructive of competition that there mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale."

Arguably S & H's practice is proscribed by this doctrine. When the FTC declined to rely on this precedent, however, it did so not to turn to considerations other than those embedded in the antitrust laws, but instead to look for considerations less "technical" and more deeply rooted in antitrust policy:

"[w]e do not believe it appropriate to decide the broad competitive questions presented in this record on the narrow and technical basis of a restraint on alienation. The circumstances here are much different from that where products are transferred to a dealer for resale. They are complicated by the nature of the trading stamp scheme. It is essential in this matter, we believe, and as we have heretofore indicated, to determine whether or not there has been or may be an impairment of competition. Thus we intend to look at the substance of the allegedly illegal practice rather than to decide the case by application of a technical formula." 1 App. 175–176.

87 L.Ed. 626 (1943). At the least the Commission has failed to "articulate any rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed. 2d 207 (1962).

[6] The Commission's action being flawed in this respect, we cannot sustain its order. "[T]he orderly functioning **[908]** of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *Chenery, supra*, 318 U.S. at 94, 63 S.Ct. at 462; *Burlington Truck Lines, supra*, 371 U.S., at 169, 83 S.Ct. at 246. A court cannot label a practice "unfair" under 15 U.S.C. § 45(a) (1). It can only affirm or vacate an agency's judgment to that effect. "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." *Chenery, supra*, 318 U.S. at 88, 63 S.Ct., at 459. And as was repeated on other occasions:

> For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate (see Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 197, 61 S.Ct. 845, 853, 854, 85 L. Ed. 1271), the administrative process, for the purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' [Securities & Exchange Comm. v. Chenery Corp.] 332 U.S. [194], at 196, 67 S.Ct. [1575], at 1577, 91 L.Ed. 1995. *Burlington Truck Lines, supra*, 371 U.S., at 169, 83 S.Ct., at 246.

In these circumstances, because the Court of Appeals' judgment that S&H's practices did not violate either the letter or the spirit of the antitrust laws was not attacked and remains undisturbed here, and because the Commission's order could not properly be sustained on other grounds, the judgment of the Court of Appeals setting aside the Commission's order is affirmed. The Court of Appeals erred, however, in its construction of § 5; had it entertained the proper view of the reach of the section, the preferable course would have been to remand the case to the Commission for further proceedings. *Chenery, supra*, 318 U.S. at 95, 63 S.Ct. at 462; *Burlington, supra*, 371 U.S. at 174, 83 S.Ct. at 248; *FPC* v. *United Gas Pipe Line Co.*, 393 U.S. 71, 89 S.Ct. 55, 21 L.Ed.2d 55 (1968). Accordingly, the judgment of the Court of Appeals is modified to this extent and the case is remanded to the Court of Appeals with instructions to remand it to the Commission for such further proceedings, not inconsistent with this opinion, as may be appropriate.

Modified and remanded.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

JEWEL COMPANIES, INC. ET AL. v. FEDERAL TRADE COMMISSION*

No. 69 C 1673—F.T.C. Docket 8788

(United States District Court, Northern District of Illinois, Eastern Division, March 17, 1972)

Commissioner's vote in favor of issuance of complaints was proper exercise of his discretion. All parties equally agree that Commissioner exercised his judgment at the time of the original complaints and thereafter. Further inquiry into the Commissioner's state of mind is unnecessary and unjustified. Motion for summary judgment denied.

Theodore A. Groenke, *John J. Voortman* and *Myron M. Cherry*, of *McDermott, Will & Cherry*, Chicago, Ill., for Jewel Companies, Inc.; *Earl W. Kintner*, *Mark R. Joelson*, and *James P. Mercurio*, of *Arent*, *Fox*, *Kintner*, *Plotkin & Kahn*, Washington, D.C. and *Sylvan Rapaport*, of *Friedman*, *Meyers and Keys*, Detroit, Mich., for Borman's, Inc.; *James W. Harbison, Jr.*, and *Melvyn L. Cantor*, of *Simpson Thacher & Bartlett*, New York, N.Y., for Bohack Corp.; *Edward J. Duggan* and *Joseph F. Ryan*, of *Lyne, Woodworth & Evarts*, Boston, Mass., for First National Stores, Inc.; *James F. Rill*, of *Collier*, *Shannon*, *Rill & Edwards*, Washington, D.C., for Jack Stires, Inc., John C. Stires, II, John P. Storm Corp. and Individually; *Warren J. Kaps*, and *Alex Akerman*, *Jr.*, of *Stein*, *Abrams & Rosen*, New York, N.Y., for Food Fair Stores, Inc. and World-Wide Produce Co., Inc.; *Eli H. Subin* of *Subin*, *Shams & Rosenbluth*, Orlando, Fla., for Hallee-Boy Sales, Ivin Arost, and Harold Arost; *Don Beverly*, of *Beverly & Frates*, West Palm Beach, Fla., for Henderson Distributing Co., Inc. and Vinson Henderson; *Ackerman*, *Shipley*, *Ackerman & Pickett*, Washington, D.C.; *Alfred T. Sanderson*, Woodbury, N.J., for Ruby Produce Co. and *Sam H. Rubenstein*, for plaintiff.

Emerson K. Elkins, FTC, Washington, D.C. for defendant.

MCMILLEN, *District Judge.*

DECISION AND ORDER

This cause comes on to be heard on Motions by each side which

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 74,210, at 92,987 (1972 Trade Cases). 5th Cir., 479 F. 2d 1323 (1973), see p. 598 herein. Case before the Commission *dismissed* 83 F.T.C. 1213.

seek to terminate this litigation. Plaintiffs have filed a motion for summary judgment, although as yet there is no answer to the Complaint. The defendant subsequently filed a motion to dismiss the Complaint on the grounds of mootness, although no such motion is specifically recognized by F.R.C.P. 12(b). Neither side has complained about any deficiencies in the foregoing procedures, however.

Since both sides seek ultimate relief and since no further pleadings are required to facilitate this, the court will treat these Motions as though brought for judgment on the pleadings under F.R.C.P. 12(b). Practically, this seems the way the matter can best be disposed of, and the exact niche where the procedure may fit within the Federal Rules is not a matter of substance. A statement of the facts and of the issue is the principal ingredient of a final decision which hopefully will lay to rest this phase of the controversy between the parties.

The Complaint was filed on August 11, 1969 by several plaintiffs seeking to enjoin the defendant F.T.C. from proceeding with five complaints which it had issued against the plaintiffs under Section 2(c) of the Clayton Act as amended (15 U.S.C. §13c). The plaintiffs' complaint in this court alleged four separate reasons why the Commission had improperly issued its five complaints, each reason being alleged in a separate count.

The defendant then filed a motion to dismiss the complaint herein for failure to state a claim upon which relief could be granted and for other grounds under F.R.C.P. 12(b). Judge Perry denied the motion to dismiss but allowed an interlocutory appeal. He restrained the defendants from proceeding with its five complaints pending appeal to the Seventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b).

The Court of Appeals rendered its decision on September 9, 1970 ruling that the complaint should have been dismissed on three of the four alleged grounds but remanding the matter on one ground "for proceeding not inconsistent" with the Court of Appeals decision. *Jewel Companies, Inc., et al.* v. *Federal Trade Commission*, 324 F.2d 1155 (7th Cir. 1970). So far as this Court is advised, neither party pursued the interlocutory appeal to the Supreme Court of the United States.

Count II of the plaintiffs' Complaint is the one which the Court of Appeals remanded for further proceedings. This count alleged that Federal Trade Commissioner MacIntyre had misconstrued his powers to be non-discretionary when he voted for issuance of the five complaints. The F.T.C. had issued these complaints by a 3–2 vote, and Commissioner MacIntyre's vote was essential for a majority. In so voting, he commented in a separate concurring "statement" in which he said, *inter alia:*

> Congress did not, as the dissent seems to imply, leave it to the Commission to decide, as a matter of policy, whether to enforce Section 2(c) of the Clayton Act when it had reason to believe "that the statute is being violated." The suggestion that this agency is free to frustrate the legislative intent on the basis of individual commissioner's conception of "bad law and economics" is astonishing. I, at any rate, do not believe that it is our function to administratively repeal what Congress has enacted on the basis of our own value judgments.

Although the Court of Appeals did not find fault with the F.T.C. complaints as such, two members (a majority) of the panel felt that Commissioner MacIntyre believed that he had no alternative to issuing the complaints and in voting with the other two members of the majority. The court said at 432 F.2d 1159:

> The plaintiffs' second challenge to the jurisdiction of the Federal Trade Commission is that one of the Commissioners did not properly exercise his statutory discretion in voting for the issuance of the complaint. Of the three Commissioners who voted for the issuance of the complaint, Commissioner MacIntyre construed the Commission's obligation of enforcement under Sections 2(c) and 11 of the Clayton Act, 15 U.S.C. §§13c and 21, as mandatory when it has "reason to believe" that the Robinson-Patman Act is being violated and that the Commission has no discretion to consider the public interest. Without Commissioner MacIntyre's vote, the complaint could not have issued since two Commissioners dissented. It is plaintiff's contention that the district court has jurisdiction to decide if Commissioner MacIntyre miscontrued his statutory obligation by assuming he had no discretion to consider whether the issuance of the complaint is in the public interest. Cf. *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1951). The question raised is inherently a legal one and does not involve any factual determination. Cf. *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111 (1944). Since the question is one of statutory construction as to the authority of a Commissioner in voting for the issuance of a complaint for violation of Robinson-Patman and does not involve any substantive determination by the Commission, the Commission's reliance on *Myers* v. *Bethlehem Shipbuilding*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938) is misplaced. We think the problem here is more analogous to the situation in *Skinner & Eddy* v. *United States*, 249 U.S. 557, 39 S.Ct. 375, 63 L.Ed. 772 (1919). If the question of the Commissioner's obligation is postponed until final appeal of a Commission order, the standard of review will be different. At that point the court of appeals would only decide whether the final order is supported by the evidence and would not question the authority of the Commission in issuing the complaint. As in *Skinner & Eddy*, "the so-called administrative remedy was without relevance to the plaintiff's claim." Jaffe, *Judicial Control of Administrative Action*, 428 (1965). The legal obligation of a Commissioner can be determined by the courts without delay and we think the proper approach is to allow such inherently legal attacks prior to an

> agency's final order. For the foregoing reasons we think the district court has jurisdiction to determine whether Commissioner MacIntyre properly interpreted his statutory obligation. (432 F.2d 1160-1161).

Thereupon the case came back to the trial court, and the plaintiffs then filed their pending motion for summary judgment, seeking to declare the Commission's complaint null and void and to permanently enjoin further proceedings thereon. In essence, the plaintiffs' theory is that, as stated in the Court of Appeals' decision, "the question raised is inherently a legal one and does not involve any factual determination." The plaintiffs argue that discretion must be exercised in the issuance of a complaint under Section 2(c) and that Commissioner MacIntyre's statement demonstrated on its face that he had mistakenly assumed that issuance of the five complaints was a ministerial act which did not permit him to exercise discretion. Plaintiffs assume that, without this Commissioner's affirmative vote, the vote would have been 3-2 against issuance of the complaints (although this is not necessarily accurate).

Before the defendant F.T.C. filed a response to the plaintiffs' motion for summary judgment, it obtained leave of court and held a hearing to reconsider the decision by which it had issued the complaints. The plaintiffs filed briefs and participated in that proceeding before the Commission. Thereafter on April 12, 1971 the Commission issued an unanimous order specifically finding that the issuance of the complaints was in the public interest and reaffirming its decision to issue them. The two commissioners who had previously dissented were no longer heard from, but Commissioner MacIntyre again filed a separate statement saying,

> At the outset, I wish to say that I have never consciously voted for the Federal Trade Commission to institute a proceeding without my conviction that to institute such a proceeding was to the interest of the public. When I voted to institute the proceedings under reconsideration at this time, I likewise was convinced that my action was clothed with public interest and was in the public interest. Likewise, I believe this last action of mine in these matters to be in the public interest. Therefore, I have not only considered that the public interest is involved, I have taken it into account and I am convinced that my actions are in accord therewith.
>
> Now, with respect to statements I have made in the past regarding laws entrusted to the Federal Trade Commission for enforcement, let me say this: I do not think that the Federal Trade Commission *"as a matter of policy"* has discretion to decide not to enforce any one of those laws. That is not to say that I do not believe the Commission has discretion to decide whether to institute or not institute a particular proceeding under any one of those laws. As the parties argued before the Commission on March 23, 1971, in these matters the Commission has on a number of occasions failed to

> institute proceedings for violation of the provision of law involved here. In a number of those actions of the Commission I participated. I consider that in each such participation I exercised my proper discretion in avoiding the "squandering scarce resources" and unnecessary litigation. [emphasis not added].

Following this reaffirmance by the F.T.C. and fuller explanation by Commissioner MacIntyre, the defendant filed its pending motion to dismiss for mootness, on the theory that the question of Commissioner MacIntyre's initial reasoning in voting for issuance of the complaints was no longer important, since upon reconsideration of the matter by the Commission, he specifically purported to exercise discretion, and presumably also, that his vote no longer could change the result. The plaintiffs do not concede this but stand on their motion for summary judgment which was filed before the reaffirmance, contending that there is no need for an evidentiary hearing and that Commissioner MacIntyre's original statement clearly showed that he misapprehended his statutory obligation. The plaintiffs do not attempt to explain why the Court of Appeals failed to make this determination itself, instead of remanding the case for further proceedings in the trial court.

The plaintiffs' argument assumes that Commissioner MacIntyre would not have voted to issue the complaints if he had properly understood his power. This argument is refuted by Commissioner MacIntyre's vote on the reaffirmance where he stated that he had properly understood his power as discretionary and that he had so exercised it in the original vote. Thereupon he exercised it again, with an explanatory opinion. Because of this, the court agrees with the plaintiffs that there is no further factual issue to be decided in this case and that the only proceedings required to comply with the mandate is to determine as a matter of law whether the commission should or should not exercise discretion in issuing Section 2(c) complaints.

We believe this issue has been resolved, but with a result diametrically contrary to plaintiffs' contention. The parties and the court all agree that discretion should be exercised by the Commission in the situation of the case at bar. See *Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 40 U.S.L.W. 4244–46 (March 1, 1972). Commissioner MacIntyre had made it as clear as he can that, originally and at the time of reaffirmance, he exercised discretion in voting to issue the complaints. For this court to inquire further into a Commissioner's reasoning or state of mind is not only unnecessary but also unjustified. Cf. *United States* v. *Morgan*, 313 U.S. 409 (1941).

On the other hand, the matter is not moot. This court should comply with the mandate of the Court of Appeals, and the subsequent proceedings of the F.T.C. should not frustrate the court's jurisdiction to decide a justiciable issue. Cf. *Richardson* v. *Wright*, 405 U.S. 208, 40 U.S.L.W. 4232 (Feb. 24, 1972). Judgment should now be entered on Count II of the Complaint for the reason that there is no genuine issue of fact. The court finds and concludes on the basis of the record in this case that Commissioner MacIntyre noted properly by exercising discretion in favor of issuance of the complaints against the plaintiffs, and that he did not abuse this discretion. *Moog Industries* v. *F.T.C.*, 355 U.S. 411 (1958).

It is therefore ordered, adjudged and decreed that judgment be and is entered in favor of the defendant on Count II of the Complaint.

It is further ordered, adjudged and decreed that Counts I, III and IV are dismissed pursuant to the opinion of the United States Court of Appeals.

FEDERAL TRADE COMMISSION v. WILLIAM BRAMMAN, JR. (MISSOURI PORTLAND CEMENT COMPANY), and RALPH BOTSFORD (BOTSFORD READY MIX COMPANY)*

Civ. A. Nos. 19,681–4, 682–4—F.T.C. Docket 8785

(United States District Court, Western District of Missouri, Western Division, March 20, 1972)

Discovery of disclosure to third parties by F.T.C., relating entirely to respondents' "6(b)" reports is within respondents' rights. Only reports already introduced into evidence may be involved. Bearing directly on respondents' position is the question of confidentiality (*Mississippi River* treatment). Court rejected plaintiff's contention that discovery could not be had without exhaustive administrative remedies on grounds it would immunize F.T.C. in almost all judicial proceedings. If necessity of disclosure exceeds public interest in nondisclosure, then discovery of information should be allowed.

Frederick O. Griffin, Jr. and *Lee I. Weintraub*, Antitrust Div., Dept. of Justice, Washington, D. C., for plaintiff.

Ray W. Bolze, of *Howrey, Simon, Baker & Murchison*, Washington, D. C. and *Watson, Ess, Marshall & Enggas*, Kansas City, Mo., for defendants.

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* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶74,045, at 92.337 (1972 Trade Cases). For case before Commission see Ash Grove Cement Co., **85 F.T.C. 1123**. **See also p. 572 herein.**

HUNTER, *District Judge:*

MEMORANDUM AND ORDER GRANTING RESPONDENTS' MOTION TO COMPEL DISCOVERY AND DIRECTING PETITIONER TO PERMIT CERTAIN ORAL DEPOSITIONS AND TO PRODUCE CERTAIN DOCUMENTS

This matter is presently before the Court upon the motion of respondents pursuant to Rule 37. F.R.Civ.P., for an order of this Court compelling certain post-hearing discovery in this subpoena enforcement proceeding. Petitioner has filed suggestions in opposition to this motion which, among other things, incorporates its contentions set forth in its motion for protective order filed February 24, 1972.

On February 11, 1972, a full evidentiary hearing and trial was held in this cause to consider all issues relating to the enforcement of the petitioner's subpoenas *duces tecum.* At the close of that hearing, the parties were given a briefing schedule for the complete submission of the cause for adjudication. Before their post-trial materials were due under the schedule of the Court, respondents served notice of depositions upon two members of the Federal Trade Commission: Thomas F. McNerney, trial counsel; and Charles A. Tobin, Secretary of the Commission. Those persons were directed to appear at the offices of counsel for respondents in Washington, D.C. on February 25, 1972 and directed them to bring the following:

> All documents relating to the release of the Section 6(b) reports, or excerpts thereof, filed by Missouri Portland Cement Company and Botsford Ready Mix Company with the Commission in 1964; such public disclosure having been made to Mr. William P. Higgins, Wichita, Kansas on or about November 16, 1971, and including although not limited to the following categories of documents: (a) the application for release of such 6(b) reports or excerpts therefrom; (b) all internal documents relating to such release; (c) the Federal Trade Commission order or minute authorizing such disclosure; and (d) copies of the 6(b) reports or excerpts which were released to Mr. Higgins or any other member of the public.
>
> All documents relating to the public disclosure on or about February 11, 1972, of the above referred to 6 (b) reports, including although not limited to the following: (a) internal documents requesting the public disclosure of such 6(b) reports or referring thereto, and (b) the order or minute of the Commission authorizing such public disclosure.

The stated purpose of this limited discovery relates entirely to the issue of whether the 6(b) reports filed with the Commission are confidential or not. Counsel for respondents claims that an inconsistency has arisen in the normal practices of the Commission concerning these reports and the testimony of representatives of the Commission during the hearing in this cause. As stated by counsel for petitioner in his brief of February 24, 1972, a primary issue in this cause is "whether the documents to be produced are so confidential that they should be covered by a highly restrictive protective order ('Mississippi River treatment')." Thus, the question of confidentiality has a direct bearing upon respondents' position in this cause concerning the treatment of its material by the Commission.

Basically, in opposing respondents' request for the discovery mentioned above, petitioner raises two contentions: (1) that respondents must exhaust their administrative remedies prior to securing the documents requested through the judicial process, and (2) that discovery is not appropriate in this summary proceeding to enforce the subpoenas *duces tecum*.

With regard to contention numbered (1) above, it initially should be noted that the documents sought by respondents relate entirely to the disclosure of their own "6(b)" reports which may be involved are those which already have been introduced into evidence in this proceeding. And, although petitioner asserts that respondents must first apply to the Commission before they obtain the documents in question through a judicial proceeding, in view of the Commission's present stance in this proceeding such administrative request would obviously be futile. Further, to hold that a party against whom an action has been brought by the Commission must first exhaust its discovery requests through administrative proceedings before making those requests in federal district court, would immunize the Commission from discovery in virtually all judicial proceedings. The Commission cannot, in this manner, create a barrier to federal pretrial discovery in an action brought by it against a private party.

The question of whether a privilege against disclosure attaches to the communications to the Commission and the "internal documents" of the Commission presents a different matter. Generally, there is no absolute executive privilege against disclosure of administrative reports and internal communications. *Timken Roller Bearing Co.* v. *United States*, 38 F.R.D. 57 (N.D.Ohio. 1954); *Freeman* v. *Seligson*, 405 F.2d 1326 (D.C.Cir. 1968); *Rosee* v. *Board of Trade of the City of Chicago*, 36 F.R.D. 684 (N.D.Ill. 1965). And, in cases wherein such requests for "internal documents" are made, there must be a judicial determination as to the "degree of necessity for disclosure shown by the private litigant" as opposed to "the importance of the maintenance of secrecy as to the particular privileged matter." 4 Moore, Federal Practice and Procedure ¶ 26.61[6.—4], p. 26–317 (1971 ed.); *Carr* v. *Monroe Mfg. Co.*, 431 F.2d 384 (4th Cir. 1970), *cert. den.* 400 U.S. 1000; *United States* v. *Gates*, 35 F.R.D. 524 (D.Colo. 1964); *Continental Distilling Corp.* v. *Humphrey*, 17 F.R.D. 237 (D.C. 1955). If the necessity of disclosure vastly exceeds the asserted public interest in non-disclosure of such information, then the discovery of that information should be allowed.

As previously noted, the discovery sought by respondents through oral deposition and production of documents is very limited. Such discovery relates solely to the disclosure of respondents' own "6(b)" reports to third-party applicants. No information is sought with regard to the "6(b)" reports of other individuals and the documents and testimony sought bear upon the question of confidentiality raised in this proceeding. Thus, in view of the limited nature of the respondents' request and its relationship to the issues raised in this proceeding, it appears that the necessity for production far outweighs the interest of the Commission in non-disclosure.

There remains contention numbered (2) that discovery procedures are not applicable to these summary proceedings. Although summary procedures are contemplated in enforcement proceedings such as these, the Federal Rules of Civil Procedure are generally applicable to them. *Daly* v. *United States*, 393 F.2d 873 (8th Cir. 1968). And, the District Court has broad discretion in determining the extent to which the rules concerning discovery are controlling. *United States* v. *Beneford*, 406 F.2d 1194 (7th Cir. 1969); *Troupe* v. *United States*, 317 F.Supp. 416 (W.D.Mo. 1970), *aff'd* 438 F.2d 117 (8th Cir. 1971). It is the opinion of this Court that the discovery sought by respondents should be granted. See: *Kennedy* v. *Rubin*, 254 F.Supp. 190 (N.D.Ill. 1966).

Accordingly, for the reasons stated above, Petitioner is hereby ordered to permit the oral depositions and production of documents requested by respondents in the notice of February 18, 1972. For the purpose of this discovery, counsel for respondents is directed to limit his interrogation of the witnesses, in scope and type, to those questions previously asked in the deposition of March 2, 1972. Counsel for both parties are to arrange for a date and time for such deposition which is mutually satisfactory. The deposition should, however, be taken within the next seven (7) days. Within 5 days thereafter, respondents are directed to file their trial brief, proposed findings and other related documents.

It is so ordered.

ARTHUR MURRAY STUDIO OF WASHINGTON, INC. v. FEDERAL TRADE COMMISSION*

No. 7-1807—F.T.C. Docket 8776

(United States Court of Appeals, Fifth Circuit, March 21, 1972)

1. NO ERROR IN REOPENING RECORD TO DEAL WITH $1,500 LIMIT ON DANCE CONTRACTS WHEN CLOSED SUBJECT TO REOPENING FOR GOOD CAUSE.

In proceeding against dance studios before the Federal Trade Commission, there was no error in reopening record for introduction of evidence on proposed $1,500 limitation on dance contracts, where record was initially closed subject to motion to reopen on good cause shown, such conditional closing was within authority of hearing examiner, sufficient good cause was shown in need for record on the propriety of the monetary limitations, which was only portion of proposed order in dispute after Commission's rejection of higher figure in proposed settlement agreement, and where there was no showing of prejudice in the reopening.

2. SUBSTANTIAL PREJUDICE MUST BE SHOWN TO MAKE OUT CASE OF DENIAL OF PROCEDURAL DUE PROCESS.

In order to make out case of denial of procedural due process in administrative proceeding, there must be showing of substantial prejudice.

3. REMEDIES OF COMMISSION SHOULD BE NO BROADER IN RESTRICTING LEGITIMATE ACTS THAN NECESSARY UNDER CIRCUMSTANCES.

Federal Trade Commission has authority to restrict otherwise lawful practices and activities when they are likely to be used to carry out an unlawful purpose, but the remedy should be no broader in restricting legitimate acts than is reasonably necessary under the circumstances.

4. RIGHT TO CONTRACT MUST BE ACCOMMODATED CONSISTENT WITH COMMISSION'S DUTY TO FORMULATE REMEDY TO ELIMINATE UNFAIR TRADE PRACTICES.

Right to contract of persons subject to regulation by the Federal Trade Commission must be accommodated if at all possible consistent with Commission's statutory duty to formulate a remedy to eliminate unfair and deceptive trade practices.

5. ORDER PROHIBITING CONTRACTS IN EXCESS OF $1,500 WAS PROPER DESPITE CONTENTIONS BY RESPONDENTS THAT OTHER PROVISIONS AND SAFEGUARDS MADE SUCH PROVISION UNNECESSARY.

In light of evidence showing multitude of transactions in which customers of dance studios were overreached in executing contracts in large amounts, portion of FTC cease and desist order prohibiting contracts

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* Reported in 458 F.2d 622 (1972). Rehearing denied May 11, 1972. For case before Commission see 78 F.T.C. 401.

for dancing instruction in an amount in excess of $1,500 was proper despite contention that such provision was not necessary in view of fines which could be imposed for violations, other provisions of the order, including seven-day period during which contracts could be canceled, and proposed alternative of reporting all contracts in excess of $1,500 to the Commission, where the limitation was adjusted to the prices usually charged by dance studios for the number of lessons [623] ordinarily needed to reach a basic stage of accomplishment.

(The syllabus, with substituted captions, was taken from 458 F.2d 622.)

On appeal, Court ordered dance studio to limit its individual contracts to $1,500 despite various contentions by the studio. Order enforced.

Tom M. Schaumberg, Washington, D.C., for petitioners; *Gadsby & Hannah*, Washington, D. C., of counsel.

Joseph Martin, Jr., *Ronald M. Dietrich*, Gen. Counsels, *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, *Robert E. Duncan*, *Thomas F. Howder*, Federal Trade Commission, Washington, D. C., for respondent.

Before BELL, DYER and CLARK, *Circuit Judges.*

BELL, *Circuit Judge:*

This is a petition to review and set aside a cease and desist order of the Federal Trade Commission entered against four Arthur Murray dance studio corporations and two individuals who were officers of each of the corporations. The primary issue before this court is whether the Federal Trade Commission may properly prohibit these dance studio petitioners from entering into contracts for dance instruction in an amount in excess of $1,500. A second issue is whether it was error for the hearing examiner to reopen the record for reception of evidence on the $1,500 limitation after the parties agreed that it be closed and the issues determined on their stipulations of fact. The petition will be denied and the order enforced.

The complaint in this matter was issued by the Commission on April 3, 1969, charging the petitioners with unfair methods of competition in commerce and deceptive acts and practices in commerce in violation of § 5 of the Federal Trade Commission Act, 15 U.S.C.A., § 45.[1] More specifically, petitioners were charged with various misleading and deceptive acts intended to induce unwary members of the public into entering dance lesson contracts at exorbitant prices. Attached to the complaint was a proposed order which, *inter alia*, would prohibit petitioners from entering into contracts which would obligate any individual to pay a total amount which exceeds $1,500 at any one time. (The only portion of this order in dispute is the monetary limitation.)

The petitioners answered, denying any illegality, and thereafter entered into a proposed settlement agreement with Commission counsel. Under the proposed settlement, the limit on indebtedness was raised to $4,000. However, the Commission rejected this provision, indicating that any acceptable consent order would require the $1,500 limitation.

Stipulations of fact were entered and the record closed to the reception of evidence, subject however, "to a motion by complaint counsel if they so wish to reopen the record on good cause shown for the introduction of further evidence." Shortly thereafter, and over objection of petitioners, the record was reopened for the reception of evidence on the $1,500 limitation. Hearings were then held, **[624]** and the hearing examiner found that the charges against petitioners had been sustained. The examiner's cease and desist order incorporated the $1,500 limitation and his order was affirmed on appeal to the Commission.

I.

[1, 2] Petitioners' contention that it was error to reopen the record for the introduction of evidence on the $1,500 limitations is without merit for at least two reasons. First, as stated, the record was closed subject to a motion by Commission counsel to reopen it on good cause shown for the introduction of further evidence. This order was well within the authority of the hearing examiner under the Commission rules, 16 C.F.R. § 3.51(d), which

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[1] In pertinent part:

§ 5(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

§ 5(a)(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

§ 5(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect. * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it * * * shall issue * * * an order * * * to cease and desist * * * See *Federal Trade Commission* v. *Sperry and Hutchinson Co.*, 1972, 405 U.S. 233, 92 S.Ct. 898, 31 L.Ed.2d 170.

vests in the hearing examiner the authority in his discretion to reopen the record for the reception of evidence at any time prior to filing his initial decision. Here the examiner added "the good cause shown" requirement which was otherwise not necessary. The good cause shown was sufficient. It was the need for a record centering on the unconscionable activities of petitioners in their trade practices which might indicate the propriety of the monetary limitation to protect the public. Second, there is no showing of prejudice to petitioners by the reopening of the record. In order to make out a case of denial of procedural due process, there must be a showing of substantial prejudice. Cf. *Pacific Molasses Co.* v. *Federal Trade Commission*, 5 Cir., 1966, 356 F.2d 386.

We therefore hold that there was no error in reopening the record for the introduction of evidence on the $1,500 limitation.

II.

The more difficult question is presented by the argument that it was improper to limit petitioners' contracts with individual dance students to an amount not exceeding $1,500 at any one time. Basically, they argue that this aspect of the remedy does not have a reasonable relationship to the unlawful practices found to exist and thus fails to meet the standard established by *Federal Trade Commission* v. *National Land Company*, 1957, 352 U.S. 419, 77 S.Ct. 502, 1 L.Ed.2d 438. See also *Jacob Siegal Company* v. *Federal Trade Commission*, 1946, 327 U.S. 608, 613, 66 S.Ct. 758, 90 L.Ed. 888.

Our determination of the question presented must be made in light of the authority of the Commission to eliminate unfair methods of competition and unfair or deceptive acts or practices, as this authority has been construed by the Supreme Court. No better statement on the subject can be found than that of Justice Clark, speaking for an unanimous court, in *Federal Trade Commission* v. *National Lead Company*, *supra:*

> The Court has held that the Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist. In *Jacob Siegal Co.* v. *Federal Trade Com.*, 327 U.S. 608, 66 S.Ct. 758, 90 L.Ed. 888 (1946), the Court named the Commission "the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." Id. 327 U.S. at [pages] 612–613, [66 S.Ct. at page 760]. * * * Again, in *Federal Trade Com.* v. *Ruberoid Co., supra,* 343 U.S. at [page] 473 [72 S.Ct. at page 803], we said that "if the Commission is to attain the objectives Con-

gress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity." We pointed out there that Congress had placed the primary responsibility for fashioning orders [625] upon the Commission. 352 U.S. at 428–429, 77 S.Ct. at 509.

[3] And, as is also stated in *National Lead*, the Commission has the authority to restrict otherwise lawful practices and activities when they are likely to be used to carry out an unlawful purpose. 352 U.S. at 430, 77 S.Ct. 502. On § 5 cases involving fact posture, see also *Jacob Siegal Company, supra; S & S Pharmaceutical Company* v. *Federal Trade Commission*, 5 Cir., 1969, 408 F.2d 487; *Slough* v. *Federal Trade Commission*, 5 Cir., 1968, 396 F.2d 870; *All-State Industries of North Carolina, Inc.* v. *Federal Trade Commission*, 4 Cir. 1970, 423 F.2d 423.

[4] The right of petitioners to contract must be accommodated by the Commission if at all possible with its statutory duty to formulate a remedy to eliminate unfair and deceptive trade practices, once such practices have been found. *Jacob Siegal Company, supra*, teaches this principle in the context of protecting an asset consisting of a trade name. Moreover, the remedy should be no broader in restricting legitimate acts than is reasonably necessary under the circumstances obtaining. See *Cotherman* v. *Federal Trade Commission*, 5 Cir., 1969, 417 F.2d 587, where we found the order overbroad to the extent that petitioners were prohibiting from actually lending money on lawful representations.

[5] Turning to the facts underlying the $1,500 limitation here, we find an abundance of evidence showing a multitude of transactions where customers of petitioners were overreached in executing contracts. One example was seven contracts totalling $17,820, made in a period of twelve months by a 69 year old widow. Examples of other totals for dance lessons, trips, club memberships, parties and the like, extracted from various individuals, were in ranges from $4,300 to $13,000. Many attempted without success to withdraw from the contracts.

The charge against petitioners out of which the $1,500 limitation arose was the petitioners' contracts were the product of intense, emotional and unrelenting sales pressure. The evidence more than supports this charge. The record is replete with trick advertisements to draw prospects, sham dancing analysis tests, relay salesmanship, some under secret electronic supervision by management, promises of social status and companionship, psychological sales techniques based on past unpleasant experiences (described as X-Factor or "past is black" technique). In many instances these tactics added up to cajolery and coercion. Many were reduced to tears. One woman begged from her knees to be allowed to contract. Another woman testified:

> The constant battering, it never let up. Two weeks at a time was about all they would let you go without being approached for some little additional something, not a big one, the big ones were about every two months and the little ones were about every two weeks. I was a nervous wreck there most of the time.

It was commonplace for contracts to be outstanding for several hundred hours of lessons which would take several years to complete. In one case, an elderly woman was signed up over a period of slightly more than a year for 696 hours of lessons. One of her contracts was in excess of $6,000. Many of the customers were placed in financial straits due to the contracts. The sales pitch for more contracts was based on the different levels of accomplishment offered—bronze, silver, gold, gold star and gold bar are illustrative. In addition, there were clubs to be joined by invitation and trips to be taken.

It can be said for petitioners that they offered activities and companionship for the lonely and the socially insecure. Some customers testified that they were completely satisfied. We can infer that many others were satisfied.

[626] Petitioners contend that the no monetary limitation was necessary, given the fines which could be imposed under the Act for violations of the order. 15 U.S.C.A., § 45 (*l*). They also urge that other provisions of the order, such as the seven day cooling off period—*i. e.*, the contract may be cancelled within seven days, render the monetary limitation unnecessary. An alternative approach would be to report all contracts in excess of $1,500 to the Commission. The Commission could then check for violations of its order. We find no merit in these suggestions.

The record makes out a case that a contractual limitation was indicated and that the limitation selected by the Commission bore a reasonable relationship to the unfair and deceptive practices found. It is clear from the record that the $1,500 line of demarcation was reasonable from the standpoint of alleviating the practices in question. This limitation is adjusted to the prices usually charged by petitioners and other dance studios for the number of lessons ordinarily needed to reach a basic stage of accomplishment.[2]

We cannot say that the limitation is overbroad in amount, or unnecessary because of the other provisions in the order, or because petitioners are subject to fines for violations of the order. Nor can we say that the rights of petitioners to contract have been improperly accommodated.

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[2] On the other hand, the California and Illinois legislatures have set a limitation on such dance contracts of $2,500.

The petition to review and set aside the cease and desist order of the Commission is denied, and the order will, pursuant to statute, be enforced. 15 U.S.C.A., § 21(c).

Enforcement ordered.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING *En Banc*

PER CURIAM.

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing *en banc*, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing *En Banc* is denied.

NATIONAL PETROLEUM REFINERS ASSOCIATION, ET AL.
v.
FEDERAL TRADE COMMISSION*

Civ. A. No. 1180–71.—F.T.C. File 215–21

(United States District Court, District of Columbia, Apr. 4, 1972)

1. FOR PURPOSE OF CARRYING OUT OTHER PROVISIONS OF F.T.C. ACT, WORDS "RULES AND REGULATIONS" SHOULD NOT BE DEFINED AS THEY WERE IN ADMINISTRATIVE PROCEDURE ACT.

   Words "rules and regulations," as used in Federal Trade Commission Act section providing that the Commission has power to make "rules and regulations" [1344] for purpose of carrying out other provisions of the Act, should not be defined as they were in the Administrative Procedure Act, where the former statute was passed in 1914, while the latter statute was not passed until 1946, and where there existed no cross reference or other legal relationship between the words in their respective statutes.

2. COMMISSION'S AUTHORIZATION BY F.T.C. ACT TO "PREVENT" UNFAIR METHODS OF COMPETITION DOES NOT CONSTITUTE AN IMPLIED RULE-MAKING POWER.

   Section of Federal Trade Commission Act that authorizes it to "prevent" unfair methods of competition did not constitute an implied rule-

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*Reported in 340 F. Supp. 1343 (1972); *rev'd & rem'd* 482 F. 2d 672 (1973), see p. 714 herein; *cert. denied*, 415 U.S. 951 (1974).

making power, where general rules of statutory construction and the scheme of the Act itself demonstrated that the mandate of the section was to be carried out by means of adjudicative process specified in the very next paragraph of the statute.

3. F.T.C. ACT DOES NOT CONFER UPON COMMISSION AUTHORITY TO PROMULGATE TRADE REGULATION RULES WITH EFFECT OF SUBSTANTIVE LAW.

   Federal Trade Commission Act does not confer upon the Federal Trade Commission the authority to promulgate trade regulation rules that have the effect of substantive law; the rule-making power of the Act conveys only the authority to make rules and regulations in connection with the Commission's housekeeping chores and with its investigative responsibilities.

(The syllabus, with substituted captions, is taken from 340 F. Supp. 1343.)

On motion for summary judgment, Court held that F.T.C. Act does not confer upon Commission authority to promulgate trade regulation rules that have effect of substantive law. Plaintiff's motion granted, Commission's motion denied.

William Simon, *J. Wallace Adair*, *Robert W. Steele*, *Roger C. Simmons*, *of Howrey*, *Simon*, *Baker & Murchison*, Washington, D.C., for plaintiffs.

L. Patrick Gray, III, Asst. Atty. Gen., *Harold H. Titus, Jr.*, U.S. Atty., *Harland F. Lathers*, and *Stuart E. Schiffer*, Attys., Dept. of Justice, *Ronald M. Deitrich*, Gen. Counsel, *Harold D. Rhynedance*, *Jr.*, Asst. Gen. Counsel, *Alvin L. Berman*, *James P. Timony*, *Nicholas S. Reynolds*, Attys., F.T.C., Washington, D.C., for the Federal Trade Comm. and others.

OPINION

AUBREY E. ROBINSON, JR., *District Judge.*

This suit questions the authority of the Federal Trade Commission (FTC) to promulgate Trade Regulation Rules pursuant to 15 U.S.C. § 41 *et seq.* (1971). It is a case of "first impression," no other courts having directly considered the issue.[1]

The FTC announced, on July 30, 1969, that it intended to issue a Trade Regulation Rule declaring that failure to post octane numbers on gasoline pumps at service stations would be an "unfair method of competition" and a "deceptive practice," constituting a violation of Section 5 of the Federal Trade Commission

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[1] In two cases, courts have refused to enjoin the Commission from holding hearings looking toward the promulgation of Trade Regulation Rules holding that the proper procedure was to attack the rule after it issued. *Bristol-Myers Co.* v. *Federal Trade Commission*, 1968 CCH Trade Case. ¶72, 496, pp. 85,677–78 (D.D.C.1968), rev'd in part and aff'd in part, 138 U.S.App.D.C. 22, 424 F.2d 935 (1970); *Lever Brothers* v. *Federal Trade Commission*, 325 F.Supp. 371 (D.Me.1971).

Act, 15 U.S.C. § 45 (1971) (hereinafter FTCA).[2] On December 30, 1970, the Commission issued such a Rule;[3] extended the effective date of the Rule on April 13, 1971 for the purpose of considering a revision thereof; withdrew the effective date[4] and proposed an alternative Rule on August 19, 1971;[5] and on December 9, 1971 isued a revised Rule in this respect that was to be effective **[1345]** March 15, 1972[6] but for a stay entered by this court.

This Rule, in simple fashion, makes the failure to post octane numbers an "unfair method of competition" and an unfair or "deceptive act" or practice without the necessity of further proof. Plaintiffs here contend that the Commission lacks statutory authority to promulgate this Rule.

The Court need not consider the several other contentions raised by the Plaintiffs, for the answer reached here pretermits all other issues. For the reasons set forth below, that to this Court are persuasive, it is held that the FTC lacks the requisite statutory authority to issue Trade Regulation Rules.

Initially, one considers that the FTC is materially distinct from other administrative bodies. The FTC was created with the express purpose that it be a purely investigative body. This factor distinguishes the FTC from other agencies that are regulatory in nature. Recognizing that the FTC might serve a more vital function, Congress appended to FTC's investigatory powers, quasi-judicial authority to file complaints, hold hearings, afford due process and determine, based upon a finding of fact, whether violations of the FTCA had or were occurring. The determination having been made that a violation existed, the FTC was granted cease and desist power to correct and prevent its continuance. Judicial review of cease and desist orders was specifically provided for to the Courts of Appeals. These quasi-judicial powers are laid out separately in Section 5 of the FTCA.[7] The investigative powers of the FTC are expressed in Section 6 of the FTCA.[8]

There is only one reference in the FTCA that speaks to the issuance of rules and regulations. The FTC relies heavily upon its substance and it states:

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[2] 34 F.R. 12449 (1969).
[3] 36 F.R. 354 (1971).
[4] 36 F.R. 7309 (1971).
[5] 36 F.R. 16120 (1971).
[6] 36 F.R. 23871 (1971).
[7] 15 U.S.C. § 45 (1971).
[8] 15 U.S.C. § 46 (1971).

> The commission shall also have power
>
> * * * * * * *
>
> (g) From time to time to classify corporations and to make *rules and regulations* for the purpose of carrying out the provisions of sections 41–46 and 47–58 of this title. (emphasis added)[9]

This clause is located in Section 6 of the FTCA where the investigative powers are conferred.

While the authority at issue may at first impression be thought to fall within this section, to issue rules and regulations concerning deceptive or unfair trade practices or competition, both the context of Section 6(g) and the legislative history accompanying it demonstrate that this particular authority was not, nor has been, granted.

The history of this section is clear. Section 6(g) of this Act was intended only as an authorization for internal rules of organization, practice, and procedure. The section was to insure that the FTC had the power to require reports from all corporations.[10] Section 6(g) of the FTCA originated in Section 7 of the House Bill of 1914 that conferred only investigative powers on the Commission.[11] This House Bill did not contain provisions analogous to Section 5 of the Statute, as enacted, that conferred adjudicative authority upon the FTC. This is because the House Bill considered the FTC as an investigative body. Thus, the rulemaking grant in Section 6(g) could only have been intended as an adjunct to the Commission's investigative powers. Supportive of this analysis is the fact that the Senate version of this FTCA made no provision whatever for the promulgation of rules [1346] and regulations in any context. Therefore, the only provisions concerning rules and regulations that were considered by the Conference Committee and the Congress stem from the House Bill. The existence of Section 6(g) in this statute could only pertain to housekeeping or procedural matters, as under the House Bill, the Commission had no authority to prescribe unfair, deceptive, or anti-competitive business practices.[12] The House Bill conferred only investigative powers.

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[9] 15 U.S.C. § 46(g) (1971).

[10] Federal Trade Commission Bill, Comparative Print, S.Doc. No. 573, 63d Cong., 2d Sess., p. 14, 15 (1914); H.R.Rep. No. 533, 63d Cong., 2d Sess., p. 3 (1914); 51 Cong.Rec. 8845, 9047, 9048 (1914).

[11] H.R. 15613, 63d Cong., 2d Sess., Sec. 8 (1914).

[12] Having admitted that both the drafters in the House and the Senate had no intention of granting the Commission any rulemaking power, the Commission took the position that rulemaking authority was somehow mysteriously incorporated into the Conference Committee Report that was ultimately passed. Reasoning from this unsupported position, the Commission claimed that the House and Senate debates prior to

Notably, when the Senate Bill's provision enabling the Commission to institute adjudicative proceedings to prevent unfair methods of competition was added, there was no indication that Section 6(g) rulemaking authority was intended to extend to this new area affixed by the Senate Bill in such a way as to circumvent the extensive due process procedures expressly provided for in Section 5 of the FTCA. Despite several amendments to the Act, no indication of such an intent has since been expressed.

Significantly, Congress refused to amend its proposals on two separate occasions that would have granted the Commission the very rulemaking power it now seeks to exercise.[13] In addition to the provisions of Section 6(g), the Amendment offered by Congressman Lafferty urged that the Commission be given the power to "make, alter, or repeal regulations further defining more particularly unfair trade practices or unfair or oppressive competition."[14] Thus when Sections 6(g) and 5 were first proposed, Congress felt that an explicit grant of legislative authority was necessary, other than 6(g), to grant substantive rulemaking powers to the FTC. This Congress consistently refused to permit.[15]

[1347] Section 6(g) has remained unchanged since 1914, and it is still located in Section 6 of the Act among the Commissions'

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[12] (Continued)
the Conference Report were of no relevance to whether Congress intended to grant substantive rulemaking powers to the Commission.

In making this argument, the Commission ignores the fact that the legislative authority of a Conference Committee is limited to resolving differences between the two Houses. Such a Conference Committee cannot authorize new legislation that has not been submitted by one of the two Houses. *See* Jefferson's Manual, Section 546, which has governed House procedures since 1837. In short, the Conference Committee could not have given the FTC a power that was not included in the bill as it passed one of the Houses. House Rule XXVII (3) (1971); Rules and Manual of the United States Senate, Section 343 (1965). *See also* comments of Judge Convington, a member of the Conference Committee, 51 Cong.Rec. 14932 (Sept. 14, 1914); and the remarks of Congressman Sherley, 51 Cong.Rec. 14938 (Sept. 10, 1914).

[13] 51 Cong.Rec. 9047, 9049–50, 9056–57 (1914).

[14] H.R.Rep. 533, 63d Cong., 2d Sess., Part 3, p. 21 (1914).

[15] The amendment proposed by Congressman Lafferty that would have given the Commission the power to make, alter, or repeal regulations further defining more particularly unfair trade practices or unfair or oppressive competition also included the text of Section 6(g) within it. Thus, even in Congressman Lafferty's own view, Section 6(g) did not in and of itself confer the legislative rulemaking powers that the Commission now asserts it confers upon it. *See also* 51 Cong. Rec. 14,932 (1914) where Judge Covington, a member of the Conference Committee, who was called the "author of the bill," specifically stated in this regard: "The Federal Trade Commission will have no power to prescribe the methods of competition to be used in the future. In issuing its orders it will not be exercising power of a judicial nature * * *."; and 51 Cong.Rec. 14,928 (1914) where Congressman Sherley expressed the thought: "In other words, (the Trade Commission) exercises in no sense a legislative function such as is exercised by the Interstate Commerce Commission." Moreover, the evidence is overwhelming that Congress intended the Commission to act only upon Orders issued in specific proceedings after a complaint, hearings, and basis in fact established. 51 Cong.Rec. 14,928 (1914).

other investigative powers.[16] If Congress at any time had intended to confer upon the Commission the authority to prescribe substantive law in such a manner as to vitiate the substantial procedural safeguards specified in the Act itself, there certainly would be some reference to this extraordinary grant of power in the Act or the legislative history. The fact that there is none lends credence to the conclusion that the Commission has no substantive, legislative rulemaking authority under the FTCA.

It is important, also, to consider the fact that the FTC, for approximately 50 years from the passage of the FTCA, never asserted the authority it claims to have always possessed. This indicia points to the fact that the FTC knew it was not originally granted this rulemaking authority.

Another critical analytical factor is that where Congress intended to grant substantive rulemaking authority to the FTC, it has done so clearly and unequivocally.[17] In each of those instances Congress felt the need to specifically authorize the Commission to issue substantive rules.[18] These examples of specific authorization would be "a meaningless and superfluous legislative gesture" if the Commission had had the authority it now claims was given it in 1914.[19] The fact that Congress particularized the grant of substantive rulemaking power in these narrowly circumscribed statutes and yet did not do so with respect to the Federal Trade Commission Act, that deals, not with consumer labeling, but with "competition" generally in all its many aspects, makes clear that Congress did not intend the Commission to have such powers under the latter statute.

This conclusion is further substantiated by the history of the Flammable Fabrics Act. Unlike the Wool, the Fur, and the Textile Fiber Acts, the general rulemaking power granted the Commission in the Flammable Fabrics Act did not specify the subjects upon which rules could be issued, nor did it contain an express provision that a violation of rules promulgated would constitute a violation of the FTCA.[20] It provided only that the Commission could make, "such rules and regulations as may be necessary and proper for purposes of administration and enforcement of (the Act),"[21] *i.e.*, in language similar to that of Section 6(g) of the FTCA. In 1967, however, Congress amended the Flammable Fabrics Act [22] to specifically provide that the Commission could issue rules requiring the "maintenance of records relating to fabrics, related materials, **[1348]** and products" and the following language was added by Congress to that provision:

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[16] 1951 Annual Report of the Federal Trade Commission, pp. 16–18 that states "the broad scope of the Commission's authority to investigate is indicated" by the powers conferred on the Commission in Section 6 of the Federal Trade Commission Act, specifically including the rulemaking powers of Section 6(g). Other annual reports also refer to the Commission's rulemaking power in an investigative context. *See, e.g.*, 1954, p. 12; 1955, p. 9; 1956, p. 9; and 1957, p. 8; all Annual Reports of the Federal Trade Commission.

[17] Wool Products Labeling Act, 15 U.S.C. §§ 68–68j (1971); Textile Fiber Products Identification Act, 15 U.S.C. §§ 70–70k (1971); Fur Products Labeling Act, 15 U.S.C. §§ 69–69j (1971); Flammable Fabrics Act, 15 U.S.C. §§ 1191–1200 (1971); and the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451–61 (1971).

[18] This is consistent with the Congressional belief in 1914 that a separate provision from Section 6(g) was necessary to grant the FTC substantive rulemaking authority.

[19] R. Burris and H. Teter, Antitrust: Rulemaking v. Adjudication in the FTC, 54. Georgetown L.J. 1106, 1125 (1965).

> The violation of such rules and regulations shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice, in commerce, under the Federal Trade Commission Act.

The purpose of that amendment, according to the Report of the House Committee on Interstate and Foreign Commerce, was to "make the Flammable Fabrics Act more flexible by permitting flammability standards and other regulations to be issued under rulemaking procedures rather than having them fixed by law as is now the case." [23] The report explained further that, under the amended Flammable Fabrics Act, the Commission was authorized "to establish regulations for recordkeeping" and that "(v)iolations of any such regulation would be an unfair trade practice under the Federal Trade Commission Act." [24]

The original language of the Flammable Fabrics Act was *in pari materia* to Section 6(g) of the FTCA.[25] Nevertheless, Congress felt the need to amend the statutes to give the Commission the power to include "provisions for maintenance of records relating to fabrics, related materials, and products," and the further need to amend the statutes to provide that violations of such rules would constitute a violation of Section 5.[26] Logic compels a similar need to spell out substantive rulemaking authority in the case of Section 6(g) before such authority can be said to exist. Congress has not done so.[27] The Commission's claim of unlimited rulemaking power under the FTCA is, therefore, not only unsupported by anything in that Act itself, or its legislative history, but is also inconsistent with the history of other statutes entrusted to the Commission's administration by Congress.

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[20] *Compare* 15 U.S.C. § 1192 (1964) *with* 15 U.S.C. § 68a, 15 U.S.C. § 69a(a). (b). (c), and 15 U.S.C. § 70a(a), (b), (c) (1964).

[21] 15 U.S.C. § 1194(c) (1971).

[22] Id. at 5.

[23] H.R.Rep. No. 972, 90th Cong., 1st Sess., p. 1 (1967) U.S.Code Cong. & Admin. News, p. 2136.

[24] *Id.* at 5.

[25] 67 Stat. 112 (1953).

[26] 81 Stat. 570 (1967).

[27] *See Textile and Apparel Group, American Importers Ass'n* v. *Federal Trade Com-*

[1] The Federal Trade Commission further argues that the words "rules and regulations" in Section 6(g) are to be defined as they are in the Administrative Procedure Act (APA): "The whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy * * *." [28] The Federal Trade Commission Act was passed in 1914. The APA was passed in 1946. It is inconceivable to this Court that those words, when written and considered by Congress in 1914, can have the same exact meaning as those words carry today via the 1946 APA. There exists no cross reference or other legal relationship between these words in their respective statutes. The APA gave a specialized construction to these words. Congress recognized this special meaning by amending the National Labor Relations Act, also passed before the APA, to read, "to make * * * in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter." [29] Congress, however, did not make a similar amendment to the Federal Trade Commission Act. The inference, therefore, is that Congress did not expect the FTC to engage in substantive rulemaking in the manner prescribed by the APA. The rulemaking power in Section 6(g) of the FTCA remains unchanged by Congress to date, and conveys only the authority to make such rules and [1349] regulations in connection with its housekeeping chore and investigative responsibilities.

[2] The Commission further contends that Section 5(a)(6) of the Act, that authorizes it to "prevent" unfair methods of competition, constitutes implied rulemaking power. In making this argument, the Commission ignores Section 5(b), the very next paragraph of the statute that requires the Commission to conduct adjudicative proceedings. General rules of statutory construction

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[27] (Continued)
mission, 133 U.S.App.D.C. 353, 410 F.2d 1052, *cert. denied, National Knitted Outwear Ass'n* v. *Textile and Apparel Group, Am. Importers Ass'n,* 396 U.S. 910, 90 S.Ct. 223, 24L.Ed.2d 185 (1969); *Federal Trade Commission* v. *B. F. Goodrich Co.,* 100 U.S.App. D.C. 58, 242 F.2d 31 (1957) which indicates that broad power to promulgate trade regulation rules does not exist beyond the narrower grants of rulemaking authority given by the Congress.

[28] 5 U.S.C. § 551(4) (1971).

[29] 29 U.S.C. § 156 (1971).

and the scheme of the FTCA itself demonstrate that the mandate of Section 5(a)(6) is to be carried out by means of adjudicative process specified in Section 5(b).[30] Moreover, the Supreme Court has expressly stated that the FTCA must "be read as an integrated whole." [31] Thus, the FTC's claim is patently untenable. If the legislative history of the Act will not permit the issuance of Trade Reguation Rules under the only section explicitly granting the Commission rulemaking authority, such sweeping authority cannot be based upon an implied grant of power in some other section of the Act or in the Act as a whole. In the face of an overwhelmingly contrary legislative history, there must be some basis for granting an agency unprecedented and farreaching rulemaking power other than the claim of the agency itself that such power is necessary or desirable for its more efficient operation. The only support, however, for the Commission's novel theory of statutory construction is its own words. While the courts may have sustained imprecise grants of rulemaking power in some instances, they have never done so in the face of an overwhelmingly contrary legislative history, such as that of the Federal Trade Commission Act.[32]

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[30] Section 5 remained a single unitary provision without separate, designated subsection throughout the House and Senate consideration of the measure. Today's lettering of Section 5 paragraphs resulted from the 1952 McGuire Act, a development 38 years after the original passage of the statute and completely unrelated to the question here under consideration.

[31] *United States* v. *Morton Salt Co.*, 338 U.S. 632, 650, 70 S.Ct. 357, 368, 94 L.Ed. 401 (1950).

[32] This factor readily distinguishes cases such as *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943) where neither the statutory scheme nor the legislative history of that Act clearly negated an implied grant of legislative power to the Federal Communications Commission and that statute was intended to authorize an agency to broadly regulate a specific, narrow segment of industry; *United States* v. *Oregon*, 336 U.S. 643, 648, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961); *United States* v. *Public Utilities Comm. of Calif.*, 345 U.S. 295, 73 S.Ct. 706, 97 L.Ed. 1020 (1953); *Schwegman Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed.2d 1035 (1951); *Pacific Coast European Conf.* v. *Federal Maritime Comm.*, 126 U.S.App.D.C. 230, 376 F.2d 785 (1967). *See also* Weston, Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor, 24 Fed.Bar.J. 548, 570–71 (1964) where it is stated:

> To support its theory (of implied power), the FTC cites Supreme Court decisions involving the S.E.C. under the Public Utility Holding Co. Act, and the F.C.C. and the F.P.C. as authority for the proposition that an administrative agency has the choice to use either adjudication or rulemaking procedure to make 'substantive' rules. These cases, however, involve agencies with not only express power to issue 'legislative' rules but also with far more pervasive regulatory jurisdiction over the specialized industries involved. It may be that some agencies vested with both adjudicatory and legislative rulemaking powers have a choice of which procedure to use. But it is not at all clear that an adjudicatory agency specifically denied 'legislative' rulemaking power can use legislative type hearings to make 'substantive' rules other than merely 'interpretative' rules that are open to full-scale judicial review.

Testimony by former Federal Trade Commission Chairman Paul Rand Dixon before a Senate Subcommittee, Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 169–70 (Oct. 31, 1963).

The record amply reflects that the Commission itself has repeatedly admitted [1350] that it has no power to promulgate substantive rules of law[33] and Congress has implicitly rejected the efficacy of Commission Trade Regulation Rules by legislatively superseding them.[34] Moreover, the Supreme Court has impliedly rejected the Commission's claim of rulemaking power, as have many of the legal commentators.[35]

[3] The Court has considered fully all the other arguments put forth by the FTC in this suit. The sum total of their argument is a "bootstrap" operation, designed to conclude that the FTC possesses powers that it clearly does not have. The famous stricture of Mr. Justice Brandeis applies here:

> What the Government asks is not a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.[36]

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[33] Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 169–70 (Oct. 21, 1963); Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 281 (March 20, 1963); Hearings before the Senate Committee on Commerce, 91st Cong., 1st and 2d Sess., p. 9 (Dec. 17, 1969); Hearings before the House Subcommittee on Commerce and Finance of the Interstate and Foreign Commerce Committee, 91st Cong., 2d Sess., p. 54, 76–77 (Feb. 4, 1970). *See also* Title II of S. 986, 92d Cong., 2d Sess. § 206 (1972), currently pending in Congress, where Section 206 of that Bill would amend Section 6(g) of the FTCA to authorize the Commission to define with specificity through legislative rules those acts or practices which are unfair or deceptive to consumers and in violation of Section 5(a)(1) of the FTCA. It is noteworthy, here, that almost sixty years after the passage of the original Act that the Commission claims implicity granted it authority to promulgate rules to regulate all otherwise non-regulated industries, the Senate found the grant of such authority so far reaching and so inherently capable of abuse that it retained a sixty day veto over any use of that power in their proposed Bill. It is further significant that Congress has still not passed this legislation giving the Commission rulemaking authority. *See*, Cong.Rec., Nov. 8, 1971, Daily Ed., p. S 17828 and statements of Senator Hruska *Id.*, at p. 17857; Senator Cotton, *Id.*, at S 17873; and Senator Cooper, *Id.*, at S 17884.

[34] The Trade Regulation Rule relating to unsolicited mailing of credit cards (16 C.F.C. 415) was superseded by express provisions in the Truth-In-Lending Act (15 U.S.C. §§1642–44, et seq. (1971); the Rule relating to the prevention of unfair or deceptive advertising in labeling of cigarettes (29 F.R. 12626, 15570) was preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq. (1971); and the proposed Rule relating to shipment of unordered merchandise (16 C.F.R. 427) was superseded by express provisions of the Postal Reorganization Act, 39 U.S.C. § 3009 (1971).

[35] *Federal Trade Commission* v. *Colgate Palmolive Co.*, 380 U.S. 374, 385, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965); *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617–618, 64 S.Ct. 1215, 88 L.Ed. 1488 (1944); *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 532–533, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); *Fedeal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 648, 51 S.Ct. 587, 75 L.Ed. 1324 (1931); *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 427, 40 S.Ct. 572, 64 L.Ed. 993 (1920). *See* Comment, 113 U.Pa.L.Rev. 303, 304–305 (1964); R. Burris and H. Teter, Antitrust: *Rulemaking* v. *Adjudication in the FTC*, 54 Georgetown L.J. 1106 (1965); Weston, Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor, 24 Fed.Bar. J. 548 (1964). *But see*, Wegman, Cigarette and Health: A Legal Analysis, 51 Cornell L.Q. 678, 741 (1966); Elman, Rulemaking Procedures in the FTC's Enforcement of the Merger Law, 78 Harv.L.Rev. 385 (1964).

[36] *Iselin* v. *United States*, 270 U.S. 245, 251, 46 S.Ct. 248, 70 L.Ed. 566 (1926).

It is therefore the conclusion of this Court, that for the above stated reasons, the statute (FTCA) does not confer upon the Federal Trade Commission the authority to promulgate Trade Regulation Rules that have the effect of substantive law.

Plaintiffs' motion for Summary Judgment is hereby granted. Defendants' motion for Summary Judgment is hereby denied.

FEDERAL TRADE COMMISSION
v.
APPROXIMATELY 500 DOZEN FLAMMABLE CHENILLE BERETS*

No. 71-1197—F.T.C. File 99-102

(United States Court of Appeals, Third Circuit, April 25, 1972)

1. STANDARD OF FLAMMABILITY APPLICABLE TO HATS UNDER 1953 ACT STILL EFFECTIVE.

   Standard of flammability applicable to hats under 1953 Flammable Fabrics Act is still effective considering that Secretary of Commerce has promulgated no superseding or modifying standards.

2. LANGUAGE OF 1953 ACT INTENDED TO INCLUDE THOSE HATS WHICH PRESENT A DANGER IN LIGHT OF THEIR FLAMMIBILITY AND THEIR COVERAGE OF THE NECK, FACE OR SHOULDERS AS TO CREATE PROBABILITY OF SERIOUS INJURY.

   Under 1953 Flammable Fabrics Act defining an article of wearing apparel subject to flammability standards and to prohibitions on sales or offering for sale in commerce as any article of clothing except hats which do not "constitute or form part of a covering for the neck, face, or shoulders," quoted phrase was intended to include within coverage of Act those hats which present a danger to the public, in light of their flammability, and their coverage of such a portion of the neck, face or shoulders as to create probability of serious injury if ignited.

3. BERETS COVERING ONLY PART OF FACE AND NECK DID NOT "CONSTITUTE OR FORM PART OF A COVERING FOR THE NECK, FACE OR SHOULDERS" AND WERE EXEMPT FROM PROVISION OF THE FLAMMABLE FABRICS ACTS.

   Berets which covered the ears, part of the face, and part of the neck when worn, did not "constitute or form part of a covering for the neck, face, or shoulders" and were exempt from provisions of 1953 Flammable Fabrics Act defining an article of wearing apparel subject [1278] to flammability standards and to prohibitions of sales or offering for sale in commerce as any article of clothing except hats which do not constitute or form part of a covering for the neck, face, or shoulders when worn by individuals.

4. JUDICIARY MUST NOT INTERFERE IN LEGISLATIVE AND EXECUTIVE FUNCTIONS OF GOVERNMENT.

   Judiciary must exercise restraint not to interfere in legislative and

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* Reported in 458 F.2d 1277 (1972).

executive functions of government lest it abdicate its role, mandated by Constitution, of impartial decision-making.

(The syllabus, with substituted captions, was taken from 458 F.2d 1277)

On appeal Court held that berets which cover only part of neck or face were exempt from provisions of the 1953 Flammable Fabrics Act. District Court affirmed.

Charles C. Moore, Jr., Federal Trade Commission, Washington, D.C., for appellant.

Albert H. Brodkin, Keating & Brodkin, New York City, for appellee.

Before MCLAUGHLIN, VAN DUSEN and ADAMS, Circuit Judges.

OPINION OF THE COURT

VAN DUSEN, *Circuit Judge.*

This case involves an appeal by the Federal Trade Commission from a ruling of the United States District Court for the District of New Jersey that certain flammable berets were exempt from seizure under the terms of the Flammable Fabrics Act, 15 U.S.C. § 1191 *et seq.* (1970). The berets in question were manufactured in Italy and were imported into this country by claimants-appellees, Betmar Hats, Inc. and M. Grossman & Son, Inc., in August of 1970. The Federal Trade Commission (Commission) obtained several of these berets in September of 1970 and subjected them to flammability tests in accordance with Commercial Standard 191–53 of the Department of Commerce. As a result of these tests, the Commission determined that the berets were dangerously flammable and that their introduction into commerce violated Section 3 of the Flammable Fabrics Act, 15 U.S.C. § 1192 (1970). The Commission then instituted a seizure action[1] pursuant to Section 6(b) of the Flammable Fabrics Act, 15 U.S.C. § 1195(b) (1970), which provides:

> (b) Whenever the Commission has reason to believe that any product has been manufactured or introduced into commerce * * * in violation of section 1192 of this title, it may institute proceedings by process of libel for the seizure and confiscation of such product * * * in any district court of the United States within the jurisdiction of which such product * * * is found.

The complaint alleged in paragraph 4, *inter alia*, that the berets "[w]hen worn, * * * form a covering for the ears, forehead, part of the neck, and the top of the head" and claimants concede the accuracy of this allegation for purposes of the decision from which this appeal is taken (see paragraph 4 of answer).

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[1] Two separate seizure warrants were executed by the Commission and a total of 6,385 berets were seized.

Claimants asserted ownership of the seized berets in accordance with Supplemental Rule C(6), F.R.Civ.P., and filed an answer. Claimants then moved for dismissal of the claim and summary judgment, and supported their motion with three sworn affidavits. The Commission filed a cross-motion for summary judgment and oral arguments were heard on these cross-motions on December 14, 1970. At this oral argument and in their papers claimants contended that flammability standards only apply to hats under Section 4(a) of the 1953 Flammable Fabrics Act and that such provisions had been repealed by the 1967 Flammable Fabrics Act, which had not included coverage of hats. The district court rejected this contention and held that the 1953 standard (191–53) is applicable under the savings clause of the 1967 Act. However, the court went on to hold that the berets in question were not covered by the wording of Section **[1279]** 2(d), 15 U.S.C. § 1191(d), 67 Stat. 111 (1953), and were thus not properly seized by the Commission. The cross-motion for summary judgment was denied and an order was entered prohibiting the claimants from selling or otherwise disposing of the berets pending appeal. We agree with these rulings of the district court and affirm on the basis of the record presented to us on this appeal.

The 1967 Flammable Fabrics Act contains no specific reference to hats but applies to "any article of wearing apparel." [2] Section 2 of the Act (15 U.S.C. § 1192 (1970)) prohibits the sale or offering for sale in commerce of any article of wearing apparel which fails to conform to a flammability standard promulgated under Section 3 of the 1967 Act (15 U.S.C. § 1193 (1970)). That section provides for the adoption of such standards by the Secretary of Commerce upon a showing of a need to protect the public and after an appropriate hearing. No such standard has been promulgated for hats. However, when the 1967 Act was passed, Congress included a savings provision which provides:

> Notwithstanding the provisions of this Act, the standards of flammability in effect under the provisions of the Flammable Fabrics Act, as amended, on the day preceding the date of enactment of this Act, shall continue in effect for the fabrics and articles of wearing apparel to which they are applicable until superseded or modified by the Secretray of Commerce.

* * * § 11, P.L. 90–189, 81 Stat. 568, 1967 U.S.Code Cong. & Admin. News, p. 625; see also notes following 15 U.S.C. § 1191 (1970).

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[2] 15 U.S.C. § 1191(h) (1967). This section defines the term "product" as including any article of wearing apparel.

[1] We agree with appellant and the district court that the standard of flammability applicable to hats under the 1953 Flammable Fabrics Act is still effective since the Secretary of Commerce has promulgated no superseding or modifying standards.

The above-mentioned Section 2(d) of the 1953 Act (15 U.S.C. § 1191(d), 67 Stat. 111 (1953), defined "article of wearing apparel," which is subject to the flammability standards of Section 4 (15 U.S.C. § 1193 (1953)) and to the prohibitions on sales or offering for sale in commerce in Section 3 (15 U.S.C. § 1192, 67 Stat. 111 (1953)), as meaning any article of clothing except hats, "Provided, however, That such hats do not constitute or form part of a covering for the neck, face or shoulders when worn by individuals." [3]

The district court decided that the berets in question were not subject to the provisions of the Flammable Fabrics Act, apparently for the reason that they did not "constitute or form part of a covering for the neck, face, or shoulders when worn by individuals," and that, therefore, there was no applicable standard of flammability for these berets. Under such a decision, their sale or introduction into commerce was not prohibited by Section 2 of the 1967 Act (15 U.S.C. § 1192 (1970)). As a basis for such conclusions, it is necessary to determine what is meant by the phrase "constitute or form part of a covering for the neck, face, or shoulders" and then to apply that standard to the berets in question on the basis of the record.

[2] In determining the scope of the above-quoted proviso, the legislative history of the 1953 Act is pertinent. *See United States* v. *An Article of Drug * * * Bacto-Unidisk*, 394 U.S. 784, 799, 89 S.Ct. 1410, 22 L.Ed.2d 726 (1969). Beginning in 1945 legislation **[1280]** was introduced in the Congress to prohibit the transportation in interstate commerce of highly flammable fabrics.[4] Several subsequent bills were introduced and in 1953 H.R. 5069 was enacted into law. The legislative purpose of all of these bills was to protect the public against the dangers of highly flammable wearing apparel. The Senate Report to H.R. 5069 cited numerous examples of injuries caused by "torch sweaters" and other such flammable garments.[4] Earlier versions of the legislation had ex-

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[3] Act of June 30, 1953, Pub.L. No. 164–83, § 2, 67 Stat. 111, 15 U.S.C. § 1193(a) makes Commercial Standard 191–53 applicable to all articles of wearing apparel and provides that it "shall apply with respect to the hats * * * covered by section 1191(d) of this title, not withstanding any exception contained in such Commercial Standard with respect to hats * * *" This language was necessary to overcome the exception from coverage of all hats contained in § 2.2 of Commercial Standard 191–53.

[4] See Senate Report No. 400, 83 Cong. 1st Sess. (1953), U.S.Code Cong. & Admin. News 1953, p. 1722.

empted all hats, gloves and footwear from the coverage of the Act. The Federal Trade Commission, which had promoted flammable fabrics legislation because of its inability to deal with the problem under its existing statutory powers, suggested that the exemption of hats be limited by a proviso which would include within the coverage of the Act "such wearing apparel as hoods, baby bonnets, head scarves, or other headwear which provide a covering for the neck, face, or shoulders." [5] The Commission felt that absent such a limitation on the hat exception the Act would "leave the public exposed to the dangers against which the bill is intended to afford protection." [6] It thus appears that the above-quoted proviso to Section 2(d) of the 1953 Act was intended to include within the Act's coverage those hats which present a danger to the public, in light of their flammability, and their coverage of such a portion of the neck, face or shoulders as to create the probability of serious injury if ignited. Such an analysis of the coverage of the Act focuses on the statutory purpose in order to interpret the imprecise language of the proviso.[7]

[3, 4] Applying this standard to this record, we find that the berets in question do not come within the Section 2(d) proviso and are exempt from coverage, since the berets only cover the ears, part of the face, and part of the neck under the wording of paragraph 4 of the complaint. In addition, photographs showing the manner in which the berets are worn were submitted by both sides as parts of their affidavits. On the basis of this record, we agree with the findings and conclusions of the district court that the berets in question are exempt from coverage under the above-described provisions of the 1953 Act, as continued in effect by the 1967 Act, § 11 of P.L. 90–189, 81 Stat. 568, 1967 U.S.Code Cong. & Admin.News, p. 625.[8] Although we are concerned with the result reached in this appeal, the solution to the problem rests with the Secretary of Commerce [9] or Congress, or both. The judiciary

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[5] Senate Report No. 1869, 82 Cong. 2nd Sess. (1952).

[6] Letter of James H. Mead, FTC Chairman, of March 19, 1953, appended to Senate Report No. 400, 83 Cong. 1st Sess. (1953).

[7] *See United States* v. *An Article of Drug* . . . Bacto-Unidisk, 394 U.S. 784, 799, 89 S.Ct. 1410, 22 L.Ed.2d 726 (1969); *SEC* v. *Ralston Purina Co.*, 346 U.S. 119, 124–125, 73 S.Ct. 981, 97 L.Ed. 1494 (1953).

[8] While we disagree with claimants' contention that hats must cover *all* of the face, neck, or shoulders to come within the proviso, the district court was justified in deciding that berets do not cover a sufficient portion of the face, neck or shoulders so as to create the probability of serious injury if ignited.

[9] In view of Section 1 of the 1967 Act (15 U.S.C. § 1191), defining articles of wearing apparel as "an article of clothing worn or intended to be worn by individuals," the Secretary of Commerce is able at any time to establish an appropriate flammability standard in accordance with Section 3 of that Act (15 U.S.C. § 1193) covering berets of the type involved here. A copy of this opinion will be sent to the Secretary of Commerce to call his attention to the situation presented by this case.

must exercise restraint not to interfere in the legislative and executive functions of government lest it abdicate its role, mandated by the Constitution, of impartial decision-making.

Accordingly, we affirm the district court order of December 17, 1970, and [**1281**] date that portion of such order which prohibited the sale or distribution of the berets pending appeal expires as of the date on which the appeal is determined.

GERALD MCLAUGHLIN, *Circuit Judge* (dissenting).

In 1967, despite the strong, high level political pressure put upon the Congress and the Department of Commerce which embraces appellant "Federal Trade Commission," the revised Flammable Fabrics Act contained a savings clause carried over from the 1953 Act which clearly states that "Notwithstanding the provisions of this Act, the standards of flammability in effect under the provisions of the Flammable Fabrics Act, as amended, on the day preceding the date of enactment of this Act, shall continue in effect for the fabrics and articles of wearing apparel to which they are applicable until superseded or modified by the Secretary of Commerce pursuant to the authority conferred by the amendments made by this Act." [Follows 15 U.S.C. § 1191 in Supplement V 1965–69].

It is not disputed and cannot be, that the standards applicable under the 1953 Act continue in effect under the 1967 Act and Commercial Standard 191–53 remains appropriate for such hats as "constitute or form part of a covering for the neck, face, or shoulders when worn by individuals." Despite the unmistakable meaning of the above clear language the appellees amazingly and successfully argued that the 1953 language in the savings clause merely meant hats which do not themselves cover any part of the neck, face or shoulders or are attached to some other garment which completely covers the neck, face or shoulders. That brazen theory was put forward by a witness who was not a general hat expert but merely claimed knowledge of ladies' hats and headwear.

The berets in question, affirmatively found to be dangerously flammable, are close fitting hats which concededly cover a part of the neck and face, and it is not denied that they also cover the ears. The appellees would have it that Congress, despite its specific language, only meant hats that totally cover the entire neck and face. What appellees avoid noting is that Congress was trying to protect the public from the very real danger of wearing a close fitting, flammable hat that could result in horrible injury before it could even be removed from a person's head. It is really a great pity that not only the expertness of the Commission and its sound common sense in obtaining the savings clause are brushed aside to perpetuate the political victory in the retention of headwear that no one should be allowed to inflict upon a public completely unaware of its terrible potential. The result before us is utterly wrong. I would reverse the judgment of the district court.

COCA-COLA COMPANY, ET AL. v. FEDERAL TRADE COMMISSION*

Civ. A. No. 16484—F.T.C. Docket 8855

(United States District Court, N.D. Georgia, Atlanta Div., May 16, 1972)

1. District Court Held Without Jurisdiction to Hear Suit by Soft Drink Manufacturer Seeking Dismissal of Commission Complaint.

   Federal district court was without jurisdiction of action by soft drink manufacturer and bottlers seeking dismissal of administrative complaint issued by Federal Trade Commission, and which Commission had refused to dismiss, for failure to join indispensable parties.

2. Ordinarily District Courts Lack Jurisdiction to Review Agency Actions.

   In view of statutory prescription of judicial review of agency action directly in Court of Appeals, district courts ordinarily lack jurisdiction to review agency action.

3. Only in Extraordinary Circumstances will Parties be Allowed to Deviate from Established Judicial Procedures.

   Where Congress has provided adequate procedure for judicial review of administrative action, procedure must be followed, and only in extraordinary cases will parties be allowed to deviate from statutory course and seek injunctive relief from district court, short-circuiting administrative procedures.

(Syllabus, with substituted captions, was taken from 342 F. Supp. 670)

Court held it has no jurisdiction to hear dismissal suit by soft drink manufacturers and bottlers for failure to join indispensable parties.

Miller, Martin, Hitching, Tipton, Lenihan, & Waterhouse, Chattanooga, Tenn., *King & Spalding, White & Chase,* Atlanta, Ga., for the Coca-Cola Co.

Kilpatrick, Cody, Rogers, McClatchey & Regenstein, Atlanta, Ga., for Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola

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*Reported in 342 F. Supp. 670 (1972). Fifth Cir., 475 F. 2d 299 (1973), see p. 557 herein, *cert. denied*, 414 U.S. 877, 94 S. Ct. 121 (1973). See also p. 446 herein.

Bottling Works (Thomas), Inc., & Coca-Cola Bottling Works 3rd, Inc.

Sutherland, Asbill & Brennan, Atlanta, Ga., for Elberton Coca-Cola Bottling Co., Roddy Mfg. Co., Westminster Coca-Cola Bottling Co., Inc., Coca-Cola Bottling Co. of Keene, Inc., Ann Arbor Coca-Cola Bottling Co., the Scioto Coca-Cola Bottling Co. & Texas Coca-Cola Bottling Co.

Ronald M. Dietrich, Gen. Counsel, Federal Trade Comm., Washington, D.C., for defendant.

ORDER

RICHARD C. FREEMAN, *District Judge.*

In this action for injunctive and declaratory relief, plaintiffs attack an interlocutory order of the Federal Trade Commission (hereinafter referred to as FTC) entered in an adjudicative proceeding pending before the FTC. Plaintiffs [671] are a soft drink manufacturer. The Coca-Cola Company, and ten bottling companies who package and distribute its products. Defendant is a regulatory agency of the United States—FTC. Plaintiffs assert that this court has jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1337 (antitrust), 28 U.S.C. § 1361 (mandamus) and 28 U.S.C. § 1651 (All Writs Act).

Plaintiffs have moved for a preliminary injunction. Defendant has moved to dismiss the action. On May 3, 1972 this court heard argument on the above motions.

STATEMENT OF THE CASE

Plaintiff, Coca-Cola, is a Delaware corporation with its principal office and place of business in Atlanta, Georgia. Coca-Cola is engaged primarily in the business of manufacturing syrups and concentrates used by over nine hundred (900) contract bottlers in the preparation of soft drink products under its trademarks, including the trademark Coca-Cola. The bottlers, licensed by Coca-Cola to sell in certain geographical areas, mix the concentrate purchased from Coca-Cola, package it in bottles and resell the product. In addition to manufacturing and selling soft drink products, Coca-Cola also operates bottling plants in twenty-six (26) cities and sells soft drink products to retailers in those areas.

Plaintiffs, Coca-Cola Bottling Co. (Thomas), Inc.; Coca-Cola Bottling Works (Thomas), Inc.; and Coca-Cola Bottling Works 3rd, Inc. (hereinafter referred to as Thomas Companies), are Delaware corporations with their principal offices and places of business in Chattanooga, Tennessee. The Thomas Companies are parent bottlers who have operated for many years under contract with Coca-Cola whereby they purchase concentrate from Coca-Cola for resale to numerous bottlers which have obtained licenses from the Thomas Companies to bottle and resell Coca-Cola products within certain geographical territories.

The remaining plaintiffs (hereinafter referred to as FTC Intervenor Bottlers) are corporations organized, existing and having their principal offices and places of business as follows: Elberton Coca-Cola Bottling Company, Elberton, Georgia; Roddy Manufacturing Company, Knoxville, Tennessee; Westminster Coca-Cola Bottling Company, Inc., Westminster, Maryland; Coca-Cola Bottling Company of Keene, Inc., Keene, New Hampshire; Ann Arbor Coca-Cola Bottling Company, Ann Arbor, Michigan; The Scioto Coca-Cola Bottling Company, Circleville, Ohio; Texas Coca-Cola Bottling Company, Abilene, Texas. The FTC Intervenor Bottlers are engaged in the processing and sale of Coca-Cola products in designated territories pursuant to bottler contracts.

Defendant, FTC, is an administrative agency of the United States charged with, among other things, the duty of investigating, issuing and prosecuting in its adjudicative proceedings alleged violations of the antitrust laws.

On July 15, 1971, the FTC issued an administrative complaint (Docket No. 8855) charging The Coca-Cola Company (hereinafter referred to as Coca-Cola), Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc. and Coca-Cola Bottling Works 3rd, Inc. with a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).[1] Specifically, the administrative complaint[2] charges that, in the course of their business, Coca-Cola and the Thomas Companies have entered into licenses [**672**] with their bottler customers whereby the bottlers agree not to resell Coca-Cola products outside a designated geographical area, and that such license provisions constitute an unfair method of competition.

Coca-Cola and the Thomas Companies filed an answer admitting the material facts in the complaint, including the existence of the territorial restrictions; but they denied the alleged violation of law. The FTC Intervenor Bottlers applied for and were granted permission to intervene in the proceeding.

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[1] Section 5(a) provides in part:

(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

* * * * * * *

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

[2] The FTC also issued administrative complaints involving seven (7) other soft drink manufacturers, alleging similar theories.

Plaintiffs filed motions to dismiss the administrative complaint in Docket 8855 for failure to join indispensable parties. In their motions, plaintiffs contended that all bottlers licensed to bottle and distribute Coca-Cola products are indispensable parties to the administrative adjudication and therefore must be joined. On March 23, 1972, the FTC denied plaintiffs' motions to dismiss.[3]

Plaintiffs instituted the present action seeking: (1) a declaratory judgment decreeing that the bottlers of plaintiff Coca-Cola and plaintiff Thomas Companies are indispensable to the FTC proceeding challenging the contractual provisions and, the FTC having willfully failed to join them as parties, the complaint therein should be dismissed; and (2) an injunction enjoining the FTC from conducting any further proceedings in Docket 8855 as long as the bottlers are not joined as parties to said proceeding, and, failing that, requiring defendant to dismiss the complaint therein.

Plaintiffs base the requests for relief on the allegations that unless the FTC is enjoined it will proceed with the adjudication without all the bottlers being parties and should the FTC prevail therein with respect to its challenge to the exclusive territorial provisions of the bottlers' contracts:

> (a) Plaintiffs Coca-Cola and the Thomas Companies would be subject to two inconsistent decrees, to wit: the decree of the United States District Court of Deleware [4] and the order of the Federal Trade Commission;

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[3] Plaintiffs initially presented their motions to the hearing examiner who denied them on January 7, 1972. Plaintiffs sought review of the hearing examiner's order by filing an application for permission to file an interlocutory appeal under the FTC's Rules of Practice (16 C.F.R. § 3.23) or, in the alternative, to treat the motions as certified to the Commission by the hearing examiner pursuant to FTC's Rules of Practice (16 C.F.R. § 3.22). Since the Commission found that the hearing examiner did not have authority to add parties, it dealt with plaintiff's motions under the latter Rule, stating that:

> The Commission has made a distinction however, between those instances in which the motion to dismiss challenges the Commission's legal power to issue the complaint and those in which it seeks to probe the Commission's discretion or judgment on whether or not a proceeding would be in the public interest. It is only in the latter instance in which the examiner is considered to be without authority to rule. See, The Drive-X Company, Inc., Docket No. 8615, Order Denying Application for Leave to File Interlocutory Appeal, or in the Alternative for an Order Requiring Certification of Question, June 10, 1964. While it is clear that the present situation falls within the former, *i.e.*, the category of cases challenging the Commission's legal authority to issue the complaint, and hence within the examiner's authority to decide, we have nevertheless determined that that question is so intertwined with the question of amending the complaint by the addition of parties that both should have been certified to the Commission. Order Ruling on Motions to Dismiss for Failure to Join Indispensable Parties, The Coca-Cola Company, et. al, Docket No. 8855 (March 23, 1972) at 4.

[4] Without passing on the merits of this contention the court makes the following comments. In *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.*, 269 F. 796 (D.Del. 1920) the court considered the legality of a 1894 contract between Coca-Cola and a predecessor to the Thomas Companies. Under that contract, Coca-Cola, which previously had sold syrup only through soda fountains, licensed the distribution of soft drink in bottles and granted exclusive right to establish plants throughout a large part of the United States. In 1919, Coca-Cola and the bottling company had a disagreement concerning a

[673] (b) The judicially declared property rights of the bottlers who are not parties, including the rights of said bottlers vis-a-vis other such bottlers, would be altered;

(c) All bottlers must have the opportunity to be heard further in other proceedings in defense of their property rights. As a result thereof, without the presence of the bottlers, Docket 8855 cannot result in effective relief of the kind sought by defendant Commission;

(d) Plaintiffs and the public would also be subject to multiple litigation and would be deprived of the right to a settlement of the dispute by wholes;

(e) The ultimate resolution of the matter will be inordinately delayed;

(f) The proceeding would have to be dismissed or repeated with the bottlers as parties;

(g) Bottlers might be forced out of business.

Plaintiffs contend that a continuation of the proceedings in Docket No. 8855 without the presence of the bottlers as parties will deprive plaintiffs of their rights to due process of law and to basic fairness under the Fifth Amendment to the Constitution of the United States and the Administrative Procedure Act.

Since defendant's motion to dismiss raises the issue of this court's jurisdiction to entertain the present action, the court will deal with it first.

JURISDICTION

[1] Although plaintiffs contend that the present action is a suit for a declaratory judgment and injunctive relief to protect plaintiffs' fundamental rights and to prevent the exercise of engaging in a potentially futile trial, the court believes that it is more appropriately characterized as a collateral suit to review agency action which is procedural in nature. Thus, the court will treat this as an action seeking judicial review of an administrative decision.

Both plaintiffs and defendant concede that the FTC's order denying plaintiffs' motion to dismiss is reviewable. Therefore, the questions for this court to determine are: first, when is the

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[4] (Continued)
price rise in the cost of syrup. Coca-Cola attempted to unilaterally terminate the contract. The bottling company sued for specific performance. Coca-Cola defended, *inter alia*, on the grounds that the terms of the contract violated federal antitrust laws. The court held that the contract was not terminable at the will of Coca-Cola. The court also held that the various restrictions in the contract were ancillary to the main purpose of the contract which was to develop a system of distributing the soft drink in bottles. Thus, the "territorial provision", whereby Coca-Cola agreed to "select [the bottling company] as its sole and exclusive customer and licensee for the purpose of bottling Coca-Cola in the territory heretofore acquired * * *" (269 F. at 802), was found to be reasonable. However, there is no mention in the case of any provision whereby the bottlers agree not to sell Coca-Cola products outside a certain territory which is the provision under attack in the present FTC proceeding Docket No. 8855. Thus, it would appear that unless such a provision can be inferred from the above quote, the legality of the "territorial provision" under attack in the FTC proceedings was not ruled upon by the Delaware Court.

FTC's action reviewable; and second, by whom is it reviewable? The first question presents the issues of ripeness and exhaustion, while the second question presents the issue of the proper court —District Court or Court of Appeals. In determining the answers to these questions the court will look first to the statutory law and then to the case law.

STATUTORY LAW

Congress has delegated the administration of the Federal Trade Commission Act (15 U.S.C. § 41 *et seq.*) (hereinafter referred to as the Act) to the FTC. That delegation gives the FTC jurisdiction to institute and conduct adjudicative proceedings whenever it has reason to [674] believe that an unfair method of competition is being used and a proceeding would be in the public interest.[5] If, as a result of such adjudicative proceeding, the FTC finds that there has been an unfair method of competition practiced, it has the power to issue cease-and-desist orders.[6] Section 5(c) of the Act confers jurisdiction to review cease-and-desist orders upon the courts of appeals.[7] That jurisdiction is made exclusive by Section 5(d).[8] The Act is silent as to any other type of judicial review. Since no cease-and-desist order has been entered, this court must look elsewhere.

Plaintiffs assert that the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*) makes such agency action reviewable at this time. The review provision of Section 10 of that Act provides in part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. 5 U.S.C. § 704.

Before determining when the above section makes the FTC's denial of plaintiffs' motions to dismiss reviewable, it is necessary to characterize the denial of a motion to dismiss in an agency adjudication.

Since the agencies frequently refer to the Federal Rules of Civil Procedure to make procedural determinations in their proceedings, the court will use the federal judicial proceedings by way of analogy. In a proceeding before a federal district court the denial of a motion to dismiss is not a final order and therefore is not appealable. 2A Moore's Federal Practice, Section 12.14 at 2338. Thus, a denial of a motion to dismiss is interlocutory in character. Under the Federal Rules of Appellate Procedure, Rule 5(a), appeal of an interlocutory order may be had under certain circumstances. However, Federal Rules of Appellate Procedure, Rule 20, excludes the application of Rule 5 interlocutory appeals from review or enforcement of agency orders. Thus, it would appear that Congress did not provide for any review of interlocutory agency orders in the Federal Rules.

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[5] 15 U.S.C. § 45 *et seq.* Docket 8855 is such a proceeding.

[6] Plaintiffs do not contest the FTC's authority to conduct adjudicative proceeding dealing with alleged unfair methods of competition. Neither do plaintiffs contest the FTC's authority to issue cease-and-desist orders to prevent such practices.

[7] 15 U.S.C. § 45(c).

[8] 15 U.S.C. § 45(d).

Turning now to the review provisions of Section 10 of the Administrative Procedure Act, the first sentence addresses itself to agency action which is reviewable by statute or final in character. The court has determined that the Federal Trade Commission Act does not provide for review of the denial of a motion to dismiss and the court is not aware of any other statutory provision making such action reviewable. The court has characterized the FTC's action as interlocutory rather than final. Thus, the first sentence of Section 10 does not confer the power on this court to review the FTC's action. The second sentence of Section 10 provides for review of "preliminary, procedural, or intermediate agency action" on the review of final agency action. Since interlocutory is synonymous with intermediate, the Administrative Procedure Act provides for review of the FTC's denial of plaintiffs' motion to dismiss only upon review of a cease-and-desist order entered by the FTC as a result of the adjudicative proceeding in Docket 8855. However, such review is in the exclusive jurisdiction of the Court of Appeals. Thus, there is no statutory basis for this court's jurisdiction over the present action. Therefore, if this court has jurisdiction, then it must be conferred by case law.

CASE LAW

[675] [2, 3] In view of the statutory prescription of judicial review of agency action directly in a court of appeals, district courts ordinarily lack jurisdiction to review agency action. Thus, where Congress has provided an adequate procedure for judicial review of administrative action, that procedure must be followed. Only in extraordinary cases will parties be allowed to deviate from this statutory course and seek injunctive relief from the district court, short-circuiting the administrative procedures. The court agrees with and adopts the reasons for the exhaustion doctrine as stated by Mr. Chief Justice Burger, while a circuit

judge, in *Wolf Corp.* v. *Securities and Exchange Commission*, 115 U.S.App. D.C. 75, 317 F.2d 139 (1963):

> Judicial power to impose prior restraint is not called an extraordinary remedy without reason. Even as between private parties the ordinary remedy is legal action after injury. Prior restraint is granted only upon a strong showing and is subject to definite and well established limitations. Prior restraint against governmental action, regular on its face and under color of authority, is even more cautiously exerted. Still higher hurdles stand in the way of prior restraint against the processes of a regulatory body exercising quasi-judicial powers which can be judicially reviewed as a matter of right before they become final. In this third category the jurisdiction of the regulatory or administrative body is exercised within the framework of a statutory scheme in which it acts as an arm of Congress; moreover it has established patterns of procedure and acts in a context where courts have long acknowledged a considerable deference to the specialized experience and competence of such a body. To exert judicial power to stop processes of this third category, which can always be judicially reviewed when the story is fully told and recorded, is an extraordinary step in the usual as well as the legally artful sense of that word. One who seeks our employment of such powers must make the strongest kind of showing; his jurisdictional "t's" must be crossed and the factual "i's" dotted.
>
> The reasons for this restrained attitude on our part are plain if we look at the whole panorama. When Congress vested broad powers in the Commission it was not unaware of possible risks of misuse or even abuse of those powers by administrators. But except in the very unusual and limited circumstances Congress did not contemplate a grant of jurisdiction to the courts to prevent abuse or misuse of power by prior restraint of the exercise of the powers. Instead judicial review after full hearing was accorded. While this does not preclude judicial restraint in advance of the administrative process in all circumstances, such relief is to be very sparingly applied and is limited to cases where on its face the contemplated hearing or other administrative process, if consummated, would be set aside on review on procedural grounds. 317 F.2d at 142–143.

There are however cases which recognize very narrow and extraordinary exceptions to the general rule requiring exhaustion of administrative remedies. Plaintiffs contend that the present action falls within the limited exceptions carved out of the exhaustion doctrine by the cases. Although most of the exceptions have been established in labor cases, the principles established are equally as applicable to actions before the FTC.

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938) established that a district court did not have jurisdiction to enjoin the hearing of a case before, or to review any interlocutory order of, the National Labor Relations Board because Congress had vested the exclusive power of review in the Circuit Courts of Appeal and for the additional reason that "* * * no one is entitled to judicial relief for a supposed or threatened injury **[676]** until the prescribed administrative remedy has been exhausted." *Myers*, *supra*, at 50, 58 S.Ct. at 463. The *Myers* ruling has consistently been approved and the principle has become well established that a district court does not possess the power to police either the procedural or the substantive purity of a proceeding in progress before an agency. *Bokat* v. *Tidewater Equipment Co.*, 363 F.2d 667 (5th Cir. 1966).

The *Myers* principle is, however, not without exceptions and case law has allowed district court interference in agency proceedings in a few narrowly circumscribed instances, all of which have been thought to be based upon "exceptional circumstances". *Boire* v. *Miami Herald Publishing Company*, 343 F.2d 17 (5th Cir. 1965).

The first exception is where the suit tenders a "public question particularly high in the scale of our national interest because of their international complexion." *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17, 83 S.Ct. 671, 675, 9 L.Ed.2d. 547 (1963). There the court permitted review of an NLRB election order because of the international overtones involved in the Board's application of the National Labor Relations Act to foreign maritime crews. In the present case, there is no international implication or urgency as there was in *Sociedad Nacional.* Thus, the present action does not fall within this exception.

A second exception to the rule of exhaustion was fashioned by the Second Circuit in *Fay* v. *Douds*, 172 F.2d 720 (2d Cir. 1949). This exception allows a district court to assert jurisdiction where there has been a substantial showing that agency action has violated the constitutional rights of the complaining party. This exception has only limited application in the Fifth Circuit. See *Boire* v. *Miami Herald Publishing Company,* 343 F.2d. 17, 21 at n. 7 (5th Cir. 1965). Plaintiffs may be attempting to invoke this exception by alleging that by failing to join all the Coca-Cola bottlers as indispensible parties the FTC is denying them due process and basic fairness. The court finds this proposition has no merit. Since a party to a judicial action before a federal district court could not be said to be denied due process by a court's denial of a motion to dismiss for failure to join indispensable parties, the same must hold true for a party to an administrative action. See *Frito-Lay* v. *Federal Trade Commission* 380 F.2d 8 (5th Cir. 1967).

A third exception was developed by the court in *Leedom* v. *Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). There the court permitted review of the NLRB's certification of a bargaining unit which included both professional and nonprofessional employees even though the professional employees had not consented to inclusion in the otherwise nonprofessional unit. This action was in direct defiance of an express provision of the National Labor Relations Act. The District Court, whose judgment was affirmed by the Second Circuit, held that the Board had acted in excess of its powers and set aside the Board's determination even though it was not a "final order." On appeal the Board contended that the District Court lacked jurisdiction to entertain the suit. In this extreme factual context the Supreme Court held that the District Court had original jurisdiction:

> This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. * * * Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given. 358 U.S. at 188, 189, 79 S.Ct. at 184.

Leedom could easily have opened the doors to the Federal District Courts for numerous attacks on agency action. However the exception created by *Leedom* [677] has remained very narrow. The narrowness of this exception was pointed out by the Fifth Circuit in *United States* v. *Feaster,* 410 F.2d 1354 (5th Cir. 1969):

> * * * *Leedom* v. *Kyne* represents only a narrow and rarely successfully invoked exception to the doctrine that exhaustion of administrative procedure is a condition precedent to federal court jurisdiction. Under this exception access to the courts is accorded only if the Mediation Board's determination is infused with error which is of a *summa* or *magna* quality as contraposed to decisions which are simply *cum* error. Only the egregious error melds the Board's decision into justiciability. Lesser malignancies thwart the jurisdiction of the courts. (cases cited) at 1368.

In the present action there is no statutory prohibition or provision of the Federal Trade Commission Act which the FTC is alleged to have violated. Even if on review by the Court of Appeals it was found that the FTC should have joined all the bottlers as indispensable parties, the FTC's failure to do so is not such an abuse by it that it is obvious on its face that it has acted incorrectly. Even if it was, the court does not believe that this is the kind of agency action protected against by the *Leedom* exception. Accordingly the court finds that the present action does not fall within this exception.

A fourth exception is recognized by the Fourth Circuit. In

Deering-Milliken Inc. v. *Johnston*, 295 F.2d 856 (4th Cir. 1961), an action was brought pursuant to Section 10(e) of the Administrative Procedure Act [5 U.S.C. § 1009(e)] to compel agency action wrongfully withheld. The Court concluded that Section 6(a) of the Administrative Procedure Act [5 U.S.C. § 1005(a)] gave the complaining party a "specific statutory right" to have his hearing concluded with reasonable dispatch and that, as judicial review to prevent delay was adequate only through district court intervention, a district court was vested with the power to act. Delay on the part of the agency was considered implicitly to constitute exhaustion of administrative remedies. This exception has no application to the present case since there has been no delay on the part of the FTC.

The Court has also considered the other cases relied on by plaintiffs such as: *McKart* v. *United States*, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 39 S.Ct. 375, 63 L.Ed. 772 (1919); *Jewel Companies, Inc.* v. *Federal Trade Commission*, 432 F.2d 1155 (7th Cir. 1970); *Davis* v. *Secretary, Dept. of Health, Education and Welfare*, 386 F.2d 429 (4th Cir. 1967); *Wolf Corp.* v. *Securities Exchange Commission*, 115 U.S.App.D.C. 75, 317 F.2d 139 (1963); *The Coca-Cola Company* v. *Federal Trade Commission* (N.D.Ga.1972), Civil Action No. 15436; *Lehigh Portland Cement Co.* v. *Federal Trade Commission*, 291 F.Supp. 628 (E.D.Va.1968); *Union Bag—Camp Paper Corp.* v. *Federal Trade Commission*, 233 F.Supp. 660 (S.D.N.Y.1964); *Yanish* v. *Wixon*, 81 F. Supp. 499 (N.D.Cal.1948). None of these cases creates any new exception or broadens any of the above exceptions.

Thus, this court has been unable to find any case which has broadened the exhaustion doctrine to the point where the denial of a motion to dismiss for failure to join indispensable parties by an administrative agency can amount to the kind of agency action which will create jurisdiction in a Federal District Court to grant review or relief of any kind.

This court has been unable to find jurisdiction in either the statutory law or the case law to entertain the present action. Thus, the answers to the questions before the court as to when review of the FTC action is available and by whom the FTC's action is reviewable, are at the time any cease-and-desist order is reviewed and that review must be by the Court of Appeals.

Accordingly, defendant's motion to dismiss is hereby granted.

It is so ordered.

NABISCO, INC. v. FEDERAL TRADE COMMISSION*

No. 25231—F.T.C. Docket 5013

(United States Court of Appeals, Fifth Circuit, May 19, 1972)

1. **COMMISSION WITHOUT AUTHORITY TO MODIFY CONSENT ORDER UNILATERALLY.**

   Federal Trade Commission was without authority to unilaterally modify consent cease and desist order.

2. **INVALIDITY OF MODIFYING ORDER ALSO INVALIDATES SUBSEQUENT ENFORCEMENT PROCEEDING.**

   Where order of Federal Trade Commission purporting to modify cease and desist order was invalid, subsequent enforcement proceedings were also invalid.

3. **COMMISSION COULD MODIFY ORDER BY FILING NEW COMPLAINT CHALLENGING PRICING SCHEDULES OR BY VALID PROCEDURAL MEANS.**

   Federal Trade Commission could seek modification of consent cease and desist order through valid procedural means or could challenge petitioner's pricing schedules by filing of new complaint.

4. **COURT WILL NOT REMAND CASE TO DETERMINE WHETHER LACK OF COMPETITIVE INJURY WAS A DEFENSE TO PRICE DISCRIMINATION CHARGES.**

   Where appeal from Federal Trade Commission was born entirely of invalid enforcement proceedings, court would not remand for hearings to determine whether under antecedent order lack of competitive injury was contemplated as defense to price discrimination charges.

5. **COURT WILL NOT SPECULATE AS TO WHICH REGULATIONS MIGHT BE APPLICABLE IN NEW COMMISSION PROCEEDINGS.**

   Court of Appeals would not speculate as to which Federal Trade Commission rules and regulations might be applicable in event Commission instituted new proceedings against petitioner under Robinson-Patman Act.

(The syllabus, with substituted captions, is taken from 459 F.2d 1023).

Following a remand, Court held the Commission was without authority to unilaterally modify consent order. Modified order set aside and enforcement proceedings discontinued, cease and desist order reinstated.

J. Randolph Wilson, *Geoffrey R. W. Smith*, Washington, D. C., for petitioner.

J. B. Truly, Asst. Gen. Counsel, *Thomas F. Howder*, *Harold D. Rhynedance, Jr.*, *Miles J. Brown*, Attys., *Ronald M. Dietrich*, Gen. Counsel, Federal Trade Comm., Washington, D. C., for respondent.

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* Reported in 459 F.2d 1023 (1972). For case before Commission see 38 F.T.C. 213, 50 F.T.C. 932, and 81 F.T.C. 196.

Before RIVES, BELL and MORGAN, *Circuit Judges.*

PER CURIAM:

[**1024**] This appeal arises out of the mandate of this court which was issued in connection with a prior appeal. We refer to our opinion therein for a statement of the background facts and circumstances. *National Biscuit Company* v. *Federal Trade Commission*, 5 Cir., 1968 400 F.2d 270.

Briefly, the case may be stated as follows. In 1967 the FTC instituted proceedings against Nabisco to enforce a 1954 modification of a 1944 consent cease and desist order. The 1954 modification had been unilaterally implemented by the Commission, apparently to abrogate Nabisco's claimed right under the 1944 order to use lack of competitive injury as a defense to price discrimination charges.

Nabisco challenged the validity of the 1967 proceedings in this court. We concluded that the validity of those proceedings turned on the threshold question of whether the 1944 order was in fact a consent order. The court also noted the presence of additional issues:

> Additional issues involve the propriety of the Commission's actions measured by the criteria governing the modification of orders under Section 11 of the Clayton Act, prior to its amendment in 1959, and the propriety of the Commission's orders related to the persent enforcement proceedings as measured by the Commission's rules of practice and the Administrative Procedure Act. Finally, the peripheral but substantively basic issue concerning cost justification and competitive effects of Nabisco's discount schedule remains unanswered. 400 F.2d at 274.

After noting that no FTC hearings had been held in connection with any of these issues, we stayed the 1967 proceedings and remanded the case to the FTC "for such hearings as may be indicated" by the court's opinion.

On remand, the Commission limited the hearings solely to the question whether the 1944 order was a consent order. The hearing examiner answered the question in the affirmative. The FTC acquiesced in that finding and certified the record of the hearings to this court, thus precipitating the present case.

[1] Nabisco asks that we remand this case once again and that we instruct the Commission to hold hearings to resolve the additional issues noted *supra* in our prior opinion. Since we agree that the 1944 order constitutes a consent order, the 1954 modification is without validity. Viewed in that light, we are persuaded that

the additional issues are not ripe for consideration, either by this court or by the FTC.

[2] The first additional issue was the propriety of the 1954 modification by the FTC, measured by the criteria governing modification. That modification has now been declared invalid. Similarly, there is no need to inquire into the propriety of the Commission's orders related to the 1967 enforcement proceedings since those proceedings were also invalid. Only if the Commission had determined that the 1944 order was not a consent order would resolution of these two issues be necessary.

[3, 4] The only question left unresolved has to do with cost justification and the competitive effects of Nabisco's discount schedules which are on file with the FTC. That issue is live in one sense. The Commission may bring a new action, either to modify the 1944 consent decree through valid procedural means or to challenge the Nabisco pricing schedules by the filing of a new complaint. See *Federal Trade Commission* v. *Jantzen, Inc.*, 1967, 386 U.S. 228, 235, 87 S.Ct. 998, 18 L.Ed.2d 11. In either event, the question whether lack of competitive effect may be asserted as a defense under the 1944 consent order will be aired. The issue raised in the 1967 proceedings was not whether such a defense was available under the 1944 order but whether it was cognizable under the 1954 modification. Since this appeal is born entirely of the 1967 proceedings, now invalid, we will not remand the case for hearings to determine whether, under the 1944 order, lack of competitive injury was contemplated **[1025]** as a defense to price discrimination charges.

[5] Nor will we rule, as Nabisco asks, on which of the FTC rules and regulations would be applicable in the event the FTC institutes new proceedings against Nabisco. It may be that no further action will be taken. We can only speculate as to the form of the additional proceedings if additional proceedings are instituted. Only in the context of concrete litigation can this court determine which Commission rules and regulations are applicable.

In sum, we dissolve the order of this court heretofore entered which stayed the 1967 proceedings. The 1954 modification of the 1944 order will be vacated and set aside and the 1944 order reinstated as a consent order. It follows that the FTC will discontinue all action against Nabisco which has been taken pursuant to the 1967 proceedings and that those proceedings will be dismissed.

It is so ordered. 15 U.S.C.A. § 21(a).

FEDERAL TRADE COMMISSION v. H. R. GIBSON, SR., ET AL.*

No. 71-3080—F.T.C. File 691 0058

(United States Court of Appeals, Fifth Circuit, May 19, 1972)

1. REORGANIZATION ACT OF 1949 DOES NOT GRANT UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWERS OF CONGRESS TO THE PRESIDENT.

   Reorganization Act of 1949 permitting reorganization plans which authorizes any officer to delegate any of his functions where appropriate does not grant an unconstitutional delegation of legislative powers of Congress to the President.

2. ISSUANCE OF SUBPOENAS DUCES TECUM WAS PROPERLY DELEGATED TO ASSISTANT ATTORNEYS IN 11 F.T.C. FIELD OFFICES BY REORGANIZATION PLAN NO. 4.

   Authority to issue investigative subpoenas duces tecum was properly and unequivocally delegated to the assistant attorneys in charge of the 11 Federal Trade Commission field offices by an order of the Commission whose power to make such delegation was derived from Reorganization Plan No. 4, contrary to claim of parties that the subpoenas issued and signed by an assistant attorney were invalid on ground that only members of Commission could validly sign and issue subpoenas.

3. POWER TO SUBPOENA WITNESSES AND DOCUMENTS NECESSARILY ENTAILED POWER TO SIGN THE SUBPOENAS.

   Since power of Federal Trade Commission to require by subpoena and subpoena duces tecum the attendance and testimony of witnesses and production of documents was properly delegated to the assistant attorneys in charge of field offices, the power to require the attendance necessarily entailed power to sign [605] the subpoenas.

4. LANGUAGE OF SUBPOENA SPECIFICATIONS NEITHER AMBIGUOUS NOR IMPRECISE, AND NOT IN VIOLATION OF FOURTH AMENDMENT.

   Review of specifications in subpoena duces tecum issued by Federal Trade Commission in connection with investigation of pricing policies of company and its franchisees showed the language thereof was neither ambiguous nor imprecise on its face and left no doubt about identity of documents whose disclosure was sought, despite claim that specifications were so broad and indefinite as to violate Fourth Amendment.

5. INFORMATION SOUGHT BY COMMISSION RELATIVE TO POSSIBLE VIOLATION OF CLAYTON ACT WAS NOT IRRELEVANT TO INVESTIGATION.

   Examination of specifications of subpoenas duces tecum in connection with Federal Trade Commission's investigation of pricing policies of company and its franchisees in order to determine whether they have knowingly induced or received discriminations in price prohibited by Clayton Act from various suppliers of milk and dairy products disclosed that the information sought was not irrelevant to the investigation.

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* Reported in 460 F.2d 605 (1972).

6. **Whether or not Activities of Company were in Interstate Commerce is Premature on Appeal from Subpoenas.**

Determination of jurisdictional issue of whether or not activities of company, for which a subpoena duces tecum was issued with regard to Federal Trade Commission investigation into its pricing policy, were in interstate commerce would be premature on appeal from order requiring compliance with the subpoenas.

7. **Subpoenas Issued by Administrative Agencies are Enforceable where Evidence Establishing Interstate Commerce is in Possession of suspected Violator, and He may not Litigate Jurisdictional Issue as Defense to Subpoenas Enforcement.**

Subpoenas duces tecum issued by federal administrative agencies are enforceable where evidence necessary to establish interstate nature of commerce involved is in possession of suspected violator and can only be secured by such subpoena, and hence suspected violator may not litigate jurisdictional issue as a defense to subpoena enforcement proceeding.

(The syllabus, with substituted captions, taken from 460 F.2d 605)

On appeal, Court held the Commission may delegate power to issue subpoenas to its 11 assistant attorneys in its field offices, such power being delegated by Reorganization Plan No. 4.

Bardwell D. Odum, Dallas, Tex., for respondents-appellants.

Eldon B. Mahon, U.S. Atty., Dallas, Tex., *Howard Shapiro*, Atty., *Ronald M. Dietrich*, Gen. Counsel, *Nicholas S. Reynolds*, Atty., *Harold D. Rhynedance*, Asst. Gen. Counsel, Federal Trade Comm., *Bruce D. Wilson*, Chief, *Howard Epstein*, *C. Coleman Bird*, Consumer Affairs Section, Antitrust Div., *Walker B. Comegys*, Acting Asst. Atty Gen., Dept. of Justice, Washington, D. C., for petitioner-appellee.

Before AINSWORTH, GODBOLD and MORGAN, *Circuit Judges.*

PER CURIAM

This is an appeal from an order of the district court requiring that appellants H. R. Gibson, Sr., H. R. Gibson, Jr., and G. P. Gibson comply with three identical subpoenas *duces tecum* issued by the Federal Trade Commission in connection with an investigation of the pricing policies of the Gibson Products Company and its franchises. Finding the arguments of appellants to be without merit, we affirm the district court's order.

I.

The subpoenas in question were issued and signed by the Assistant Attorney in Charge of the New Orleans Field Office of the FTC. Appellants contend that the subpoenas were not validly issued in that only members of the Commission may validly sign and issue subpoenas. They argue that power to sign subpoenas has been improperly delegated to lower Commission officials. We disagree.

[607] [1, 2] The authority to issue investigative subpoenas *duces tecum* was properly and unequivocally delegated to the Assistant Attorneys in charge of the eleven FTC field offices by a Commission order which became effective on July 1, 1970.[1] The Commission's power to make such a delegation of authority is derived from Reorganization Plan No. 4. 1961 U.S.Code Cong. & Admin.News, p. 1358, which provides as follows:

> In addition to its existing authority, the Federal Trade Commission hereinafter referred to as the "Commission," shall have the authority to delegate, by published order or rule, any of its functions to * * * an employee * * *.

Reorganization Plan No. 4 was promulgated by the President pursuant to the authority granted by the Reorganization Act of 1949, 5 U.S.C. § 901 *et seq.* That Act expressly permits reorganization plans which involve the "authorization of any officer to delegate any of his functions" where appropriate to effectuate any of the Act's purposes. 5 U.S.C. § 903(a) (5).

Appellants are aware of the existence of these statutory materials. However, they contend that the Reorganization Act of 1949 is an unconstitutional delegation of the legislative powers of Congress to the President. Since appellants cite no authorities which even remotely support this proposition, we reject the argument as being frivolous.

Secondly, appellants contend that Reorganization Plan No. 4 does not authorize the delegation of the power to "sign" subpoenas even though it concededly authorizes delegation of the power to "issue" subpoenas. As we understand the argument, it is that the power to "sign" subpoenas is a power which resides with the individual Commissioners and is not possessed by the Commission as a whole. See 15 U.S.C. § 49. Since Reorganization Plan No. 4 literally authorizes the delegation of the functions of the Commission but not of the individual Commissioners, it is said that it does not authorize delegation of the power to sign subpoenas.

[3] We conclude that this asserted distinction is unsupportable. The Commission is explicitly given the power "to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under

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[1] The order, published at 35 Fed.Reg. 10627 (170) provides, inter alia:
[t]he commission or any member thereof may issue a subpoena—and the attorneys in charge and *assistant attorneys in charge of the Commission's Field Offices,* pursuant to delegation of authority by the Commission, without power of re-delegation, *also may issue investigative subpoenas,* * * * (Emphasis supplied.)

investigation." 15 U.S.C. § 49. This power was properly delegated to the Assistant Attorneys in charge of the field offices. Since the power to require the attendance of witnesses by subpoena necessarily entails the power to sign the subpoena, we conclude that the power to "sign" subpoenas has also been validly delegated.

Cudahy Packing Company v. *Holland*, 315 U.S. 357, 62 S.Ct. 651, 86 L.Ed. 895 (1942) relied upon by appellants as supporting this argument was decided prior to the Reorganization Act of 1949. More recently, a delegation of the power to sign subpoenas which is very similar to that involved here has been approved by this court. See *United States* v. *Marshall Durbin & Co.*, 363 F.2d 1 (5 Cir. 1966).

II.

[4] Appellants contend that the specifications attached to the subpoenas are so broad and indefinite as to violate the Fourth Amendment. Appellants have not, however, specified the particular language in the specifications which they regard as being vague. We have carefully reviewed the specifications. The language does not appear ambiguous or imprecise on its face nor does it leave any doubt about the identity of the **[608]** documents whose disclosure is sought. We conclude, therefore, that this argument is without merit. See *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946).

III.

[5] Appellants urge that enforcement of the subpoenas should be denied because the information and documents sought are not relevant or material to the investigation of Gibson Products Company which has been authorized by the Commission. By a resolution dated September 17, 1969, the Commission authorized an investigation of appellants' business practices to determine whether appellants may have:

> * * * knowingly induced or received discriminations in price prohibited by Section 2(a) of the amended Clayton Act from various suppliers of milk and dairy products and obtained discriminatory prices from milk and dairy products suppliers through unfair methods of competition in commerce or unfair acts or practices in commerce, and sold milk and dairy products at unreasonably low or below cost prices to the injury of competition in the retail and wholesale sale of milk and dairy products.

We have reviewed the specifications and cannot conclude that the information sought is irrelevant to this investigation. The bulk of the information sought in specification 1 is essential to determine the extent of appellants' actual control over the purchasing and selling practices of their various franchisees, licensees, and subsidiaries. Specification 2 focuses on eight stores and requests the retail prices charged for milk, as well as expenses and net profits or loss on food products broken down by departments. This request is patently relevant to the Commission's investigation of whether Gibson stores have been selling milk and milk products at unreasonably low or below cost prices to the detriment of competition.

IV.

[6] Gibson Products Company does business in 27 states. Notwithstanding this fact, appellants contend that enforcement of the subpoenas should be denied because their activities are not in interstate commerce. See 15 U.S.C. §§ 13, 45. Because a determination of this jurisdictional issue by the federal courts would be premature at this stage of the proceedings, we reject this contention.

[7] The role of the federal courts in reviewing the jurisdictional determinations of federal administrative agencies during preliminary agency investigations is a narrowly restricted one. The Supreme Court defined that role in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 214, 66 S.Ct. 494, 508, 90 L.Ed. 614 (1946) as follows:

> We think, therefore, that the Courts of Appeals were correct in the view that Congress had authorized the Administrator, rather than the District Courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence on that question, by seeking the production of petitioner's relevant books, records and papers.

The rationale of the *Oklahoma Press* rule is that it allows enforcement of subpoenas where the evidence necessary to establish the interstate nature of the commerce involved is in the possession of the suspected violator and can be secured only by such a subpoena. Under this rule, appellants may not litigate the jurisdictional issue as a defense in a subpoena enforcement proceeding.

V.

We have carefully considered the numerous other contentions made by appellants and conclude that they are without merit.

Affirmed.

PEPSICO, INC. v. FEDERAL TRADE COMMISSION *

No. 72 Civ. 1770—F.T.C. Docket 8856

(United States District Court, S.D., New York, June 2, 1972)

1. ORDINARILY FEDERAL DISTRICT COURT LACKS JURISDICTION TO REVIEW INTERLOCUTORY ADMINISTRATIVE AGENCY DECISION

[397] Federal district court ordinarily lacks jurisdiction to review interlocutory administrative agency decision.

2. MOTION FOR PRELIMINARY INJUNCTION DENIED WHERE DENIAL OF MOTION TO DISMISS BY AGENCY WAS NOT A FINAL ORDER REVIEWABLE BY FEDERAL COURTS

Federal Trade Commission's denial of motion to dismiss, for nonjoinder of individual bottlers, a proceeding brought against soft drink manufacturer allegedly engaging in unfair methods of competition was not a final order which could be reviewed by federal courts prior to termination of agency proceedings and manufacturer's motion for preliminary injunction would be denied.

3. WHERE IMPORTANT CONSTITUTIONAL RIGHT HAS BEEN VIOLATED, COURT MAY GRANT REVIEW PRIOR TO END OF PROCEEDING

Where administrative agency has violated important constitutional right, court may grant judicial review prior to termination of administrative proceedings.

4. COURT MAY INTERVENE WHERE ADMINISTRATIVE AGENCY ACTS IN EXCESS OF ITS DELEGATED POWERS

Where administrative agency acts in excess of its delegated powers and contrary to applicable statute, court may intervene prior to termination of administrative proceedings.

5. COURT MAY GRANT REVIEW PRIOR TO END OF ADMINISTRATIVE PROCEEDINGS WHERE HIGH NATIONAL OR INTERNATIONAL FEATURES ARE INVOLVED

Where administrative proceeding involves question of high national interest because of international complexities, court may grant review prior to termination of administrative proceedings.

(The syllabus, with substituted captions, taken from 343 F. Supp. 396)

On appeal, Court held that soft drink manufacturer's motion to dismiss case for nonjoinder of individual bottlers be denied because proceeding was not yet final.

Kaye, Scholer, Fierman, Hays & Handler, by *Milton Handler,* New York City, for plaintiff.

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*Reported in 343 F. Supp. 396 (1972). For case before the United States Court of Appeals for the Second Circuit see 472 F.2d 179, and page 407 herein. For the case before Commission see ——— F.T.C. ———.

Whitney North Seymour, Jr., U.S. Atty., for the S.D. of New York, by *Richard S. Toder,* Asst. U.S. Atty., New York City, for defendants.

Hughes, Hubbard & Reed, by Robert J. Sisk, New York City, for the intervenor Pepsi-Cola Bottling Co. of Corvallis, Inc.

CANNELLA, *District Judge.*

Plaintiff's application for a preliminary injunction, made pursuant to Rule 65(a) of the Federal Rules of Civil Procedure (F.R.Civ.P.), is denied.

Defendants' motion to dismiss the complaint for lack of jurisdiction over the subject matter, made pursuant to Rule 12(b) (1), F.R.Civ.P., is granted.[1]

On July 15, 1971 the Federal Trade Commission instituted proceedings against the plaintiff and other soft drink manufacturers alleging violations of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45), which prohibits unfair methods of competition. The complaint against the plaintiff challenges the validity of exclusive bottling agreements in effect between the plaintiff and some 513 franchised Pepsi-Cola bottlers, wherein the bottlers have agreed not to sell PepsiCo products outside of a designated territory.

In the course of the proceedings before the FTC, the plaintiff moved before the hearing examiner to dismiss the complaint for non-joinder of each of the 513 bottlers as indispensable parties. The examiner denied the plaintiff's motion, stating in part that as a practical matter it was not feasible to attempt to join all of the bottlers as parties since it would create an unmanageable situation for trial purposes and some bottlers might not be subject to jurisdiction if they operate within a small territory within a state. However, before this order was issued, the examiner indicated at a hearing that all of the bottlers were free to intervene in the proceedings.[2] **[398]** Three individual bottlers and the Pepsi-Cola Bottling Association, an organization representing 512 of the 513 bottlers, elected to intervene while none of the remaining 510 bottlers have sought to intervene up to this point.

On March 23, 1972 the FTC upheld the examiner's decision denying the motion to dismiss the complaint. The Commission stated, after citing numerous authorities, that it was a well established rule that third parties to a contract, the legality of which is being challenged under the antitrust laws, need not be joined in a suit against the first party.[3] Thereafter, on April 28, 1972, the plaintiff instituted this action in this District Court seeking a declaratory judgment and injunctive relief to prohibit the FTC from conducting any further proceedings against the plaintiff unless the bottlers were joined as indispensable parties.

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[1] A motion made by Pepsi-Cola Bottling Company of Corvallis, Inc. to intervene in support of the application for a preliminary injunction, made pursuant to Rule 24, F.R.Civ.P., was granted without objection during oral argument. See Hearing Minutes, pp. 2–3.

[2] The examiner's order provided that the intervenors would have certain rights, within the control of the examiner, to object to questions, to cross-examine witnesses, to offer evidence, and to file proposed findings of fact and briefs. Absent, of course, would be the right of the intervenors to appeal any action taken by FTC.

The court concludes that it has no jurisdiction to consider the interlocutory order of the Federal Trade Commission because the plaintiff has not exhausted its administrative remedies.[4] In view of the absence of jurisdiction, the court takes no position on the issue of indispensable parties.

[1] It is a well settled principle of law that a federal district court ordinarily lacks jurisdiction to review interlocutory administrative agency decision.[5] See, *e.g.*, *Boire* v. *Greyhound Corporation*, 376 U.S. 473, 84 S.Ct. 894, 11 L.Ed.2d 849 (1964); *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938). One court stated the rule as follows in *Wolf Corporation* v. *Securities and Exchange Commission*, 115 U.S.App.D.C. 75, 317 F.2d 139 (1963) (Burger, J.):

> Judicial power to impose prior restraint is not called an extraordinary remedy without reason. Even as between private parties the ordinary remedy is legal action after injury. Prior restraint is granted only upon a strong showing and is subject to definite and well established limitations. Prior restraint against governmental action, regular on its face and under color of authority, is even more cautiously exerted. Still higher hurdles stand in the way of prior restraint against the processes of a regulatory body exercising quasi-judicial powers which can be judicially reviewed as a matter of right before they become final. In this third category the jurisdiction of the regulatory or administrative body is exercised within the framework of a statutory scheme in which it acts as an arm of Congress; moreover it has established patterns of procedure and acts in a context where courts have long acknowledged a considerable deference to the specialized experience and competence of such a body. To exert judicial power to stop processes of this third category, which can always be judicially reviewed when the story is fully told and recorded, is an extraordinary step in the usual as well as the legally artful sense of that word. 317 F.2d at 142–143.

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[3] In addition, the Commission stated that Rule 19, F.R.Civ.P., even if it were applicable to administrative agency proceedings, would not change the result.

[4] In this regard, the court is in accord with a recent decision by a Georgia federal court involving the Coca-Cola Company. See *Coca-Cola Company* v. *Federal Trade Commission*, 342 F. Supp. 670 (1972). The intervening party seeks to distinguish this case but the court does not agree with its position.

[5] The plaintiff argues that *Jewel Companies, Inc.* v. *Federal Trade Commission*, 432 F.2d 1155 (7th Cir. 1970), has relaxed the exhaustion rule where abstract issues of law are involved. However, the crucial distinction in that case was that the aggrieved party was unable to raise the issue again from a later order of the FTC. In this case the aggrieved party will get relief from the Circuit Court rather than from one district court judge.

[399] In effect, piecemeal review of interlocutory matters should be rarely exercised.

[2] The court finds that the Commission's denial of the motion to dismiss for non-joinder is not in the nature of a final order and therefore, under the applicable statutes, it cannot be reviewed by the federal courts at this stage of the proceedings. *Cf. Ritter* v. *Wyoga Gas & Oil Corporation*, 110 F.2d 524 (3rd Cir.), *cert. denied*, 311 U.S. 669, 61 S.Ct. 29, 85 L.Ed. 430 (1940). The usual avenue for judicial review of actions taken by the Federal Trade Commission is through the courts of appeal after a final cease and desist order issues. See 15 U.S.C. § 45(c), (d). Similarly, the Administrative Procedure Act provides for judicial review of intermediate agency action only upon review of the final agency action. 5 U.S.C. § 704.

[3–5] The courts, however, have carved out certain narrowly circumscribed areas where judicial review is appropriate before the agency proceedings have terminated. One of these exceptional circumstances includes instances where an agency has very clearly violated an important constitutional right. See *e.g.*, *Herald Company* v. *Vincent*, 392 F.2d 354 (2d Cir. 1968); *Fay* v. *Douds*, 172 F.2d 720 (2d Cir. 1949). When the agency acts in excess of its delegated powers and contrary to the applicable statute, the courts have also seen fit to intervene. See *e.g.*, *Breen* v. *Selective Service Local Board No. 16*, 396 U.S. 460, 90 S.Ct. 661, 24 L.Ed.2d 653 (1970); *Leedom* v. *Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958); *Federal Trade Commission* v. *B. F. Goodrich Company*, 100 U.S.App.D.C. 58, 242 F.2d 31 (1957); *Skinner & Eddy Corporation* v. *United States*, 249 U.S. 557, 39 S.Ct. 375, 63 L.Ed. 772 (1919). Another circumstance justifying interference in the administrative process occurs when the action involves a question of high national interest because of international complexities. See *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963).

The plaintiff argues that the Commission's refusal to join the bottlers as indispensable parties is such an exceptional circumstance which would allow this court to entertain jurisdiction. More specifically, the plaintiff claims, *inter alia*, that the bottlers, who are facing serious business uncertainty, are threatened with the deprivation of valuable contract and property rights without due process of law. In addition, the plaintiff urges that the question of joinder should be resolved at this point rather than waste a great deal of time and expense by raising the issue when a final order is issued. The court has considered all the arguments and concludes that there are no substantial grounds based upon the exceptions developed by case law to warrant the extraordinary exercise of jurisdiction by this court.

In support of its contention that the court has jurisdiction, the plaintiff cites *American Communications Association* v. *United States*, 298 F.2d 648 (2d Cir. 1962) and *Interstate Broadcasting Company* v. *United States*, 109 U.S.App.D.C. 255, 286 F.2d 539 (1960) which involved proceedings before the Federal Communications Commission in which certain parties were denied the right to intervene. These cases held that immediate review was desirable so that the intervenors could be heard from the start in order to advance the public interest. Clearly this is not the situation presented in this case since the bottlers have not been deprived of their rights to intervene in the FTC proceedings.

The plaintiff, citing the Supreme Court's decision in *McKart* v. *United States,* 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969), also contends that this court should exercise jurisdiction since the Commission's administrative expertise is not involved and judicial review would not be significantly aided by an additional administrative decision. However, the Court, in *McKart*, emphasized that the administrative process [**400**] was at an end and that the defendant was faced with a criminal prosecution. Moreover, in the case at bar, it cannot be assumed that judicial review will not be enhanced by allowing the administrative process to be completed. In addition, it is conceivable that the Commission could alter its position or refuse to issue a cease and desist order, in which case there would be no need for judicial review. See *Sterling Drug Inc.* v. *Federal Trade Commision*, 450 F.2d 698, 711 (D.C.Cir. 1971).

In view of the foregoing, the plaintiff's application for a preliminary injunction is denied; the defendant's motion to dismiss the complaint is granted.

So ordered.

UNITED STATES v. LITTON INDUSTRIES, INC.*

No. 72-1001.—F.T.C. File 691 0629

(United States Court of Appeals, Ninth Circuit, June 15, 1972
As Amended on Denial of Rehearing July 28, 1972)

1. COMMISSION INVESTIGATIVE ORDER MAY BE CONTESTED ON GROUNDS THAT IT IS BEYOND SCOPE OF AUTHORITY OR THAT IT IS VAGUE OR IRRELEVANT
   In an enforcement proceeding under the Federal Trade Commission

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* Reported in 462 F.2d 14 (1972).

Act, a defendant may contest a Federal Trade Commission investigative order on the grounds that the inquiry is not within the agency's scope of authority, that the order is too vague or that it seeks irrelevant information.

2. APPEALS COURT MAY DECIDE CONSTITUTIONALITY OF DISTRICT COURT ORDER FOR DISCLOSURE OF INFORMATION IN MERGER CASE

On appeal from district court order which directed corporation to comply with Federal Trade Commission orders for disclosure of information to aid the F.T.C. in its investigation of conglomerate corporation mergers, Court of Appeals could decide whether the investigative orders were unconstitutional on their face.

3. DUE PROCESS NOT VIOLATED WHERE COMMISSION WAS CONDUCTING OVERLAPPING INVESTIGATIVE AND ADJUDICATIVE PROCEEDINGS AGAINST SAME CORPORATION

Orders of Federal Trade Commission directing corporation to disclose information to aid the F.T.C. in its investigation of conglomerate corporation mergers did not violate the due process clause because the F.T.C. was conducting simultaneous overlapping investigative and adjudicative proceedings against the same corporation.

4. COMBINATION OF INVESTIGATIVE AND JUDICIAL FUNCTIONS WITHIN AN AGENCY DOES NOT VIOLATE DUE PROCESS

The combination of investigative and judicial function within an agency does not, of itself, violate due process.

5. ADMINISTRATIVE IRREGULARITY NOT PRESUMED BY RELIANCE ON IMPROPER EVIDENCE IN PENDING ADJUDICATIVE CASE

Courts do not presume administrative irregularity by the reliance upon improper evidence in pending adjudicative proceedings.

6. DEFENDANT IN ACTION TO ENFORCE COMMISSION DISCOVERY ORDER NOT ENTITLED TO ENGAGE IN COUNTERDISCOVERY

In an action to enforce Federal Trade Commission discovery order, the defendant is not entitled to engage in counterdiscovery in order to find grounds for resisting the order.

7. ONLY IN "EXCEPTIONAL" CASE OF ADMINISTRATIVE PREJUDICE WILL COURT INTERRUPT AN AGENCY ADJUDICATIVE HEARING

The courts do not normally consider assertions of administrative bias prior [15] to the completion of an adjudicative proceeding; only in the "exceptional" case where the court is presented with undisputed allegation of fundamental administrative prejudice will the court interrupt the progress of the agency adjudicative hearing.

8. RESPONDENT'S CONTENTION THAT COMMISSION'S CONDUCT AS BOTH ADJUDICATIVE AND INVESTIGATIVE WAS PREMATURE AND NOT PROPERLY BEFORE COURT.

Where corporation had not yet furnished the Federal Trade Commission the information which corporation predicted would prove prejudicial to its position in pending divestiture proceeding, corporation's contention that the conduct of simultaneous adjudicative and investigative proceedings by the F.T.C. deprived corporation of due process in that the F.T.C. might consider evidence compiled by its staff from the investigative proceedings in the adjudicative proceeding was premature and not prop-

erly before the district court proceeding for enforcement of disclosure orders.

(The syllabus, with substituted captions, was taken from 462 F.2d 14.)

On appeal Court held that FTC orders did not violate the due process clause because FTC was conducting simultaneous overlapping investigative and adjudicative proceedings against same corporation.

John R. McDonough (argued), of *Ball, Hunt, Hart, Brown & Baerwitz*, Beverly Hills, Cal., *Theodore F. Craver* (argued), Beverly Hills, Cal., *Israel B. Greene*, Newark, N.J., *Sheppard, Mullin, Richter & Hampton*, Los Angeles, Cal., *J. Wallace Adair*, Washington, D.C., for appellant.

Gerald Harwood, Harold D. Rhynedance, Jr. (argued), *Ronald M. Dietrich*, Gen. Counsel, Federal Trade Comm., Washington, D.C., *Howard E. Shapiro, Walker E. Comegys*, Acting Asst. Atty. Gen., Washington, D.C., *Robert L. Meyer*, U.S. Atty., *Frederick M. Brosio, Jr., Larry M. Dier*, Asst. U.S. Attys., Los Angeles, Cal., for appellee.

Before KOELSCH, BROWNING, and GOODWIN, *Circuit Judges*.

ALFRED T. GOODWIN, *Circuit Judge*:

Litton Industries, Inc., appeals from a district court order directing Litton to comply with Federal Trade Commission (FTC) orders for the disclosure of information to aid the FTC in its investigation of conglomerate corporation mergers.

The FTC issued its orders pursuant to Section 6 of the Federal Trade Commission Act, 15 U.S.C. § 46.[1] Upon Litton's refusal to comply, the FTC requested the Attorney General to seek judicial enforcement pursuant to 15 U.S.C. § 49.[2] He did so. After a minor modification of the request, which is not here relevant, the district court ordered Litton to produce the desired information. Litton appealed, and was granted a stay pending our decision. We have jurisdiction pursuant to 28 U.S.C. § 1291. The order is affirmed and the stay is vacated.

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[1] U.S.C. § 46(b) empowers the FTC:

"* * * to require, by general or special orders, corporations engaged in commerce * * * to file with the commission * * * special, reports * * * furnishing to the commission such information as it may require as to the [corporation's] organization, business, conduct, practices, management, and relation to other corporations * * *."

[2] 15 U.S.C. § 49 provides in pertinent part:

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of sections 41–46 * * * of this title or any order of the commission made in pursuance thereof."

The FTC, on July 2, 1968, adopted a resolution directing an investigation of the social and economic consequences of corporate mergers in the United States. The investigation was specifically directed toward Litton and eight other corporations.

On January 2, 1969, the FTC issued to the nine corporations subpoenas *duces tecum* and orders requiring the filing of special reports. Litton moved in the FTC to quash or limit the subpoena and order, contending that the information [**16**] sought was both irrelevant and confidential.

While that motion was pending in the general investigation of "bigness," the FTC filed a separate divestiture complaint against Litton under Section 7 of the Clayton Act, 15 U.S.C. § 18. In the Section 7 proceeding, the FTC seeks divestiture of two recently acquired German typewriter companies.

Upon commencement of the divestiture proceeding, Litton supplemented, in the investigative proceeding, its pending motion to quash the FTC discovery order, arguing that Litton should be excluded from the general investigation because the divestiture proceeding had been filed. The FTC denied Litton's motion, leaving two proceedings, one investigative and one adjudicative, in progress before the FTC.

On February 3, 1972, the examiner in the divestiture proceeding concluded that Litton's typewriter-manufacturing acquisitions did not violate Section 7 of the Clayton Act. That conclusion is now before the FTC for administrative review.

In defense of its refusal to comply with the FTC investigative orders, Litton made two arguments in the district court:

First, Litton contended that Section 6 of the Federal Trade Commission Act cannot, consistent with the Fifth Amendment's due process clause, authorize the FTC to conduct simultaneous overlapping investigative and adjudicative proceedings against the same corporation. We will call this the "unconstitutional-on-its-face" defense.

Second, Litton argued that the disclosure orders are unconstitutional as applied, in the factual circumstances of this case. As a related issue, Litton also argues that it is entitled to engage in discovery in order to substantiate its allegations related to its "unconstitutional-as-applied" defense.

The FTC argues that both of Litton's defenses lack merit, and that, in any event, they are premature. If the FTC rules in Litton's favor in the divestiture case, Litton's protests will be moot. See

Public Utilities Commission of State of California v. *United States*, 355 U.S. 534, 539–540, 78 S.Ct. 446, 2 L.Ed.2d 470 (1958); *Allen* v. *Grand Cent. Aircraft Co.*, 347 U.S. 535, 74 S.Ct. 745, 98 L.Ed. 933 (1954). The FTC urges, therefore, that Litton's due process defenses can be raised, if at all, only on appeal from an adverse adjudicative order pursuant to 15 U.S.C. § 21.[3]

[1–3] In an enforcement proceeding pursuant to 15 U.S.C. § 49, a defendant may contest an FTC investigative order on the grounds that the inquiry is not within the agency's scope of authority, that the order is too vague, or that it seeks irrelevant information. *United States* v. *Morton Salt*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *Okla. Press Pub. Co.* v. *Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946). Litton argues that the FTC's investigative orders are not within the FTC's constitutional scope of authority. This "unconstitutional-on-its-face" defense presents a single question of law which may be decided on the present record. Like the district court, we reject the contention. See *Genuine Parts Co.* v. *F.T.C.*, 445 F.2d 1382, 1388 (5th Cir. 1971); *Lehigh Portland Cement* v. *F.T.C.*, 291 F.Supp. 628, 632 (E.D.Va. 1968), *aff'd*, 416 F.2d 971 (4th Cir. 1969).

[4] The combination of investigative and judicial functions within an agency does not, of itself, violate due process. *Federal Trade Com'n.* v. *Cement Institute*, 333 U.S. 683, 700–702, 68 S.Ct. 793, 92 L.Ed. 1010 (1948); *San Francisco Mining Exch.* v. *Securities & Exchange* [17] *Com'n*, 378 F.2d 162, 167 (9th Cir. 1967); *Pangburn* v. *C.A.B.*, 311 F.2d 349 (1st Cir. 1962).

From the provision of the Administrative Procedure Act which prohibits the same person from investigating and rendering a decision in the same matter, Congress has expressly excluded "the agency * * * or a member or members of the body comprising the agency." 5 U.S.C. § 554(d) (1966), formerly 5 U.S.C. § 1004 (1964).

[5] The FTC's ex-parte reliance, in the pending adjudicative proceeding, upon evidence obtained outside that proceeding's record would, of course, present due process problems. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 799–800, 65 S.Ct. 982, 89 L.Ed. 1372 (1945); *San Francisco Mining Exch.* v. *Securities & Exchange Com'n.*, 378 F.2d at 168. However, acceptance of Litton's unconstitutional-as-applied argument would require this court to indulge in a presumption that the FTC will,

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[3] 15 U.S.C. § 21 provides, *inter alia*, that whenever the FTC orders a corporation to cease and desist from violating Section 7 of the Clayton Act the corporation may obtain review of such order in the United States Court of Appeals for the Circuit where the violation occurred or where the corporation resides or does business.

or will be likely to, rely upon improper evidence. Courts do not presume such administrative irregularity. *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 229, 67 S.Ct. 756, 91 L.Ed. 854 (1947); *Securities and Exchange Com'n.* v. *R. A. Holman & Co.*, 116 U.S.App.D.C. 279, 323 F.2d 284 (1963).

Litton contends that it presented the district court with alleged "facts" which, if true, would establish that the Commission's simultaneous proceedings at least violate due process in the circumstances of this case. Litton alleged, in substance, that the FTC would consider evidence compiled by its staff from the investigative proceedings as "background" information in the adjudicative proceeding. Litton alleged further that it would have no opportunity to know what the staff report and data contained. Finally, Litton alleged that one FTC member, Commissioner Jones, had been substantially involved in, and necessarily would be prejudiced by, the investigation. The district court denied Litton's efforts to discover evidence to support these claims.

[6] In an action to enforce an FTC discovery order under 15 U.S.C. § 49, the defendant is not entitled to engage in counter-discovery to find grounds for resisting the order. See *Genuine Parts Co.* v. *F.T.C.*, *supra*; *F.T.C.* v. *Browning*, 140 U.S.App.D.C. 292, 435 F.2d 96 (1970). See also *United States* v. *Newman*, 441 F.2d 165, 169 (5th Cir. 1971).

[7] The courts do not normally consider assertions of administrative bias prior to the completion of an adjudicative proceeding. *Securities and Exchange Com'n.* v. *R. A. Holman & Co.*, *supra*. Only in the "exceptional" case where the court is presented with undisputed allegations of fundamental administrative prejudice will the court interrupt the progress of the adjudicative hearing. *Amos Treat & Co.* v. *Securities and Exchange Commission*, 113 U.S.App.D.C. 100, 306 F.2d 260 (1962).

[8] Litton's case is not "exceptional" within the meaning of *Amos Treat*. Litton's allegations are purely speculative. The bias which Litton sought to establish by discovery could not have developed within the FTC, because Litton has not yet furnished the FTC the very information which, Litton predicts, could prove prejudicial to its position in the divestiture proceedings.

Since the courts do not presume administrative irregularity, *National Labor Relations Board* v. *Donnelly Garment Co.*, *supra*, Litton's unconstitutional-as-applied claim is presently too remote and too vague to warrant either discovery or judicial consideration. *San Francisco Mining Exch.* v. *Securities & Exchange Com'n.*, 378

F.2d at 169–170. In *Amos Treat*, a factual record existed upon which a commissioner's prejudice could be readily established.

In *Federal Home Loan Bank Bd.* v. *Long Beach Fed. S. & L. Ass'n.*, 295 F.2d 403 (9th Cir. 1961), specific allegations of bias and an offer of proof were sufficient to justify an inquiry into the alleged bias on the part of board members. But the record on the question of bias was made in the administrative hearing.

[**18**] Commissioner Jones, to whom Litton specifically attributes bias, has, by affidavit, sworn to consider against Litton only such evidence as is presented on the adjudicative record. Significantly, in *Amos Treat* the defendant's claims of administrative prejudice were not denied. See *Securities and Exchange Com'n.* v. *R. A. Holman & Co.*, *supra.*

Absent a record to which Litton could point as establishing *prima facie* evidence of fraud, prejudice, or other administrative wrongdoing, this is not an *Amos Treat* situation. We will not speculate as to the possible states of the Commissioners' minds during the pending decisional process. *United States* v. *Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941); *National Labor Relations Bd.* v. *Botany Worsted Mills*, 106 F.2d 263, 267 (3rd Cir. 1939); *San Francisco Mining Exch.* v. *Securities & Exchange Com'n.*, 378 F.2d at 168. If we were to presume anything, we would presume administrative regularity. Due process will be served at the adjudication's conclusion if Litton appeals from an adverse FTC order. 15 U.S.C. § 21. At such time, Litton will have available a complete factual record upon which to base its claims that individual commissioners were prejudiced and that they relied upon information received by them outside the adjudicative record. *Cinderella Career and Finishing Schools, Inc.* v. *F.T.C.*, 138 U.S. App.D.C. 152, 425 F.2d 583 (1970); *Sperry and Hutchinson Company* v. *F.T.C.*, 256 F.Supp. 136 (S.D.N.Y.1966); *R. H. Macy & Company* v. *Tinley*, 249 F.Supp. 778, 783 (D.D.C.1966).

Litton, therefore, must await the event rather than attempt to anticipate it. *Securities and Exchange Com'n.* v. *R. A. Holman & Co.*, *supra; National Lawyers Guild* v. *Brownell*, 96 U.S.App.D.C. 252, 225 F.2d 552, 555 (1966), *cert. denied,* 351 U.S. 927, 76 S.Ct. 778, 100 L.Ed. 1457 (1956).

In the circumstances of this case, Litton's "as-applied" due process defense was premature, and was thus not properly before the district court. That court, therefore, did not abuse its discretion by denying Litton's discovery motion.

Affirmed.

UNITED STATES v. ITT CONTINENTAL BAKING COMPANY *

Nos. 72–1072, 72–1073—F.T.C. Docket 8309

(United States Court of Appeals, Tenth Circuit, July 12, 1972)

1. Civil Actions for Imposition of Monetary Penalties are not Appealable Directly to Supreme Court Under the Expediting Act

   Under Expediting Act to effect that in every civil action brought in any district court under acts relating to monopolies and combinations, wherein United States is complainant, an appeal from final judgment of district court will lie only to the Supreme Court, civil actions brought by United States for imposition of monetary penalties are not appealable directly to Supreme Court.

2. Granting Injunctive Relief to Remedy Three Violations of F.T.C. Order Did Not Divest Court of Appeals of Jurisdiction

   Fact that injunctive relief was granted along with monetary penalties in action by United States against violations of Federal Trade Commission cease and desist order did not divest Court of Appeals of jurisdiction to hear appeal and case was not appealable under Expediting Act only to the Supreme Court.

(The syllabus, with substituted captions, taken from 462 F.2d 1104.)

On appeal, Court held that fact the injunctive relief was granted along with monetary penalties did not divest Court of Appeals and case was not appealable to the Supreme Court under the Expediting Act. Motion to dismiss denied.

George Edelstein, Dept. of Justice, Washington, D.C., for plaintiff-appellant.

Gerald P. Norton, Washington, D.C. (*John H. Schafer, III*, Washington, D.C., and *Robert F. Welborn*, Denver, Colo., on the brief), for defendant-appellee.

Before HILL and BARRETT, *Circuit Judges*, and LANGLEY, *District Judge.*

HILL, *Circuit Judge.*

[1105] This appeal is from a final judgment of the United States District Court for the District of Colorado in a civil action commenced by the United States against ITT Continental Baking Company to remedy three alleged violations of a Federal Trade Commission cease and desist order.

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* Reported in 462 F.2d 1104 (1972). For case before the Commission, see 64 F.T.C. 1079, 66 F.T.C. 1222.

In 1960 the FTC issued a complaint charging that Continental Baking Company (predecessor of ITT Continental Baking Company) had violated § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act by acquiring a number of bakeries. The parties terminated this litigation by agreeing to a cease and desist order which forbad acquisition by Continental of other baking concerns for a ten-year period without prior FTC appoval.

In 1965 and 1966, Continental entered into transactions with three firms engaged in the production and sale of bread. These transactions provided that the three firms would discontinue producing bread and would become exclusive distributors of bread produced by Continental. Two of the firms were acquired outright by Continental; the third firm continued to operate as an exclusive distributor of bread produced by Continental. In June, 1968, Continental and International Telephone and Telegraph agreed to merge; the merger was completed by September, 1968.

The instant action was instituted by the United States in December, 1968; the trial court entered judgment on August 2, 1971. The trial judge found that the two direct acquisitions were violations of the FTC cease and desist order, and imposed the maximum penalty of $5,000 for each of the two acquisitions. The third transaction was adjudged to be non-violative of the order. The United States requested an injunction commanding compliance with the Commission's order, which was granted, but injunctive relief requiring ITT Continental to divest itself of the assets unlawfully acquired was denied. The government appeals and ITT Continental cross-appeals.

The appellee has moved to dismiss the appeal on the ground that under the Expediting Act, 15 U.S.C. § 29, this appeal lies only to the Supreme Court, and this Court thus lacks jurisdiction. The Expediting Act provides:

> In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

ITT Continental contends that the instant appeal falls squarely within the language of the Expediting Act.

[1] This is a question of first impression in this Circuit. An examination of cases dealing with like appeals in other circuits convinces us that it would be inconsistent with the intent of the Expediting Act to construe the words "in every civil action" to make civil actions brought by the United States for the imposition of monetary penalties to be appealable directly to the Supreme Court. The Second Circuit has specifically so held in *United States*

v. *New York, N.H. & H. R.R. Co.*, 276 F.2d 525 (2d Cir. 1957). See also *United States* v. *St. Regis Paper Co.*, 285 F.2d 607 (2d Cir. 1960). Although the question of jurisdiction was not discussed therein, four other circuits have decided appeals in like cases in which monetary penalties were sought by the United States. *United States* v. *Vulcanized Rubber & Plastics Co.*, 288 F.2d 257 (3d Cir. 1961), *cert. denied*, 368 U.S. 821, 82 S.Ct. 38, 7 L.Ed.2d 26; *Am. Greetings Corp.* v. *United States*, 272 F.2d 945 (6th Cir. 1959); *Mueller* v. *United States*, 262 F.2d 443 (5th Cir. 1958); *United States* v. *Lowenthal*, 248 F.2d 397 (7th Cir. 1957).

[2] We are not persuaded that the grant of injunctive relief along with the imposition of the monetary penalties divests this Court of jurisdiction to hear this appeal. Although jurisdiction was **[1106]** not an issue, two circuits have decided appeals from decisions in civil actions brought by the United States for monetary penalties and injunctive relief. *Herbold Laboratory, Inc.* v. *United States*, 413 F.2d 342 (9th Cir. 1969); *United States* v. *Vitasafe Corp.* 352 F.2d 62 (2d Cir. 1965). Jurisdiction of appeals in civil penalty cases, even where injunctive relief is additionally sought, lies in the courts of appeal.

The motion to dismiss is denied.

TYSONS CORNER REGIONAL SHOPPING CENTER, ET AL. v. FEDERAL TRADE COMMISSION, ET AL.*

Civil Action No. 1125–72—F.T.C. Docket 8886

(United States District Court, District of Columbia, July 13, 1972)

A bureau director's participation in a case against respondent prior to his appointment to the F.T.C. is not a procedural infirmity warranting intervention by this court in an incompleted proceeding. Standard of Conduct Sec. 0.735–10 was not violated. Since plaintiffs would not be irreparably injured, the proceeding will go forward, the court denying a preliminary injunction.

George W. Wise, Washington, D.C., for Tysons Corner Regional Shopping Center and Woodward and Lothrop, Inc.; *James C. McKay*, Washington, D.C., for May Dept. Stores Co., for plaintiffs.

Harold H. Titus, Jr., *Joseph M. Hannon*, *Gil Zimmerman* and *Ronald M. Dietrich*, Washington, D.C., for defendants.

PRATT, *District Judge.*

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* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶74,091, at 92,487 (1972 Trade Cases). Appeal to Court of Appeals denied, July 24, 1972. For case before Commission see 83 F.T.C. 1598, 85 F.T.C. 970, *modified* 86 F.T.C. 921.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the Court on plaintiffs' motion for a preliminary injunction and on defendants' opposition thereto; defendants also having suggested pursuant to Rule 12(h) (3) of the Federal Rules of Civil Procedure that the Court now dismiss the action for lack of jurisdiction; upon consideration of the foregoing, the complaint, exhibits and other papers of record and the Court having heard oral argument in open Court on July 7, 1972, the Court viewing the allegations in the complaint in the light most favorable to plaintiffs' claims, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiffs are respondents in an adjudicative proceeding presently pending before the Federal Trade Commission ("Commission") under FTC Docket No. 8886. The complaint which initiated the FTC proceeding was issued on May 8, 1972. The administrative complaint, in general, charges that Tysons Corner Regional Shopping Center ("Tysons") is one of the nation's largest regional shopping centers, and that May Department Store Company ("May Company") through its subsidiary the Hecht Company, and Woodward and Lothrop, Inc. ("Woodward") are large department store operators in the Washington, D.C. metropolitan area and that they are major tenants of Tysons. The complaint further charges that May Company and Woodward, in leasing store space at Tysons, induced Tysons to execute leases with them which included provisions giving May Company and Woodward the power, individually, to exclude competitors from leasing store space at Tysons, and the power to exercise control over the conduct of the business operations of other tenants of Tysons, and that City Stores Company, operator of Lansburgs' department stores, subsequently also executed a similar lease with the knowledge and consent of May Company and Woodward. The complaint finally charges that such lease provisions restrain competition in the retail distribution of goods and services, and that the execution of these lease provisions and their enforcement by each of the parties to the leases are unfair mehods of competition prohibited by Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

2. The Commission's complaint followed an investigation by the Commission of restrictive leasing practices at Tysons Corner Regional Shopping Center. The investigation was conducted by the Commission's Bureau of Competition, in connection with its general investigation of restrictive leasing practices in shopping cen-

ters. A complaint was issued at the same time (FTC Docket No. 8885) against *Gimbel Brothers, Inc.*, for engaging in similar restrictive leasing practices in leasing store space in other regional shopping centers throughout the country.

3. Mr. Allen S. Ward is presently the Director of the Bureau of Competition of the Federal Trade Commission and has held that position since November 1, 1970.

4. Prior to becoming director of the Commission's Bureau of Competition, Mr. Ward had been a partner in the Washington, D.C. law firm which had represented Dalmo Sales Company ("Dalmo") in an antitrust case brought by that company against plaintiffs and City Stores Company. The complaint charged that plaintiffs and City Stores Company had violated the Sherman Act, 15 U.S.C. §§ 1, 2, by entering into a group boycott and preventing Dalmo from leasing store space at Tysons. Mr. Ward's activities in the litigation were limited to taking part in the decision to represent Dalmo, discussing the case and the issues with attorneys who were responsible for the litigation, reviewing one of the briefs filed by the plaintiffs, and attending the oral argument in the court of appeals. Mr. Ward shared in the fee his firm received in the litigation.

6. The Dalmo case was settled on August 3, 1970. The fee received by Mr. Ward's firm for representing Dalmo was paid and his firm's representation of Dalmo in the matter was ended before Mr. Ward left his firm and assumed his duties as Director of the Commission's Bureau of Competition.

7. Mr. Ward assumed his position as a Director of the Commission's Bureau of Competition on November 1, 1970. Prior to that time, starting on February 8, 1969, the staff of the Commission's Bureau of Competition had been conducting an inquiry of restrictive leasing practices in shopping centers, including the leases involved in leasing store space at Tysons; in July 1970, the staff of the Bureau of Competition determined that shopping center leasing practices should receive top priority in the Bureau of Competition and on September 16, 1970, the Commission was granted clearance by the Department of Justice to proceed with an investigation of Tysons. By late September or early October 1970, the attorneys in the Bureau of Competition assigned to the shopping center investigation had determined to concentrate their investigational efforts on Gimbel Brothers, Inc., and Tysons.

8. On Nevember 24, 1970, three and one-half weeks after Mr. Ward became director, the staff of the Commission's Bureau of Competition, after approximately three months of informal in-

vestigation, recommended, and Mr. Ward approved, the opening of a formal investigation under FTC File No. 711 0046, of plaintiffs' leasing practices at Tysons.

9. Thereafter, Mr. Ward had general supervision of the formal investigation as Director of the Bureau of Competition. The primary responsibility for the investigation, however, was assigned to John L. Ferguson, Assistant to Mr. Ward, who worked under the immediate supervision of Mr. Ernest G. Barnes, an Assistant Director of the Bureau. Mr. Ferguson was assisted by Commission attorneys Alan S. Ransom and Barbara Wiggs.

10. Mr. Ward was not involved in organizing the investigation, drafting requests for information, preparing the memorandum recommending a complaint or drafting the formal complaint or proposed order. His actual participation was limited to consulting with the staff at times on the progress of the investigation, and forwarding to the Commission with his approval the staff recommendation that a complaint issue against plaintiffs.

11. Upon receipt of the staff recommendation, the Commission made its own independent evaluation respecting whether this complaint should issue. Based on the evidence on file, the Commission decided that a proposed complaint should issue under the Commission's consent order procedures, 16 CFR §§ 2.31–2.35. Plaintiffs, accordingly, were notified by the Commission of its intention to institute a formal proceeding against plaintiffs, and were also served with a copy of the proposed complaint and proposed form of order.

12. On receipt of the notice of the proposed complaint and order, plaintiffs sought to have the proceeding settled by entry of a consent order.

13. Plaintiffs' initial settlement discussions were with Commission attorneys Barnes, Ransom and Wiggs. On September 2, 1971, after being unable to reach an agreement with the staff, plaintiffs' counsel requested Mr. Ward to personally take part in the consent settlement negotiations, and Mr. Ward did so.

14. Plaintiffs thereafter negotiated directly with Mr. Ward for approximately two months in an attempt to persuade Mr. Ward of the propriety of their proposed settlement, without raising any question as to Mr. Ward's qualifications to participate in the negotiations.

15. On November 1971, it became apparent that plaintiffs and the Commission's staff could not agree on a satisfactory settlement. On notice to plaintiffs by the staff, the entire file, including the staff's recommendations and plaintiffs' written proposals, was sub-

mitted to the Commission, pursuant to Section 2.34 of the Commision's Rules, 16 C.F.R. § 2.34. Also forwarded to the Commission was plaintiffs' request to Mr. Ward that they be furnished with copies of the materials submitted by the staff to the Commission concerning their written proposals so that plaintiffs might have the opportunity to comment thereon. This request had been denied by Mr. Ward on the grounds that the Commission's rules do not provide for furnishing plaintiffs with copies of the staff's comments to the Commission.

16. Thereafter and for the first time, plaintiffs, by letter dated December 14, 1971, raised the question of the propriety of Mr. Ward's participation in the proceedings. Specifically, they stated that they were concerned as to whether his participation in the matter was consistent with the Commission's Standards of Conduct as set forth in subparagraphs (d) and (f) of Section 0.735–10 of the Commission's Procedures and Rules of Practice.

17. On January 18, 1972, after meeting with Mr. Ward, plaintiffs wrote Mr. Ward and stated that they were of the opinion that Mr. Ward's participation in the case violated Section 0.735–10 of the Federal Trade Commission's Standards of Conduct, 16 C.F.R. § 0.735–10. Specifically, they asserted that Mr. Ward's conduct violated the following portions of 16 CFR § 0.735–10:

> An employee shall avoid any action, whether or not specifically prohibited by this part, which might result in, or create the appearance of:
>
> * * * * * * *
>
> (d) Losing complete independence or impartiality;
>
> * * * * * * *
>
> (f) Affecting adversely the confidence of the public in the integrity of the Government.

They requested Mr. Ward to join with them in an application to the Commission that the proposed complaint should be withdrawn and the entire matter be reconsidered *de novo* by the Commission on the basis of an evaluation by staff personnel not subject to Mr. Ward's supervision.

18. Mr. Ward replied and declined to join in any such recommendation. He did not agree that the Commission's standards of ethical conduct had been breached by his participation, or that plaintiffs had any reason to complain of his impartiality. He did, however, request them to bring the matter to the Commission for its consideration.

19. Plaintiffs moved before the Commission for withdrawal of the proposed complaint and for reconsideration of the matter *de novo* on the basis of an evaluation by staff personnel not subject to Mr. Ward's supervision.

20. On May 3, 1972, the Commission responded to plaintiffs' motion. By letter of the Secretary, plaintiffs were informed that the Commission had denied the motion. At the same time, the Secretary made available to plaintiffs the affidavits submitted by Mr. Ward and members of his staff regarding Mr. Ward's participation in the matter.

21. On May 12, 1972, the Commission served upon plaintiffs its formal complaint commencing the adjudicative proceeding in Docket No. 8886. In a letter accompanying the complaint the Commission stated that the Commission had given careful consideration to plaintiffs' proposed settlement and had rejected it as inadequate. The Commission denied plaintiffs' request for copies of materials filed with the Commission by the staff relating to plaintiffs' submission to the staff, and also denied plaintiffs' request filed with their written proposals for oral arguments on their written proposals and for industrywide hearings.

22. At the oral hearing before this Court on July 7, 1972, plaintiffs' counsel questioned the sufficiency of Mr. Ward's affidavit which explained his conduct in the administrative proceedings (Exhibit B to the Complaint). Mr. Ward was present in Court and the Court and counsel for defendants afforded plaintiffs' counsel the opportunity to cross-examine Mr. Ward with respect to the matters in his affidavit. Plaintiffs' counsel declined to take advantage of this opportunity to cross-examine Mr. Ward.

CONCLUSIONS OF LAW

1. Plaintiffs have not demonstrated that they are likely to prevail on the merits of their complaint.

2. Plaintiffs will not be irreparably injured if a preliminary injunction is denied. Plaintiffs will have an adequate remedy in the judicial review afforded them under 15 U.S.C. § 45 of any Commission order to cease and desist.

3. The likelihood of harm to defendants, if the Commission's proceeding is stayed, and the public interest both require that the Commission's administrative proceeding in FTC Docket 8886 be allowed to go forward.

4. The procedural infirmity in the administrative proceedings alleged by plaintiffs does not present the exceptional case warranting district court intervention in the uncompleted administrative proceedings. The issue in question can be raised by plaintiffs on judicial review of a final Commission order, if a final order is issued in the administrative proceeding. No important constitutional or statutory rights of plaintiffs appear to have been violated. Upon suggestion by the defendants pursuant to Rule 12(h) (3)

of the Federal Rules of Civil Procedure, the Court will dismiss this action for lack of jurisdiction over the subject matter. ***Sterling Drug, Inc.*** v. ***Federal Trade Commission***, U.S.App.D.C. 450 F.2d 698, 710–711 (1971).

Accordingly, the motion for a preliminary injunction shall be denied and the complaint shall be dismissed for lack of jurisdiction over the subject matter, and the Court will enter an appropriate order.

ORDER

Upon consideration of plaintiffs' motion for a preliminary injunction, defendants' opposition thereto, the complaint, exhibits and other papers of record, and a hearing having been held in open Court on July 7, 1972, and defendants having suggested pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure that the Court now dismiss the action for lack of jurisdiction over the subject matter, and this Court having made its findings of fact and conclusions of law, it is by the Court on this 13th day of July 1972, hereby

Ordered, That plaintiffs' motion for a preliminary injunction be denied, and it is further

Ordered, That pursuant to the suggestion of lack of subject matter jurisdiction made by defendants, the complaint *sua sponte* be, and the same hereby is dismissed for lack of jurisdiction over the subject matter.

GARDNER AND NORTH ROOFING AND SIDING CORPORATION v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.*

No. 71–1089—F.T.C. File 99–89

(United States District Court, District of Columbia, July 14, 1972)

1. **Meaningful Disclosure of Credit Terms to Customers is Purpose of Truth in Lending Act**

   Purpose of Truth in Lending Act is to assure a meaningful disclosure of credit terms to customers.

2. **Broad Construction Must be Used to Effectuate the Purpose of the Truth in Lending Act**

   Truth in Lending Act must be broadly construed to effectuate its purpose.

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* Reported in 464 F.2d 838 (1972).

3. **MECHANICS AND MATERIALMEN'S LIENS ATTACHED TO EVERY CONTRACT TO RENOVATE, REMODEL OR REPAIR A HOUSE**

   Since a contract to renovate, remodel or repair a house imports that work will be done by mechanics and artisans and that materials will be furnished in connection with that work, implicit in contract is a provision that a lien will attach to secure payment for work and materials, and statutory provisions for mechanic's and materialmen's liens must be taken as a part of contract.

4. **TRUTH IN LENDING ACT REQUIRES DISCLOSURE OF ALL CONSEQUENCES FLOWING FROM SIGNING OF A HOME IMPROVEMENT CONTRACT**

   A reasonable construction of Truth in Lending Act is that Congress intended to require disclosure of all consequences flowing from signing of a home improvement contract, including not only consequences spelled out in contract, but also those necessarily inherent therein.

5. **REGULATION PROVIDING THAT CUSTOMERS SHALL HAVE RIGHT WITHIN THREE DAYS TO RESCIND ANY TRANSACTION INVOLVING CUSTOMER'S RESIDENCE IS CONSISTENT WITH LEGISLATIVE PURPOSE**

   Regulation which was promulgated by Federal Reserve Board pursuant to Truth in Lending Act and which provides that within three days of consummation [839] of any credit transaction in which a security interest is or will be retained or acquired in customer's residence, customer shall have right to rescind transaction and which requires creditor to notify customer of his right to rescind when there is a probability that a lien on his home will arise by operation of law even though he has not executed an indenture on property is entirely consistent with legislative purpose and is a reasonable and proper device for carrying it out.

6. **LETTER WRITTEN BY CONGRESSMAN A YEAR AFTER LEGISLATION PASSED WAS NOT PART OF LEGISLATIVE HISTORY OF THE TRUTH IN LENDING ACT.**

   Scope of Truth in Lending Act is not limited to mortgages and other consensual liens but includes mechanic's, materialmen's, artisan's and other similar liens which may arise by operation of law even though obligor has not executed an indenture on property, notwithstanding fact that a Congressman indicated in a letter that much of discussion in committee and on floor focused on credit transactions involving second mortgages, where letter, written a year after legislation was passed, was not a part of legislative history and could not be considered on question of congressional intent.

(The syllabus, with substituted captions, is taken from 464 F.2d 838)

On appeal, Court held regulation made pursuant to Truth in Lending Act providing right of customer to cancel contract for residence repairs within three days is valid and entirely consistent with Act's legislative purpose.

Mr. Joseph J. Lyman, Washington, D.C., for appellants.

Mr. Thomas J. Press, Atty., Dept. of Justice, with whom *Mr. L. Patrick Gray, III*, Deputy Atty. Gen. at the time the brief was filed, *Messrs. Thomas A. Flannery*, U.S. Atty. at the time the brief was filed, and *Alan S. Rosenthal*, Atty., Dept. of Justice, were on the brief, for appellees. *Messrs. Harold D. Rhyndedance, Jr.*, Asst. Gen. Counsel, and *Gerald Harwood*, Atty., F.T.C., also entered appearances for appellee Federal Trade Comm.

Before LEVENTHAL and ROBB, *Circuit Judges*, and FRANK A. KAUFMAN,* *U.S. District Judge for the District of Maryland.*

ROBB, *Circuit Judge*:

In an action for declaratory judgment the appellants challenged as invalid a regulation promulgated by the Federal Reserve Board under the Truth in Lending Act, Title I of the Consumer Credit Protection Act, 15 U.S.C. § 1601 *et seq.* On cross motions for summary judgment the district court upheld the validity of the regulation and dismissed the action. We affirm.

The appellant Gardner and North Roofing and Siding Corporation, a New York corporation, is engaged in the business, of renovating, remodeling, reconstructing and repairing dwelling houses in and around Syracuse, New York. The appellant Surfa-Shield Corporation, a Virginia corporation, engages in a similar business in the area of Fairfax, Virginia.

In the course of the appellants' businesses their salesmen solicit homeowners to contract for the repair, renovation or modernization of their houses. Credit is extended to customers pusuant to a "deferred payment plan" under which the customer executes a promissory note, without collateral, for the amount to be charged for labor and materials. Although no mortgage is executed, the laws of New York [1] and Virginia,[2] and of many other states, give home improvement contractors a lien on the customer's home—a contractor's or mechanic's lien—at the time the work is performed.

[840] Section 125(a) of the Consumer Credit Protection Act, 15 U.S.C. § 1635(a), provides:

> (a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later by notifying the creditor, in accordance with regulations of the Board of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board,

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* Sitting by designation pursuant to 28 U.S.C. § 292(c) (1970).

[1] N.Y. Lien Law § 3 (McKinney's Consol. Laws, c. 33 1966).

[2] Va.Code Ann. § 43-3 (1950).

> to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section.

Section 105 of the Act, 15 U.S.C. § 1604, directs the Federal Reserve Board to "prescribe regulations to carry out the purposes of this subchapter," and provides that:

> These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

Pursuant to this authority the Board promulgated the challenged regulation. 12 C.F.R. § 226.9(a). The regulation provides that within three days of the consummation of "any credit transaction in which a security interest is *or will be* retained or acquired" in customers' residences, the customer shall have the right to rescind the transaction.[3] (Emphasis supplied.) In addition, the Board by regulation 12 C.F.R. § 226.2(z) defined the term "security interest" to include liens created by operation of law, such as mechanic's, materialmen's, artisan's and other similar liens.[4] The effect of these regulations is that the appellants are required to notify a customer of his right to rescind when there is a probability that a lien on his house will arise by operation of law even though he has **[841]** not executed an indenture on the property.

The appellants contend, as they did in the district court, that section 125(a) of the Act limits an obligor's right of rescission to transactions in which the obligor executes a mortgage or other similar indenture in favor of the creditor or lender. Conceding that the term "security interest" as used in section 125(a) is not defined and is therefore ambiguous, the appellants argue that Congress did not intend the term to include liens created by operation of law as distinguished from consensual security interests. Noting that section 125(a) speaks only of a security interest which "is retained or acquired" they assert that this language does not encompass a lien that may arise in favor of a third party not privy to the original contract. Finally, the appellants point to section 125(b), 15 U.S.C. § 1635(b), which provides that upon rescission "any security interest given by the obligor becomes void * * * ." The appellants argue that since an obligor cannot give mechanic's or materialmen's liens the statute must refer only to mortgages or other consensual liens. From all these considerations the appellants conclude that the Board's regulations relating to a security interest that "is or will be retained or acquired" are beyond its power and invalid. We are unable to agree.

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[3] 12 C.F.R. § 226.9(a) provides in pertinent part:

(a) *General rule.* Except as otherwise provided in this section, in the case of any credit transaction in which a security interest is or will be retained or acquired in any real property which is used or is expected to be used as the principal residence of the customer, the customer shall have the right to rescind that transaction until midnight of the third business day, following the date of consummation of that transaction or the date of delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is latre, by notifying the creditor by mail, telegram, or other writing of his intention to do so. Notification by mail shall be considered given at the time mailed; notification by telegram shall be considered given at the time filed for transmission; and notification by other writing shall be considered given at the time delivered to the creditor's designated place of business. (Footnote omitted.)

[4] 12 C.F.R. § 226.2(z) provides in pertinent part:

(z) "Security interest" and "security" mean any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialmen's, artisan's, and other similiar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation.

[1] In general the purpose of the Consumer Credit Protection Act was "to assure a meaningful disclosure of credit terms" to consumers. 15 U.S.C. §1601. The specific purpose of section 125(a), 15 U.S.C. § 1635(a), was to protect homeowners from the unscrupulous business tactics of certain home improvement contractors. The need for such protection was emphasized in testimony before congressional committees concerning "second mortgage" racketeers who encumbered their customers' houses to secure payment for unneeded or shoddy work. There was also reference to the liens of artisans, materailmen and others arising by operation of law which could subject a consumer's property to loss by foreclosure. Witnesses told of cases in which consumers paid double for work because artisans, unpaid by an unscrupulous contractor, filed mechanic's liens.[5] All this is conceded by the appellants in their brief (App.Brief p. 18). The appellants also concede that "[i]n either instance, whether the cloud on the homeowner's title was induced by a second mortgage, or by other consensual liens of his own making, or, from liens arising by operation of law, the possibility of loss by foreclosure was evident." As we have said, however, the appellants contend that the "plain language of Section 125(a), as enacted, made rescindable only those contracts

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[5] Hearings on S.J.Res. 130, S. 3065, and S. 3066 Before the Senate Commerce Committee, 90th Cong., 2d Sess., ser. 90-64, at 10, 42-43, 75, 241-42 (1968), in Unfair Practices in the Home Improvement Industry and Amendments to the FTC Act (1968). *See* H.R.Rep. No. 1397 (Conference Report), 90th Cong., 2d Sess. (1968). Regarding rescission of certain contracts, see *id.* at 26.

[involving] a security interest through a second mortgage or other consensual type lien."

[2] We think the appellant's construction of the statute is too narrow and technical. Being remedial legislation to protect the homeowner, the Act must be broadly construed to effectuate its purpose. *Peyton* v. *Rowe*, 391 U.S. 54, 65, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968); *Tcherepnin* v. *Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967). So construed, the statute supports the challenged regulation.

[3] A contract to renovate, remodel or repair a house imports that work will be done by mechanics and artisans and that materials will be furnished in connection with that work. Implicit in the contract, therefore, is a provision that a lien will attach to secure payment for the work and materials. In other words, the statutory provision for mechanic's **[842]** and materialmen's liens must be taken as a part of the contract. This conclusion is fortified by the settled rule that "the laws which subsist at the time and place of the making of a contract * * * enter into and form a part of it, as if they were expressly referred to or incorpoated in its tems." *Von Hoffman* v. *City of Quincy*, 71 U.S. (4 Wall.) 535, 550, 18 L.Ed. 403 (1866).

[4, 5] We think it a reasonable construction of the statute that Congress intended to require disclosure of all the consequences flowing from the signing of a home improvement contract, including not only the consequences spelled out in the contract, but also those necessarily inherent therein. Any other construction would expose the homeowner to hidden and perhaps fatal traps; it would lead to precisely the kind of imposition that Congress intended to prevent. Viewed in this light we think the challenged regulation is entirely consistent with the legislative purpose and is a reasonable and proper device for carrying it out.

[6] We have carefully considered the appellants' argument that the legislative history of section 125(a) of the Act indicates that Congress intended to limit its scope to mortgages and other consensual liens. Alhough it is true that much of the discussion in committee and on the floor focused on credit transactions involving second mortgages, we find nothing to indicate that Congress intended to exempt other liens from the salutary effect of the legislation. The appellants' reliance upon a letter from one congressman is misplaced. The letter, written a year after the legislation was passed, is not a part of the legislative history and cannot be considered on the question of congressional intent. See *National*

School of Aeronautics, Inc. v. *United States,* 142 F. Supp. 933, 938, 135 Ct.Cl. 343 (1956).

The Board's construction of the statute is entitled to deference, and we find nothing unreasonable in its use of its authority, under section 105 of the Act, to issue the regulation. *Udall* v. *Tallman,* 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

The judgment is affirmed.

UNITED STATES v. BEATRICE FOODS CO.*

No. 4–70 Civ. 459—F.T.C. Docket 6653

(United States District Court, District of Minnesota, Fourth Division, July 16, 1972)

1. WHERE MOTIVE AND INTENT ARE IMPORTANT, SUMMARY JUDGMENT IS INAPPROPRIATE

   [105] Summary judgment is inappropriate in complex antitrust cases where motive and intent are important and credibility is a factor.

2. SUMMARY JUDGMENT PROPER WHEN CASE TURNS ON DOCUMENTARY EVIDENCE AND INVOLVES CONCLUSIONS OF LAW

   Where gist of case turns on documentary evidence and involves conclusions of law, summary judgment is proper.

3. DAIRY PRODUCTS DISTRIBUTOR VIOLATED F.T.C. CONSENT ORDER WHEN IT ACQUIRED FIVE-YEAR LICENSE AND RIGHTS OF ANOTHER DISTRIBUTOR

   Distributor and processor of dairy products "acquired" an "interest," in violation of Federal Trade Commission consent order requiring that such processor cease and desist from acquiring, directly or indirectly, any interest in any firm engaged in distributing retail milk, by group of transactions with another milk distributor consisting of five-year license for use of other distributor's label and assignment of other distributor's rights under notes, distributorship agreements, sales contracts and factor's liens.

4. IN CIVIL ENFORCEMENT ACTION COURT SHOULD LOOK TO PURPOSE OF ORDER AND WHAT IT INTENDED TO ACCOMPLISH

   Court, in civil enforcement action brought at instance of Federal Trade Commission for alleged violations of Commission order which was product of negotiations between parties during pendency of appeal from earlier adverse order, should look to purpose of the order in question and what it was intended to accomplish.

5. PAROL EVIDENCE OF PREORDER NEGOTIATIONS NOT ADMISSIBLE IN CIVIL ENFORCEMENT ACTION

   Where Federal Trade Commission consent order was not ambiguous,

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*Reported in 344 F. Supp. 104 (1972). For case before the Commission, see 67 F.T.C. 473, 68 F.T.C. 1003, *modified* 71 F.T.C. 797. For penalty proceedings, see pp. 437,867 herein.

and there was no suggestion that agreement in question was not integrated in the order, parol evidence of preorder negotiations was not admissible so as to provide factual basis to preclude summary judgment in civil enforcement action brought at instance of the Commission for alleged violations of the order.

6. EVEN IF AMBIGUITY EXISTED AFTER 11 YEARS LITIGATION PAROL EVIDENCE OF PREORDER NEGOTIATIONS NOT ADMISSIBLE

Even if ambiguity existed in part of Federal Trade Commission consent order, where 11 years of litigation preceded the order, including full hearings on both question of antitrust violations and as to sanctions imposed, and where there was full record of hearings before examiner, an opinion of the examiner and two opinions of the Commission providing assistance in construing the order, parol evidence of preorder negotiations would not be admissible so as to provide factual basis to preclude summary judgment in enforcement action brought at instance of the Commission for alleged violations of the order.

7. VALUABLE BUSINESS ASSETS INCLUDE TRADEMARKS AND LABELS

Trademarks and labels are valuable business assets.

8. UNTIMELY DIVESTITURE OF STOCK BY DAIRY PRODUCTS DISTRIBUTOR WAS IN VIOLATION OF F.T.C. CONSENT ORDER

Divestiture, by dairy products distributor and processor of its stock interest in dairy corporation operating in specified town, through contracts which were not executed until December 24, 1969, was untimely in violation of Federal Trade Commission consent order requiring that such processor divest itself absolutely and in good faith of all dairy plants which were owned in whole or in part by it or operated by it in such named city, notwithstanding contention [106] that its stock interest was not a "plant" within meaning of the order.

9. GOOD FAITH EFFORT TO DIVEST ALL DAIRY PRODUCTS IN SPECIFIED CITY NOT A DEFENSE TO CIVIL ENFORCEMENT ACTION

Good faith effort of distributor and processor of dairy products to comply with terms of Federal Trade Commission consent order, requiring divestiture of all dairy products such processor owned or operated in specified city, was not a defense to civil enforcement action brought against the processor by United States at instance of the Commission for alleged violations of the order.

10. ARGUMENTS AS TO DIFFICULTY OF DIVESTING STOCK IN DAIRY PLANT NOT A DEFENSE TO CIVIL ENFORCEMENT ACTION

Arguments of distributor and processor of dairy products as to difficulty or impossibility of divestiture of stock in dairy plant, required by Federal Trade Commission consent order did not constitute defense to civil enforcement action against it for alleged violations of the order, even though the arguments might have carried weight behind a request to modify the order.

11. TERM "GOOD FAITH" IN CONSENT ORDER APPLIES TO REQUIREMENT OF ACTUAL RATHER THAN ILLUSORY DIVESTITURE

The term "good faith," in Federal Trade Commission consent order requiring distributor and processor of dairy products to divest itself absolutely and in good faith of certain dairy plants, applied not to the processor's efforts to divest but rather to requirement of actual rather than illusory divestiture.

12. BY APPROVING UNIT SALE OF OTHER DAIRY PLANTS COMMISSION DID NOT IMPLIEDLY AGREE THAT REMAINING SOUTHWEST PLANT NEED NOT BE DIVESTED

Federal Trade Commission did not, by approving sale as a unit of other dairy plants in southwestern United States by distributor and processor of dairy products, impliedly agree that such processor's stock in its remaining plant in the southwest need not be divested pursuant to consent order of the Commission and was not thereby estopped from claiming, and did not waive its right to claim, that such processor violated the order.

13. STAFF HAD NO AUTHORITY TO GRANT YEAR'S EXTENSION OF TIME TO COMPLY WITH ORDER

Where Federal Trade Commission staff advised that distributor and processor of dairy products apply for extension of time for compliance with consent order of the Commission and that the staff would support it if one was applied for, but where such processor knew that the staff had no authority to make decision as to an extension, and the Commission responded to processor's formal application for one-year extension by formally granting two months to present a suitable purchaser in connection with required divestiture of dairy plant, such processor was not given an oral extension of time for compliance by the staff.

14. LETTER GRANTING TWO MONTHS EXTENSION OF TIME TO "PRESENT A SUITABLE PURCHASER" DID NOT ESTABLISH A REQUIREMENT LESS THAN FULL DIVESTITURE

Federal Trade Commission letter giving distributor and processor of dairy products two months to "present a suitable purchaser" for approval in connection with divestiture of dairy plant required by consent order of the Commission did not establish a requirement less than full divestiture.

(The syllabus, with substituted captions, taken from 344 F.Supp. 104.)

In civil enforcement action, on motion for summary judgment, Court held dairy products company violated consent order requiring that it cease and desist from acquiring any firm engaged in the distribution of milk; and that untimely divestiture was in violation of the order.

Robert G. Renner, U.S. Atty., by *Neal J. Shapiro*, Asst. U.S. Atty., Minneapolis, Minn., together with *H. Robert Field*, and *James E. Corkey*, Dept. of Justice, Washington, D.C., appeared for plaintiff.

Winston, Strawn, Smith & Patterson, by *Ronald Butler*, Chicago, Ill., appeared for defendant.

NEVILLE, *District Judge*.

The government has brought this civil enforcement action at the instance of the Federal Trade Commission (FTC), seeking monetary penalties and other relief from the defendant Beatrice Foods Co. (Beatrice) for alleged violations of a Federal Trade Commission order which was the product of negotiations between the parties during the pendency of an appeal by defendant from an earlier adverse FTC order. The government moved for summary judgment on the issue of as to whether violations occurred, with the thought that if the motion be granted, the parties and the court should **[107]** contemplate further proceedings relative to penalties to be imposed or other relief to be granted. Penalties for violation of FTC orders are provided in the Federal Trade Commission Act, 15 U.S.C. § 45(*l*); and in the Clayton Act, 15 U.S.C. § 21(*l*). Jurisdiction is found under 28 U.S.C. §§ 1337 and 1345; venue under 28 U.S.C. § 1395 and 15 U.S.C. § 22. For the reasons stated below, the motion of the government should be granted on both counts of the complaint.

The case arises from a protracted proceeding before the FTC, In the Matter of Beatrice Foods Co., FTC Docket 6653. A complaint filed in 1956 there charged that Beatrice, a distributor and processor of milk and allied products among other things, had violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by acquiring numerous companies engaged in various facets of the dairy industry. The hearing examiner filed an initial decision and order on March 2, 1964, wherein he found that five of the acquisitions complained of constituted violations of the Clayton Act. He recommended divestiture of four of those companies and a ten-year prohibition on future similar acquisitions.

Beatrice appealed the examiner's order. The FTC confirmed his findings on April 26, 1965 and entered a substantially similar final order on December 10, 1965.[1] Beatrice then sought review in the United States Court of Appeals for the Ninth Circuit. While the appeal was pending, negotiations between the parties resulted in a joint motion to the Circuit Court recommending entry of an agreed order by that court. The appeals court granted the motion on May 23, 1967, some 11 years after initiation of the original proceeding and on June 7, 1967, the FTC issued a modified order identical with that of that court.[2]

Two sections of the final order are the focus of the instant case, parts I and III which read in pertinent part as follows:

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[1] The complaint, initial decision and Commission opinion are reported in 67 FTC Decisions 473–734. The December order and accompanying opinion are reported in 68 FTC Decisions 1003–08.

[2] There is controversy as to the date the last FTC order became final. For purposes of this motion the government accepts defendant's date of June 7, 1967.

[Part I]

> Beatrice Foods Co., ('Beatrice') within a period not exceeding (18) months from the effective date of this order, unless extended, shall *divest itself absolutely and in good faith* to a purchaser approved in advance by the Commission of all plants which are *owned in whole or in part by Beatrice* or operated by Beatrice at * * * *Albuquerque, New Mexico;* * * * and which are engaged in the manufacturing, processing or distribution of pasteurized and homogenized milks, buttermilk, skim milk, cream, half and half, sour creams, cottage cheese, ice cream, ice milk, mellorine-type products, sherbert, or water ices. * * *

[Part III]

> *Beatrice shall cease and desist,* for a period of ten (10) years from the effective date of this order *from acquiring, directly or indirectly, any interest in any firm,* corporate or noncorporate, engaged principally or as one of its major commodity lines at the time of such acquisition in any state of the United States or in the District of Columbia in the business of manufacturing, processing *or distributing at wholesale or at retail milk* or any of the products described in Paragraph I of this order, without the prior approval of the Commission. [Emphasis added]

Count I of the complaint here charges that during the 10 year operative period of the order, Beatrice entered into a group of transactions involving a certain Maple Island Dairies, Inc. of Minnesota, which resulted in an acquisition or acquisitions violative of Part III of that order.

[**108**] By Count II the government charges that Beatrice's failure to divest itself of its corporate stock interest in the Valley Gold Dairy of Albuquerque, N.M. within 18 months from the date the order became final was a violation of the order. Although the Valley Gold Stock eventually was sold, the government claims the divestiture was not timely.

Resisting the government's motion, Beatrice claims essentially that, as to Count I, there are numerous disputed issues of material fact both as to the *nature* of the transactions involved—whether or not anything prohibited was *"acquired"*—and as to the meaning of the term *"interest"* in the consent order (quoted above). As to Count II, Beatrice claims there were *de facto* extensions granted by the FTC and good faith substantial compliance with the divestiture order, and that in any event whether or not there was substantial compliance is an issue of fact requiring a jury decision. In summary, thus, the issues are:

> As to Count I, did Beatrice "acquire" an "interest" as a result of its transactions with Maple Island Dairies, Inc.?
>
> As to Count II, was any extension of time for compliance granted and was there "substantial compliance" as a defense

to failure to divest within the time presented by the order or any extension therof?

[1, 2] On a summary judgment motion, where there are disputes as to material fact, the question must be viewed in the light most favorable to the party opposing the motion. As defendant points out there is authority which holds that summary judgment is inappropriate in certain complex antitrust cases where motive and intent are important and credibility is a factor.[3] However, the more apposite line of authority is that which holds that where the gist of the case turns on documentary evidence and involves conclusions of law, summary judgment is proper.[4] Here the evidence is substantial in volume and the transactions were intricate, but there is no dispute over the factual events which are represented by documents produced from or by Beatrice itself, only over their characterization within the meaning of this FTC order. The issue it seems to the court is not, for example, did Beatrice *intend* to acquire an interest in another company, but rather was an interest acquired.

COUNT I

The undisputed facts of the transactions underlying Count 1 are as follows:

In the Spring of 1968 Maple Island Dairies, Inc., a milk distributor, concluded to dispose of an unprofitable segment of its business which it called the northern division. That division consisted of four company-owned and operated dairy stores, 11 company owned branch distributors with established routes and 11 independent distributors also with established routes. Maple Island had had prior business dealings with two wholly owned Beatrice subsidiaries, competitors of Maple Island, Russell Creamery Company of Superior, Wisconsin and Russell Creamery Co. of Brainerd, Minnesota, both milk processors and distributors. In a series of meetings to discuss the disposition of Maple Island's northern division, the president of Maple Island, met with the president of Russell Creamery of Superior. A set of transactions resulted, after oral approval in principle by Russells' Beatrice superiors on July 11, 1968, whereby Russell would supply all but a few of the former Maple Island routes. The changeover began September 1, 1968, and a set of transactions was worked out for each distribution point.

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[3] *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens*, 394 U.S. 700, 89 S.Ct. 1391, 22 L.Ed. 2d 658 (1969); *Poller* v. *CBS, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962).

[4] *White Motor Co.* v. *United States*, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1962). *See generally* text and cases cited in Moore's Federal Prac. § 56.16, especially pages 2452–53.

[**109**] The company owned routes were converted into independent distributorships. In all but two cases, the new distributors were the former operating employees of Maple Island or an existing independent Russell distributor. In each such case, a meeting was held where the new distributor purchased the assets at the location, including any inventory and accounts receivable. The purchaser made a modest down payment with the remainder being financed by Beatrice.[5] Present at each meeting were the purchaser and representatives of Maple Island and Beatrice. The exhibits attached to the government brief produced from Beatrice show that, typically, at each meeting the former Maple Island employee or existing Russell distributor first executed an "Agreement to purchase," distributorship contract, factor's lien, conditional sales contract and note bearing 7% interest. Contemporaneously, a Beatrice subsidiary executed a check for the balance due after the down payment.[6] Also at each meeting Maple Island assigned all its rights under the distributorship contracts to Beatrice. The assignment was accomplished in each case by a document, signed by Maple Island, Russell and the new distributor, which contained the following recital:

> For value received, I hereby assign the attached conditional Sales Contract, Factor's Lien, Note, Franchise Agreement of ———— to Russell Creamery Co. * * * .

As to the 11 independent Maple Island distributors in the northern division, the only assets transferred were 30 day trade accounts owed by them to Maple Island. In six cases, the Beatrice subsidiary issued a check to the distributor who in turn, by prior agreement with Beatrice, endorsed it to Maple Island in payment of outstanding accounts. Four distributors financed their own transfers. One in Amery, Wisconsin, was dropped from the arrangement by mutual agreement.

Also included in the arrangements between Maple Island and Beatrice was a five-year license for use of the Maple Island label. During the period when the transfers were being made, an exchange of correspondence between Russell and Maple Island resulted in a letter (Government Exhibit No. 14, Beatrice Special

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[5] Of the 11 branch offices, the transfer of seven was financed by Beatrice. Two were financed from other sources, one by Maple Island and the eleventh was not transferred. Of the four stores, two were portable and removed. one at Virginia, Minnesota was transferred with the branch office, and the fourth, Grand Rapids, was finally transferred to an existing Russell distributor.

[6] All but one of these checks were made payable to Maple Island. One was endorsed to Maple Island by the new distributor.

Report Exhibit II–X–5) which gave that license and is otherwise instructive.

September 23, 1968

Mr. R. E. Russell
Russell Creamery Co. of Wisconsin, Inc.
1625 Broadway
Superior, Wisconsin 54881

Re: Fluid Milk and Ice Cream Distribution Under Maple Island Label

Dear Mr. Russell:

This will confirm our agreement with you concerning the processing and sale of fluid milk and ice cream products under the Maple Island label to certain independent distributors, company owned branches and dairy stores located in the area north of the Twin Cities, which locations are described on the attached sheet.

Effective September 1, 1968, or as soon thereafter as possible, you are to commence serving these locations direct from your plants at Superior, Wisconsin, and Brainerd, Minnesota, with such sales to be made on an open account basis in accordance with your normal selling terms, as we have previously discussed this matter.

As we informed you, we have decided to discontinue serving these locations, since their location in the area north of the Twin Cities has been unprofitable due to the long hauling distances [110] and the fact that they are mostly in small towns where the growth potential is not large. For this reason, we have also decided to dispose of these company branches and dairy stores to independent distributors and as these disposals are accomplished, we will expect you to continue to serve such accounts and bill them direct, however, in the meantime we will continue to operate these locations.

Since a substantial portion of *this volume is packaged under our Maple Island private label for which a consumer demand has been established*, we hereby agree to authorize you to use such label on the packages now being processed and distributed at these locations for a period of five years from September 1, 1968.

You agree to hold Maple Island, Inc. and its subsidiary companies harmless from any and all claims and losses including costs of defence arising out of the use of our name from and after September 1, 1968. *You also agree that you will do nothing to injure the goodwill of the name or jeopardize its value.* If this meets with your approval, please sign the extra copy of this letter enclosed and return it to me.

Very truly yours,

MAPLE ISLAND DAIRIES, INC.

By: /s/ D. W. O'Brien

D. W. O'Brien, Vice President

[Emphasis added]

That letter together with other correspondence and documents clearly shows that the transactions were a "package deal." In addition, various documents from Russell and Maple Island files refer to their "courtship" and to the "disposal" or "sale" of the northern division. As previously noted prior to the transactions Maple Island was a competitor of Russell in many of the towns and cities in the northern division area. Afterwards, only Russell supplied milk to those locations.

While there is no direct indication of the "value received" by Maple Island for its assignments, certain letters and account sheet in the record reveal that after September 1, 1968, Maple Island was charging—and Russell was paying—interest on the unpaid balance of the book value of the physical assets plus a $20,000 upward adjustment. Also, between September 1, 1968 and December 13, 1968, checks totalling about $230,000 were negotiated from Beatrice subsidiaries to Maple Island, either directly or by immediate endorsement from the distributor to Maple Island.[7] At minimum, therefore, with Beatrice providing financing in most cases, Maple Island was able to recover its investments or a substantial portion thereof in the northern division, including its accounts receivable, immediately rather than having to finance the transactions itself or to depend upon the ability of the purchasers to find independent sources of credit. Primarily as a direct result of the arrangement with Maple Island, the annual sales of Russell Creamery of Superior alone increased by some 30%, or by nearly $1 million.

The government asserts that by virtue of the series of transactions described above, Beatrice through its subsidiaries Russell, acquired the sales volume or market share, good will and the beneficial use of the label and other assets of Maple Island, its former competitor in northern Minnesota. The government contends that what was acquired is an "interest" within the meaning of the FTC consent order. Beatrice disputes these assertions, arguing the following issues of material fact:

(1) Whether the word "interest" as used in the negotiated decree is not in fact an ambiguous term and therefore **[111]** oral negotiations between FTC personnel and Beatrice attorneys and personnel prior to the decree and post decree conduct in relation to other cases should be the subject of an evidentiary hearing to determine as a fact issue the intent of the parties at the time.

(2) Whether as a matter of fact Maple Island sold or transferred no part of its business or operations to Beatrice, which paid no money to purchase anything from Maple Island but rather

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[7] See Appendix I, Gov't Brief. Checks in the amount of about $175,000 were made out directly to Maple Island by Russell to finance the purchase of Maple Island owned routes. (The purchasers of the routes made down payments totalling $27,000.) Indirect payments by immediate endorsement totalled some $55,000.

served only as an available, alternate financing source for the various purchasers and acquired no interest but simply began to supply dairy products where Maple Island had previously; and,

(3) Whether Beatrice acquired any interest in the license for use of the Maple Island label.

Beatrice does not contest that Maple Island was the kind of dairy firm which the order prohibited acquiring. At first blush these assertions might appear to present questions of material fact but upon analysis it is clear they do not.

That the parties dispute the contest and meaning of the negotiations prior to the consent order is clear. The parties also differ as to their characterizations of the arrangement with Maple Island. But a defendant cannot create an issue of *material* fact requiring a jury trial simply by saying over and over that one exists. Defendant's claimed factual issues in Count I either are completely contradicted by a record consisting of documents primarily obtained from defendant's own files and by deposition testimony, or depend upon clearly inadmissible evidence or are legal conclusions.

Beatrice asserts that issues of material fact are raised concerning the meaning of the word "interest" in the order from statements made by FTC staff personnel during the pre-order negotiations after the original adverse order from the FTC and from the post order conduct of the parties. Regarding the negotiations, Beatrice states that it was assured by FTC staff that "interest" was meant to be narrower in scope than the equivalent language in orders directed at three other major dairy companies.[8] Beatrice officers have so testified in deposition, and defendant asserts that such testimony is admissible to explain an ambiguous term, "interest," in the order, relying on numerous cases it asserts hold that consent orders or decrees are in the nature of private contract and the usual rules relating to use of parol evidence to explain ambiguities apply.[9]

[3] The government strongly opposes consideration of the negotiations behind the order and the court agrees. "Interest" is hardly new in the law. The precise phrase used in the order has been used in another consent decree recently construed by the Supreme Court.[10] Equally significant, the term has a fairly con-

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[8] All three other orders prohibited the acquisition of the "* * * stock, share capital or assets * * *" of other dairy firms for a ten year period. In the Matter of National Dairy Products Co. (FTC Docket 6651) Jan. 30, 1963, 62 FTC Decisions 120; In the Matter of the Borden Company (FTC Docket 7129), Jan. 30, 1963, 62 FTC Decisions 130; In the Matter of Foremost Dairies, Inc. (FTC Docket 6495), Mar. 5, 1965, 67 FTC Decisions 282.

[9] *E.g., Heights Funeral Home* v. *McClain*, 288 S.W.2d 839 (Tex.Civ.App.1956); *see generally*, 49 C.J.S. Judgments § 178.

[10] *United States* v. *Armour & Co.*, 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971).

sistent, precise usage in relationship to property, businesses and other things of value.[11] For example, the Restatement, Property § 5 states:

> The word "interest" is used in this Restatement both generically to include varying aggregates of rights, privileges, powers, and immunities, and distributively to mean any one of them.

[112] Other examples of the consistent use of the term include the following:

> More particularly it [interest] means a right to have the advantage accruing from anything; *any right in the nature of property, but less than title* * * * . Black's Law Dictionary, Revised 4th Edition 950 (1968).
>
> In a contract of sale of a business providing that vendors agreed to sell and assign to purchaser all other interests which they may have in the business, the word "interest" meant a *valuable property or right, forming a part of the business sold,* a part of said business and its assets.
>
> The word "interest" when applied to property means the legal concern of a person in the thing or property, or in *the right to some of the benefits or uses from which the property is inseparable. Parsons* v. *Parsons,* 141 P.2d 559, 561, 193 *Okl.* 160.

The foregoing clearly indicates that "interest" includes, by definition, the rights transferred here to Beatrice by Maple Island. The license to use the label,[12] the notes, distributorship agreements,[13] sales contracts and factor's liens are all "rights in the nature of property" and valuable rights forming a part of the business and in many instances comprising assets of Maple Island. Whereas before, Maple Island held all rights, privileges, powers, and immunities relating to the assets transferred, after the transfer, Beatrice held some of those rights and the independent distributors held the rest. And while the sales contracts, factor's liens and notes did not give Beatrice title, Beatrice clearly held a security *interest, i.e.,* a right of ownership contingent upon the default of the titleholder. Such interests are no less interests within the terms of the order because contingent upon default of the debtor.[14] Perhaps most significant, prior to the transfer, Maple Island had the "rights to the benefits" inseparable from the property transferred, *i.e.,* the sales of its milk to the customers along Maple Island's former routes. After the transfer, Beatrice had those rights at least for the minimum period of the distributorship agreements and the advantage of an established and continuing relationship with the distributors. Beatrice thereby gained access to all or most of the customers—the sales volume [15]—who previously bought milk from Maple Island. The net result was an increase in gross sales of Russell Creamery in Superior alone of nearly $1 million, about 30%.

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[11] See generally 22 Words & Phrases, p. 53 et seq.

[12] *United States* v. *Columbia Pictures,* 189 F.Supp. 153 (S.D.N.Y.1960); *Western Geophysical Co. of America* v. *Bolt Associates, Inc.,* 305 F.Supp. 1248 (D.Conn. 1969.)

[13] The distributorship agreements included provisions that the distributor would handle Maple Island brand products exclusively in a territory described in that contract, giving the defendant first refusal in purchasing the distributor's business, a liquidated damages clause for any violation and a non-competition agreement. A handwritten note on defendant's own copy of a letter of inquiry sent by the FTC (Exhibit 34, Fox deposition Exhibit 41, Defendant's Ex. 14) contains the following notation, "we acquired distributorship contracts from Maple Island."

[14] Indeed, artful real estate lawyers have for centuries been creating interests much less valuable than those here transferred in the form of contingent remainders.

[4] The transactions thus constitute at least an indirect acquisition of an interest in violation of the order. It is at best disingenuous for Beatrice to contend that the particular "aggregate of rights, powers, privileges and immunities" transferred was not an interest in the milk distribution firm of Maple Island. [113] The court should look to the purpose of the FTC order, and what it was intended to accomplish.

The United States Supreme Court recently stated in *United States* v. *Armour & Co.*, 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971):

> The * * * scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. [Id. at 682, 91 S.Ct. at 1757]

Nothing in the remainder of the final Beatrice order contradicts the construction of the order here made by this court.[16]

[5] Moreover, if the parties had agreed to a consent order which permitted the acquisition of the sales volume of a firm while avoiding the corporate shell and the physical assets, they were certainly capable—after 11 years of litigation and negotiation—of drafting language less broad than that used here. The order is not ambiguous so as to allow admission of parol evidence of the pre-

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[15] The only case cited by either party relating to whether sales volume is an asset is that of *United States* v. *ITT Continental Baking Co.*, Civil Action No. C–1220 (D.Colo. 8/2/71) (Exh. 48). There Judge Winner answered the question in the affirmative, stating. "I find that, particularly in businesses where route salesmen are involved, customer lists have a peculiar value, and that they frequently represent the principal asset of a business. * * * and these assets, the most important of which were sales routes and sales volume, were acquired."

[16] Paragraph II, 2 of the order reads as follows:

"By these divestitures no interest shall be sold or transferred, directly or indirectly to anyone who is at the time of the divestiture an officer, director, employee or agent of, or directly or indirectly under the control or direction of Beatrice * * *."

The FTC opinion accompanying the order stated in part:

"In the view of the majority of the Commission the proposed consent settlement achieves in large measure the original objective of the complaint which was to prevent the disappearance from the dairy industry of viable regional dairy companies."

Both paragraph II. 2 and the 10 year acquisition ban are consistent with that purpose and use the same term. Paragraph II. 2 insures that the divestiture will not be illusory. The identical term is used to insure that other regional dairy companies will not be acquired. Defendant's construction would permit an illusory ban on acquisitions.

order negotiations. There is no suggestion that the agreement was not integrated in the order. Thus, the negotiations can provide no factual basis precluding summary judgment.

[6] Even assuming ambiguity in the word "interest" *arguendo*, defendant's contentions are not well founded. As noted 11 years of litigation preceded the modified order, including full hearings on both the question of antitrust violations and as to sanctions imposed. There is a full record of the hearings before the examiner, an opinion of the examiner, and two FTC opinions which provide ample assistance in construing the order, if clarification is needed.

The extensive quasi-judicial litigation before the FTC resulted in 51 pages of findings and an opinion by the Commission, detailing the anticompetitive effects of the mergers and acquisitions typifying the dairy industry in general and Beatrice's own growth in particular. When the modified order was entered by the Court of Appeals by consent, the FTC reiterated its view that the order accomplishes the objective sought in the previous findings and order, namely the prevention of the disappearance of regional dairy firms through acquisition by the multi-market giants such as Beatrice.[17] Thus, if the public record behind the order is consulted, it is clear that the acquisition of the sales volume by Beatrice and the loss of Maple Island as a competitor is the kind of event the order was intended to prevent.

Defendant's cited cases where the contents of negotiations behind an order were allowed are all, with one set of exceptions,[18] civil cases between private **[114]** individuals and are either divorce cases or relate to issues of *res judicata* or collateral estoppel, clearly different from that here where the issue is: What does the order prohibit the defendant from doing?; not what was decided. With the one exception described below no cases have been cited, and this court's research has revealed none, in which any court has accepted evidence relating to the negotiations between the staff of a public agency and a respondent in interpreting an order by the agency.

The exception is a line of tax cases involving prior efforts by the Office of Price Administration to recover overcharges and statutory penalties for violations of price control regulations. The OPA claims were settled by negotiation resulting in payment of a sum of money and the issue before the court in the tax cases was the deductibility of the payments. Deductibility turned on whether the payments included amounts for trebel penalties which would indicate "willful" violation of the price control regulations, the deduction of which would not be allowable. The courts in each case admitted testimony regarding pre-decree negotiation as well as other evidence on the issue of willfulness. These tax cases are not on point. The issue in those cases was akin to a *res judicata* problem, namely what issues were submitted and decided. Here the issue is the interpretation of the agency or court order.[19] One case which points to the proper resolution of this issue is *Gila Valley Irrigation District* v. *United States*, 118 F.2d 507, 510 (9th Cir. 1941), where the court held that evidence as to negotiations between the parties was inadmissible in inerpreting a consent decree stating:

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[17] *Compare* 68 FTC 1007 *with* page 3 of the opinion of the FTC accompanying its modified order of June 7, 1967 (quoted page 12, n. 16, *supra*.)

[18] *United State* v. *Star-Kist Foods, Inc.*, 240 F.2d 759 (9th Cir. 1956); *Commissioner of Internal Revenue* v. *Pacific Mills, Inc.*, 207 F.2d 177 (1st Cir. 1953); *Milton S. Kronheim & Co.* v. *United States*, 163 F.Supp. 620, 143 Ct.Cl. 390 (1958); *American Brewery, Inc.* v. *United States*, 223 F.2d 43 (4th Cir. 1955), rev'g 126 F. Supp. 477 (D.Md.1954).

> Even if we assume that the terms of the decree were ambiguous, contrary to our conclusion, *evidence of negotiations leading up to the decree would not be admissible, for we are concerned not with the intention of the parties as in the case of a contract between them, but the intention of the court as expressed in the decree.* Moreover, if there was an error in the ruling it was not shown to be prejudicial for, in case of an ambiguity, the pleadings [*i. e.*, the official or public record] should be first consulted to resolve the ambiguity. [Emphasis added]

The *Gila Valley* rule appears particularly appropriate here.

The remaining alleged issue of material fact requires only summary treatment. It matters not whether Maple Island "sold" its business to defendant, although there is evidence that suggests a sale was made. The issue, disposed of above, is whether Beatrice *acquired* an interest in Maple Island or its business or assets. The issue as to whether Beatrice may have paid no money to *purchase* anything from Maple Island is similarly irrelevant.[20] The issue is one of *acquisition* by Beatrice whether by direct sale, or an indirect transaction. Clearly, there was a transfer of something of value to Beatrice.

[7] As to defendant's alleged lack of interest in the license for the Maple Island label, the law is clear that trademarks and labels are valuable business assets, and defendant's own documents re-

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[19] Whether the order here construed is considered a court order or as an order of the FTC would seem to be irrelevant: defendant has suggested no basis for distinction. Since the case was settled during the pendency of the appeal to the Circuit Court, however, it appears accurate to consider the order here as the order of the court, to be construed as other consent judgments.

[20]. Already noted is the recitation of "for value received", the transfer of more than $230,000 from Beatrice to Maple Island, either directly or through the distributors, and the payment of interest by Beatrice's subsidiary to Maple Island.

flect the defendant's belief that the label on a milk product is such.[21]

[115] The court thus concludes that as to Count I there are no issues of material fact, and summary judgment is proper.

COUNT II

[8] Summary judgment is even more clearly proper as to Count II. Part I of the consent order required Beatrice to divest itself within 18 months "* * * of all plants which are owned in whole or in part by Beatrice or operated by Beatrice at * * * Albuquerque, New Mexico; * * *" as part of the divestiture of a group of plants in the American Southwest. Defendant owned an 18½% stock interest in the Valley Gold Dairy Co. of Albuquerque, which was not divested until late 1969 or early 1970. The 18 month period expired on December 7, 1968. Defendant divested all of the other Southwest plants to a single purchaser. Following that action and in March, 1969, the FTC notified Beatrice that it was still obliged to divest the Valley Gold stock. A series of letters and conferences with FTC staff ensued. After denial by the FTC of defendant's request for an extension until August 1970, Beatrice formally requested the FTC approval of a purchaser for the stock in a letter received by the FTC on January 2, 1970. The government contends the divestiture was untimely as a matter of law. Defendant's contentions resisting the government position are considered *seriatim.*

Beatrice first argues that a jury must determine whether its stock interest was a "plant" within the meaning of the order, either because a stock interest is not literally a plant or because it was understood that Beatrice had to acquire all of the Valley Gold stock before the order was applicable to that interest. The order itself, however, speaks of plants owned "* * * in whole or in part * * *" in Albuquerque. Defendant's answer admits that it was required to divest itself of its interest in the Albuquerque Dairy plant within 18 months. The record reflects no other interest of any kind in any other dairy business in Albuquerque. Footnote 2 on page 2 of the FTC opinion of June 7, 1967 (which accompanied the consent order) states:

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[21] The letter of agreement (quoted in full, *supra,* pp. 6, 7) signed by Beatrice subsidiary is an example. Relevant excerpts include the following:

"Since a substantial portion of this [sales] volume is packaged under our Maple Island private label *for which a consumer demand has been established* * * *."

"You [Russell] also agree that you will do nothing to injure the *goodwill of the name* or jeopardize *its value.*" [emphasis added]

Attached as an exhibit to defendant's compliance report to the FTC for 1970 is a letter to all dairy plant division managers, dated 6/11/70, which states defendant's then current policy on private label agreements. The letter states in pertinent part,

"Where Beatrice is having another processor or manufacturer custom pack Meadow Gold or our label products, we should have a similar written agreement to protect our valuable *trademarks* and reputation for quality." [Emphasis added]

> Beatrice is also divesting the Valley Gold operations in New Mexico * * *

A booklet describing defendant's "Southwest Dairy Operations" and submitted to the FTC on 10/18/67 as part of defendant's compliance report contains the following statement (Exh. 60, p. 22):

> Beatrice is offering its wholly-owned southwestern dairy operations as outlined above for sale at a price of $6,272,519. In addition Beatrice's 3,458 shares of Valley Gold common stock are available for purchase at $636,686. Pursuant to agreement with the Federal Trade Commission, the dairy properties are offered as a unit to a single purchaser.

Finally, if more proof be needed, defendant's own internal memorandum for Beatrice of July 16, 1969, from General Attorney John P. Fox, Jr. to William Karnes states:

> You are familiar with *the fact that* as to the divestiture provision of the consent decree in the Merger Case, *Beatrice is still under the obligation to* [116] *dispose of our interest in Albuquerque.* This of course means some arrangement relative to our *3,458 shares of Valley Gold stock* (18.5% of the outstanding shares.) [Emphasis added]

In the face of such overwhelming documentary evidence, for defendant now to contend that its Valley Gold stock was outside the consent order is quite without merit. The only evidence offered to support this position is the fact that Beatrice and the then principal stockholder of Valley Gold had discussed, prior to the entry of the consent order, defendant's possible acquisition of his majority interest. The fact of such negotiations does not contradict the clear interpretation of the order as evidenced by the order itself, the accompanying FTC opinion, Beatrice's compliance report, and defendant's own internal memorandum. The first indication that the Valley Gold interest might not be subject to the order—anywhere in the record—was in defendant's briefs on the instant motion. As a matter of law the divestiture order clearly applies to the Valley Gold stock; there is no issue for a jury raised on this point.

[9–11] Equally groundless is defendant's contention that it's efforts to dispose of the Valley Gold stock were in good faith and that a good faith effort to comply with the terms of the order is a complete defense. Assuming such good faith *arguendo*, that issue was passed upon by this court in a previous order, *United States* v. *Beatrice Foods Co.*, 52 F.R.D. 14 (D.Minn.1971), where it was stated:

> * * * while good faith is not a defense to such an action, it is clearly relevant to the court's discretionary determination of the extent of civil penalties to

be assessed under that provision. *United States* v. *H. M. Prince Textiles, Inc.*, 262 F.Supp 383, 388–389 (S.D.N.Y.1966); *United States* v. *Vitasafe Corp.*, 212 F.Supp. 397 (S.D.N.Y.1962), *aff'd* 352 F.2d 62 (2d Cir. 1965). 52 F.R.D. 14, 18.

Similarly, defendant's arguments as to the alleged difficulty or impossibility of divesting the stock may have carried weight behind a request to modify the order, but they are not a defense to the action here.[22] Moreover, defendant did in fact divest. Whether its negotiations over price with the ultimate purchaser were reasonable is irrelevant to whether the stock was *timely* divested. The good faith language in the order clearly applies not to defendant's *efforts* to divest, but to a requirement of actual rather than illusory divestiture. Neither the order itself nor its public record background, suggests anything to indicate that defendant's divestiture obligation under the order was to be affected by the price defendant received, and defendant's position in being forced to sell is no defense. Defendant's bargaining position may have been weakened by virtue of the order.[23] But any unequal bargaining **[117]** position is the product of defendant's earlier found violations of the antitrust laws and the resultant order consented to by defendant. Having consented, defendant may not now indirectly attack the order.[24] Here, defendant expected to get a price it desired. Because the ownership of the majority of the Valley Gold stock changed due to a death, leaving those expectations unfulfilled, defendant cannot now claim "foul." There is no issue of material fact raised by defendant's alleged good faith or inability to comply.

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[22] *St. Helen* v. *Wyman*, 139 F. Supp. 545 (N.D.Calif.1956), is not apposite. There the issue was whether the good faith attempts of certain army personnel to notify persons responsible for discharge of a soldier whose discharge had been temporarily restrained by a court were a defense to claims based on violation of the restraint. The case is distinguishable on three grounds. Firstly, the time within which the requisite notice could be given was apparently extremely short whereas here, defendant had more than 18 months to comply. Secondly, the restraining order was an attempt to maintain the status quo for a short time until the main issues could be litigated, under the court's general equity powers; good faith would be relevant to an equity claim. Here the order was the considered and negotiated product of 11 years of litigation, consented to by defendant. Thirdly, there were procedures established for modification of the order and time to use them if the difficulties were insurperable.

[23] Two cases cited by defendant as authority for its claimed defense of inability to comply. *Healey* v. *United States*, 186 F.2d 164 (9th Cir. 1950), and *Federal Trade Commission* v. *Blaine*, 308 F.Supp. 932 (N.D.Ga.1970), are instances where contempt citations were sought for failure to produce documents not shown to be in the possession or control of the defendants. The inability to comply was in each case actual rather than that here, *i. e.*, the result of defendant's desire to get a better price. Similarly, there is no indication here, as in the strike case, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A.R.R.*, 127 U.S.App.D.C. 223, 380 F.2d 570 (1967), that the third party whose cooperation was required for compliance was unwilling to deal with the party under the court's order.

[24] *United States* v. *Vitasafe, supra*, and *United States Bio-Genics Corp.* v. *Christenberry*, 173 F. Supp. 645 (S.D.N.Y. 1959), *aff'd* 278 F.2d 561 (2d Cir. 1960). The FTC opinion accompanying the consent order states that divestiture of the Valley Gold and other Southwest operations was in place of defendant's Idaho division and part of its Utah division which were ordered to be divested under the appealed order.

[12] Also groundless, is the assertion that by approving the sale of the other Southwest plants as a unit, the FTC impliedly agreed that the Valley Gold stock need not be divested and is therefore estopped from claiming, or has waived its right to claim, that defendant violated the order. Defendant cites no authority, the record is devoid of evidence to support such a claim, and defendant's own internal documents reflect its continuing awareness of its obligation. The fact that Beatrice may have *inferred* briefly that the FTC was no longer interested in the Valley Gold stock is irrelevant. The order makes explicit provision for divestiture. There is no material issue of fact on the issue of waiver or estoppel.

[13] Defendant claims that it was given an oral extension of time for compliance by FTC staff until August, 1970. At most, however, the testimony of the defendant's officers supports only the conclusion that FTC staff advised defendant to apply for an extension and that, if one was applied for, the staff would support it. (See Fox deposition, pp. 37–42.) And the record is clear that defendant knew that, however influential the staff may be in FTC decisions, the staff had no authority to make a decision as to an extension. There is no evidence to support either actual or apparent authority in the staff. To the contrary, Beatrice applied formally for a one year extension; the FTC responded formally by granting defendant two months to present a suitable purchaser until November 15, 1969.[25] There was no one-year extension. It is clear to the court that there is no issue of material fact on this issue.

[14] Defendant argues that the FTC letter of September 12th, which gave Beatrice two months to "present a suitable purchaser" for approval, established a requirement less than full divestiture. Since, it is argued, the FTC knew of the negotiations with the ultimate purchaser, and had made inquiry about it, defendant had substantially complied **[118]** with the November 15th deadline. The record belies this claim. The earliest possible presentment of a purchaser was, by any view of the facts, no earlier than the letter to the FTC dated December 19, 1969. That letter indicated agreement with the estate of one Price had been reached. The contracts were not executed until December 24, 1969, however, and a formal request for approval of the FTC was not sent until

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[25] The government argues that no extension was given by its letter of September 12, 1969, but rather only a period of grace as to enforcement of the order. The text of the September 12th letter supports that contention. Since the government is claiming penalties only for the period after November 15th, however, the court need not determine whether what the Commission did was *de facto* an extension.

December 30, 1969, received on January 2, 1970. Whether the suitable purchaser was presented on December 19, 1969, January 2, 1970 or any date between, it is clear that none was presented by the November deadline. The violation of the order, even if considered as extended two months in some manner, clearly occurred and the precise date of presentment is relevant only to the question of penalties. Again there is no issue of material fact, only disputes as to the legal conclusions to be drawn from those facts. Summary judgment is appropriate as to Count II.

CONCLUSION

As the foregoing indicates somewhat *in extenso*, defendant has raised no issue of material fact necessitating a trial. As to Count I, the unchallenged documentary evidence shows that Beatrice "acquired" an "interest" in Maple Island Dairies. As to Count II, the evidence is quite clear that Beatrice's divestiture of the Valley Gold stock was untimely. Both are violations of the order entered on June 7, 1967. Summary judgment in favor of the government on the issue of defendant's liability is therefore appropriate.

On the question of the penalties which should be imposed for the violations of the FTC order by Beatrice, the court should like to hear further from counsel for the parties, before ordering the entry of judgment and accordingly has set a hearing date for consideration thereof in a separate order which has been entered.

UNITED STATES *v.* SILVER STAR CHINCHILLA, INC., ET AL.*

Civ. A. No. 6–71–219—F.T.C. Docket C–1144

(United States District Court, District of Minnesota, August 15, 1972)

Seller of chinchilla breeding stock fined $2,500 civil penalties and prohibited from selling ever again chinchilla breeding stock or any similar breedng stock. Respondent further required to deposit $2,000 with the court for ultimate payment in equal shares to the ten complainants named in the government's suit.

Joseph M. Livermore, Asst. U.S. Atty., *Gregory B. Hovendon* and *Lee I. Weintraub*, Dept. of Justice, Washington, D.C., for plaintiff.

Robert M. Hegg, *Edward W. Schulke* and *George J. King*, for defendants.

DEVITT, *District Judge.*

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* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶74,128 at 92,723 (1972 Trade Cases). For case before the Commission, see 70 F.T.C. 1456.

FINAL JUDGMENT

Plaintiff, the United States of America, having filed its complaint against defendants Silver Star Chincilla, Inc., a corporation, and Edward W. Schulke, an individual, for violations of an Order to Cease and Desist issued by the Federal Trade Commission in Docket No. C–1144, on December 6, 1966, which order became final by operation of law on February 12, 1967; and defendants having filed their answer; and, plaintiff and defendants, by their respective attorneys having consented to the making and entering of this Final Judgment, without trial or adjudication of any issue of fact or law and without any admission by plaintiff or defendants with respect to any such issue, and this Court having examined the files and considered the statements of counsel and being fully advised in the premises,

Hereby orders, adjudges and decrees that:

I.

The Court has jurisdiction of the subject matter herein and of the parties hereto. The complaint herein states a cause of action against each of the defendants under Section 5 of the Federal Trade Commision Act, 15 U.S.C. § 45.

II.

Judgment is hereby entered in favor of plaintiff, the United States of America, and against defendants, Silver Star Chinchilla, Inc. and Edward W. Schulke, jointly and severally, in the amount of Two Thousand and Five Hundred Dollars ($2,500.00), payable to the Treasurer of the United States.

III.

Defendants Silver Star Chinchilla, Inc. and Edward W. Schulke, directly or through any corporate or other device, are forever enjoined and restrained from offering for sale, selling or distributing chinchilla breeding stock, or any similar breeding stock, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

IV.

Pursuant to the agreement of the plaintiff and defendants herein, and within eighteen months of the date of the entry of this judgment by the Court, defendants will pay to the Court the sum of Two Thousand Dollars ($2,000.00), which will be distributed by the Court in equal shares to the ten individual complainants named in the Government's complaint. See Schedule I.

V.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the interpretation, construction or modification of this Judgment, for the enforcement of compliance therewith or for the punishment of violations thereof.

VI.

Pursuant to the agreement of the parties, the entry of this Judgment for plaintiff, the United States of America, shall constitute the complete and final settlement of all claims accruing to plaintiff as a result of any violations by defendants of the above mentioned cease and desist order occurring prior to the entry of this Judgment.

CONSENT AGREEMENT

Plaintiff and defendants, by their respective attorneys, hereby consent to the making and entering of the foregoing Final Judgment.

SCHEDULE I

The ten individual complainants named in the Government's complaint are:

1. Mr. and Mrs. Norman R. Ule
   Rt. 2
   Auburndale, Wisconsin
2. Mr. and Mrs. Andy G. Stublaski
   431 South 19th Avenue
   Wisconsin Rapids, Wisconsin
3. Mr. and Mrs. Vilas J. Verhulst
   Rt. #1
   Box 64A
   Abbotsford, Wisconsin
4. Clarence A. Clark
   801 South Main Street
   Alma, Wisconsin
5. Clarence J. Becker
   Box 127
   Almena, Wisconsin
6. Mr. and Mrs. Sidney W. Reek
   Route 2
   Box 249
   Marshfield, Wisconsin
7. Mr. and Mrs. Cecil A. Renner
   Route 2
   Box 16
   Wisconsin Rapids, Wisconsin

8. Arthur O. Jacobson
RR #4
Box 191
Marshfield, Wisconsin
9. Mr. and Mrs. Ronald J. Manecke
Route 1
Box 220
Rice Lake, Wisconsin
10. William L. Paul and Corine L. Paul
Route 2
Nekoosa, Wisconsin

KENNECOTT COPPER CORPORATION
v.
FEDERAL TRADE COMMISSION *

No. 71-1371—F.T.C. Docket 8765

(United States Court of Appeals, Tenth Circuit, Sept. 15, 1972)

1. WHOLE NATION IS RELEVANT MARKET WHERE LARGEST COPPER PRODUCER ACQUIRES ONE OF NATION'S LARGEST COAL PRODUCERS

Finding of Federal Trade Commission that the nation as a whole constituted a relevant geographic market in determining anticompetitive effect, if any, of transaction by which nation's largest copper producer and owner of industries related thereto acquired one of the nation's largest coal producers and distributors was supported by record.

2. THAT ACQUIRING COMPANY WAS NOT THEN AN ACTIVE COMPETITOR OF ACQUIRED COMPANY DID NOT REMOVE MERGER FROM SCOPE OF CLAYTON ACT

Fact that acquiring firm was not at time of acquisition directly engaged in the business of acquired firm so that merger did not have effect of removing a direct and active competitor did not serve to remove merger from scope of Clayton Act and did not necessarily result in the use of different criteria in determining probable competitive effect of acquisition.

3. NO ERROR IN COMMISSION ASSESSING SITUATION THAT COAL INDUSTRY WAS ON ITS WAY TO BECOMING HIGHLY CONCENTRATED

In light of general objectives of Clayton Act there was no error in Federal Trade Commission's approach to case, which involved the acquisition by the leading copper producer in United States of the leading coal producer by assessing probabilities in coal market, which was admittedly not a tight oligopoly, rather than assessing on a basis of present conditions after Commission had determined that the industry was on its way to becoming highly concentrated.

4. EVIDENCE SUPPORTS FINDING THAT COPPER PRODUCER WAS A SUBSTANTIAL POTENTIAL ENTRANT INTO COAL INDUSTRY DUE TO ITS INTEREST IN COAL BUSINESS AND ITS LONG-TERM PLANS

Record before Federal Trade Commission regarding the transaction

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* Reported in 467 F.2d 67 (1972). Petition for review denied: October 13, 1972. Petition for writ of certiorari filed October 25, 1972. For case before Commission, see 78 F.T.C. 744.

whereby the nation's largest copper producer acquired the nation's largest coal producer supported finding that copper producer, which had acquired a small coal company previously to obtain a source of coal for its own use and for the purpose of producing and selling coal on a commercial basis, was, prior to acquisition of largest coal producer a substantial potential entrant into the coal industry over which it exerted substantial influence due to its interest in coal business and its long-term plans.

5. EVIDENCE SUPPORTS FINDING THAT RESPONDENT'S ENTRY INTO COAL PRODUCING FIELD HAD EFFECT OF RAISING ENTRY BARRIERS EVEN FURTHER

Evidence in hearing before Federal Trade Commission regarding transaction in which the nation's largest copper producer acquired the nation's largest coal producer supported finding that the transaction which removed copper producer, shown to have been a most likely entrant, from entry into coal market had effect of raising entry barriers even further.

6. RECORD SUPPORTED FINDING OF COMMISSION THAT THE ACQUISITION WAS VIOLATION OF CLAYTON ACT

Evidence before Federal Trade Commission regarding anticompetitive effect, if any, of transaction by which the nation's largest copper producer, found to be a potential entrant into the coal producing field, acquired the nation's largest coal producer supported finding of Commission that the transaction was a violation of Clayton Act in that the effect may be substantially to lessen competition or tend to create a monopoly.

7. LAW GIVES COMMISSION THE COMBINED FUNCTIONS OF INVESTIGATOR, PROSECUTOR AND JUDGE AND DOES NOT INFRINGE DUE PROCESS

Federal Trade Commission was not disqualified from extending to copper producer a fair and judicious hearing concerning its acquisition of coal producer because of Commission's varied other duties including its numerous contacts with members of Congress and others on issues relating to the very subject matter of case, and the law giving Commission combined functions of investigator, prosecutor and judge did not infringe due process.

8. RESPONDENT WAS NOT DEPRIVED OF A FAIR TRIAL BECAUSE A COMMISSIONER REFUSED TO DECLARE HERSELF DISQUALIFIED

[69] In view of record showing that Federal Trade Commissioner in granting public interview was discussing the complaint in an effort to illustrate point and did not comment or editorialize to show a viewpoint, party was not deprived of a fair trial because such Commissioner refused to declare herself disqualified.

(The syllabus, with substituted captions, was taken from 467 F.2d 67.)

On appeal, Court held that evidence before FTC regarding anticompetitive effect of acquisition by nation's largest copper producer of the largest coal producer supported finding of violation of Clayton Act in that its effect may substantially lessen competition or tend to create a monopoly. Petition for review denied and orders of Commission affirmed and enforced.

Roy H. Steyer, of *Sullivan & Cromwell*, New York City (*Arthur H. Dean*, *John L. Warden* and *Barrington D. Parker, Jr.*, of *Sullivan & Cromwell*, New York City, *William Simon*, *John Bodner, Jr.* and *Francis A. O'Brien*, of *Howrey, Simon, Baker & Murchison*, Washington, D.C., (*Winston S. Howard*, and *Hugh A. Burns*, of *Dawson, Nagel, Sherman & Howard*, Denver, Colo., on brief) for petitioner.

Montgomery K. Hyun, Atty., Federal Trade Commission (*Ronald M. Dietrich*, Gen. Counsel, *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, and *Frederick H. Mayer*, Atty., Federal Trade Commision, on brief) for respondent.

Before HILL, BARRETT and DOYLE, *Circuit Judges*.

WILLIAM E. DOYLE, *Circuit Judge*.

I.

INTRODUCTION

The matter before us is the petition of Kennecott Copper Corporation seeking review of a divestiture order issued by the Federal Trade Commission. Kennecott, a New York corporation, is engaged in the production of copper and industries related to this. It is a producer, smelter, refiner and fabricator of copper and other metal products. It acquired Peabody Coal Company, an Illinois corporation, which is one of the two leading coal producers and distributors in the United States. A tentative agreement for this acquisition was signed July 1, 1966, and the final agreement providing for the acquisition was signed on March 17, 1967. On or about March 29, 1968, the transaction was closed, Kennecott paying 285 million dollars in cash and assuming 36.5 million dollars in liabilities and subject to the reservation of a production payment from Peabody's coal properties which was sold by Peabody for about 300 million dollars in cash.

On August 5, 1968, the Federal Trade Commission issued its complaint alleging a violation of § 7 of the Clayton Act as amended, 15 U.S.C. § 18.[1] Trial was thereafter had before a hearing examiner in New York, San Francisco and Salt Lake City on 48 hearing days extending from January to June 1969. Numerous witnesses testified, the record consisting of more than 6,000 pages of testimony together with some 450 documentary exhibits. In addition to the expert witnesses, there was testimony from coal company executives, utility company officials and economists. Following this trial the hearing examiner, in March 1970, issued lengthy finding and conclusions and determined that the complaint should be dismissed.

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[1] This section provides as follows:

No corporation engaged in commerce shall acquire, directly or indirectly, * * * the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

The pivotal question in the case was whether prior to the merger Kennecott was a recognized potential entrant into the coal producing business and whether the elimination of Kennecott by its purchase of Peabody may have substantially lessened competition or tended to create a monopoly. The examiner found that the evidence failed to establish that there was a likelihood that Kennecott would enter into the coal business from an internal expansion or by expansion from a limited base, but that Kennecott was a potential entrant by acquisition. He further found, however, that even if **[70]** Kennecott were regarded as a recognized potential entrant, the questioned acquisition would not have the effect which the complaint alleged, since the coal industry was found by him not to have been highly concentrated but rather to have been competitively structured. The examiner further found that there were numerous other potential entrants into the sale of coal, all of whom had special capabilities, and thus the elimination of a single potential competitor would not be significant. The examiner also based his conclusion on the fact that even though the production market was limited to coal, there was some degree of cross-elasticity of demand for coal and other fuels, and this factor was determined to contribute to his conclusion that the elimination of a single potential competitor was lacking in significance.

The Federal Trade Commission issued its decision reversing the examiner on May 13, 1971. The Commission concluded that Kennecott was indeed a substantial potential entrant and that the removal of Kennecott from this position on the threshold of the industry removed a potential competitor and had the effect of substantially lessening competition. The Commission determined that although the coal business was not at the time of the filing of its opinion in May 1971 a concentrated market, that it was nevertheless trending in that direction and that this tendency would continue in the future. It concluded that it was obligated to deal not only with present threats to competition but also with future threats in their incipient stages rather than to await the concentrated condition. The Commission cited another basis and that was Kennecott's deep pocket operating on a market which, though a loose oligopoly, is growing more concentrated. The Commission saw a likelihood of diminishing competition resulting from the merger of the great economic resources of Kennecott and Peabody.

In urging that the order of the Commission be reversed, Kennecott argues, first, that the Commission erred in holding that the relevant market was the entire United States and in refusing to consider competition which coal had with the other fuels, including nuclear energy, oil and gas. Secondly, that the Commission erred in holding that Kennecott was the most likely entrant into the coal business and in holding that the coal industry, although now a loose oligopoly, is trending toward a highly concentrated market and in failing to hold that the coal market is competitively structured and likely to remain so. It is further contended that the Commission erred in failing to address the issue whether the elimination of Kennecott as one of many potential entrants into a competitive industry had the effect of substantially lessening competition.

Further contentions are that the Commission violated standards of administrative adjudication in setting aside the hearing examiner's findings and in not making adequate findings of its own and in adopting the so-called deep-pocket theory, it being Kennecott's contention that this was not presented before the Commission. Complaint is also made that the hearing was not fair in that the Commission issued certain statements to Congress contemporaneously with the carrying out of the proceedings, which statements were said to be inconsistent with the Commission's findings and conclusions. It is also contended that one of the commissioners should have been disqualified because of her alleged prejudgment of the case.

II.

THE PRODUCT MARKET

The Commission found that the relevant line of commerce consisted of bituminous, sub-bituminous and lignite coal and in that respect endorsed the view expressed by the examiner. However, the Commission rejected the examiner's finding that:

> Factually, legally, and pragmatically, it is reasonable, therefore, to consider coal as the product market and at the same time to take into account the competition that other fuels offer to coal.

[71] The Commission said:

> Coal, in our view, is clearly a relevant product market for antitrust purposes, separate and distinct from other fuels, by virtue of the fact that coal has unique characteristics which are commercially significant and a technology obviously different from such power sources as gas or nuclear energy.

The examiner did not rule that coal does not constitute a product market in and of itself. He merely noted the market interplay between coal and other fuels. The examiner's determination that nuclear energy and natural gas competition should be considered was largely based on the competition which is shown to exist in the generation of electrical energy by utility companies, and unquestionably in this area of economic activity coal is in direct competition with other fuels, and so it seems reasonable to consider as did the examiner the competition that exists between coal and other fuels, at least in the mentioned context.

III.

THE RELEVANT GEOGRAPHIC MARKET

[1] The Commission correctly found that the nation as a whole constitutes a relevant geographic market, based as it is on the Commission's analysis that the large coal companies compete with each other throughout the United States, plus the fact that Kennecott fully intended to become a nationwide competitor. The Commission cited *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 86 S.Ct. 1665, 16 L.Ed.2d 765 (1966) in support of this finding and conclusion and, particularly, the Supreme Court's approval of general testimony in proof of the geographic market.

As we view it, the Commission's finding was not contrary to the record in this case, for although coal reserves are not found in all the states of the union, such reserves are found in virtually every section of the country, and more and more the market is acquiring a national character.

IV.

KENNECOTT COPPER CORPORATION

Kennecott was shown to have been formed in 1915 and has been engaged in the mining of copper and associated metals since. It is the largest copper producer in the United States accounting for approximately 33 percent of the 1,372,000 tons shown to have been produced in 1966. It also produces molybdenum, silver, gold, lead and zinc. It owns and operates mines in the United States under the direction of its Western Mining Divisions. One of these is in Utah, another in Nevada, one in Arizona and one in New Mexico.

A fifth mine is located in Chile, but in 1967 it was forced to sell 51 percent of its interest in this mine in Chile to the government.

Prior to the acquisition of Peabody, Kennecott devoted itself to the mining and production of copper and its by-products. In its process it uses a tremendous amount of electricity, and for the most part has its own generating plants and, of course, consumes a great amount of fuel, both natural gas and coal. It sometimes sells some of this electrical energy.

Its total assets are well over a billion dollars, and its income is substantial. It is rated 55th among United States industrial corporations in terms of assets and 111th in terms of sales.

The evidence established that Kennecott entered the coal business basically because of the fact that its copper reserves were dwindling. It concluded that it had a limited future in the mining and production of copper because of the limited sources within the United States and that it is thus engaged in a liquidating process. Its cash reserves were increasing and it foresaw that these would reach about one billion dollars in 1980 and so diversification was essential.

It first explored the possibility of getting into the oil business, and during the [72] years 1963 and 1964 made a careful inquiry, looking to the acquisition of a going oil concern. After studying this possibility, it abandoned this oil quest and turned to the coal business. Meanwhile, in 1963, it had purchased the Knight Ideal Coal Company in Utah. Although this company had considerable reserves it was a small concern and its production was very limited. This property was shown to have been purchased so as to gain reserves which would provide a hedge against rising natural gas costs, but also with the thought in mind, according to the evidence and the finding (of the examiner), of engaging at least to some extent in the coal business.[2]

It was the interest in coal which started with the Knight Ideal purchase that led to the focus on Peabody. Undoubtedly it was the difficulties in starting from scratch which led to this decision. A very careful study preceded the step, it having been previously determined that the Knight Ideal property was not a satisfactory base for getting into the coal business. Peabody was not only a going concern but the very largest coal producer with extensive reserves which were well located, and also with transportation facilities. The acquisition was finally completed on March 29, 1968, on which date Kennecott, through its subsidiary, acquired the business and substantially all of the assets of Peabody.

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[2] The examiner wrote:

Although the foregoing evidence demonstrates (1) that the Knight Ideal project developed in negation of the broad coal diversification study originally proposed and (2) that it was closely associated with Kennecott's own fuel needs, the record also makes clear that WMD viewed the project as preliminary to the production and sale of coal on a commercial basis and that while it was being developed, it was consistently so presented without any suggestion of a contrary view on the part of management in New York.

V.

PEABODY COAL COMPANY

As previously stated, Peabody was one of the two leading producers of coal in the United States. In 1966 it was shown to have produced approximately 52.8 million tons of coal, or approximately 10 percent of the total produced domestically. In addition, it sold 8.3 million tons of coal produced by others. In 1967 its total production was 59.4 million tons, considerably more than the next leading producer, Consolidation Coal Company. Its reserves were over five billion tons.

It had coal reserves in states in the southwest, west, midwest, and east-central regions of the United States. It was shown to have been aggressively expanding its marketing areas with long-term contracts, mostly to utility companies.

The examiner further found:

> During 1966, Peabody and its subsidiaries had coal sales and other revenues of $233,923,483 that provided a net income of $26,279,973. Total consolidated assets of Peabody as of December 31, 1966 were $315,629,163. Peabody's rate of return on stockholders' investment during 1966 was 14.6 percent. Among United States industrial corporations listed in "Fortune's 500" for 1966, Peabody ranked 186th in terms of assets and 317th in terms of sales.
>
> At all times relevant to this proceeding, Peabody has sold and has shipped its products in interstate commerce and has been engaged in "commerce" within the meaning of the Clayton Act.
>
> In addition to its domestic operations, Peabody owned 58 percent of an Australian company that operated a large metallurgical (coking) coal mine in Australia. Most of its output was sold to the Japanese steel industry.[3]

VI.

THE COAL INDUSTRY

The evidence showed that coal had been a dying industry prior to the 1950's. [73] During the post-World War II period (starting in 1947) the number of coal companies declined considerably, and there has been a more gradual decline in the number of the larger coal companies.

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[3] A more detailed history and analysis of Peabody Coal Company is appended hereto and is marked Appendix II.

During the period from 1948 to 1958 the coal industry was on the decline. However, from 1959 forward there has been a considerable upsurge, notwithstanding that domestic consumption declined, railroad use declined and general manufacturing use of coal declined; consumption of coal in the electrical utility industry increased markedly. This increase in consumption (by electrical utilities) was considerable—86 million tons in 1947 to 272 million tons in 1967. This phenomenal increase in sales to utilities has been attributable to more efficient coal production methods, including mining techniques and general mechanization. Transportation methods have also improved, and the net result has been that the coal industry has been able to complete successfully with gas and other energy sources for use in the generating plants. All of this is noted in the findings of the Commission which declares that by the year 2000 it is expected that coal consumption by electric utilities will reach 755 million tons.[4]

The Commission has noted that despite the expansion the market has tended to become concentrated:

> Notwithstanding the ever growing demand for, and the concomitant expansion of production of, coal, the industry is experiencing a steady trend toward rising concentration. In 1947, there were 68 firms producing more than one million tons of coal annually. In 1947, their share of the domestic coal production amounted to 48 percent; by 1967, it reached 70 percent. During the period 1954 to 1967, the top four companies increased their share of production from 15.8 percent to 29.2 percent. While during the same period the market expanded by 40.9 percent, the share of the top four companies grew by 160.5 percent. Further, the top four firms accounted for 63 percent of the total market expansion. This trend, unless halted, foreshadows ominous developments in the coal industry, with production and sale of coal concentrating in fewer and fewer hands. Cf. *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 273, 274, 276–[277, 86 S.Ct. 1478, 16 L.Ed. 2d 555] (1966).

One noteworthy fact is that the coal reserves are being bought up by the oil companies and other large corporations, including Stardard of Ohio, Gulf Oil, Bethlehem Steel, General Dynamics, U.S. Steel and Republic Steel. For example, the second largest coal company, Consolidated, is owned by Continental Oil Company. The chart appended hereto shows this ownership in relation to the individual and total production of the several producers which exceeded three million tons in 1967.

It is thus apparent that the coal industry has changed in many respects in recent years. First of all, Peabody's growth has been remarkable. It has, in a ten-year period, from 1955, increased its sales from 19 million tons to 60 million tons per year. On this question, the Commission found that of the increase in domestic production in this ten-year period of 88 million tons, Peabody accounted for 45 percent of the increase. In 1965 Peabody accounted for 90 percent of the total domestic increase.

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[4] It is noteworthy that contracts with electric utilities are long-term, generally for the life of the utility plant, which fact serves to stabilize the coal production and to enable it to systemize its distribution facilities.

The total market share of the four largest firms, according to the findings of the Commission which are supported by the evidence, rose from 15.8 percent in 1954 to 29.2 percent in 1967, and the top eight companies increased their market share from 23.6 percent to 39.7 percent in the same period. Both the top four and top eight companies experienced phenomenal disproportionate growth in this period.

[74] A number of factors militated against new entry into the coal business. The fact that the big demand was for consumption by utility companies involving long-term contract, extensive reserves and ready ability to deliver all contributed. Thus, experience, know-how and equipment are essentials.

There is, of course, no lack of demand for coal. The oil companies are, which has been shown, likely purchasers of coal reserves, but not necessarily with a view to entering the coal business, although some of them have done so. Rather, the oil companies are concerned with a possible source of petroleum and petroleum products. Therefore, the coal market as such, although perhaps not concentrated at the time of trial, is headed in that direction. As the Commission points out, it seems inevitable that the market shares will, to an increasing extent, go to the top producers in the industry not only because of their reserves but also because of their productive capacities, transportation facilities, expertise in extraction and marketing and, of course, because of their great resources which are shown to be essential to the coal business in its present and foreseeable future form.

Kennecott tries to turn these facts to its advantage, pointing out that substantial concerns like Continenal Oil Company, Occidental Pertoleum, U.S. Steel, Gulf Oil and Standard Oil of Ohio operate as a stabilizing factor in the competition picture and furnish some assurance that Peabody and Kennecott will not simply because of Kennecott's resources make any great impact.

VII.

ANALYSIS OF THE ISSUES

We are called on to determine whether the Commission was correct in holding that Kennecott was a most likely entrant into the coal business and, indeed, a more likely entrant than other forms, including the major oil and gas companies, railroads and utilities. We must also appraise the Commission's holding that the coal industry is presently a loose oligopoly which is moving at an accelerated rate toward a highly concentrated condition and is not, as Kennecott maintains, an industry which is competitively structured and likely to remain so in the future.

We must also consider the Commission's holding that there is a dearth of potential new entrants into the coal business and, further, whether the elimination of Kennecott had the effect of substantially lessening competition.

The remaining question of substance is whether the Commission erred in its conclusions as to the probable effects of the acquisition on competition and particularly in its conclusion that the special circumstances of the merging companies in relationship to the concentrated market may be substantially to lessen competition or to tend to create a monopoly.

VIII.

KENNECOTT AS A MOST LIKELY ENTRANT

This is an unusual merger case in that it is neither a horizontal nor a vertical merger such as the courts have most frequently considered. Nor is it a product extension merger such as that in *Federal Trade Commission* v. *Procter & Gamble Company*, 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967). This latter type has distinct characteristics, although it is more similar to the conglomerate type merger which we have here than it is to the horizontal and vertical. It is also unusual in that it brings together the two largest companies in their respective industries. However, as was said by the Supreme Court in Procter & Gamble, 386 U.S. at 577, 87 S.Ct. 1229:

> All mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other. * * *

A conglomerate merger was defined in *Procter & Gamble* as being one in which there are no economic relationships between the acquiring and the acquired firm.

[75] [2] Since this was a conglomerate merger there existed little direct economic relationship between the two firms, although Kennecott was shown to have been a substantial consumer of coal and was thus a potential customer. It was also shown to have been a potential coal producer, and thus in its latter capacity had at least some competitive relationship to Peabody and to the industry.

Nevertheless, the facts are peculiar in that Kennecott was not at the time of the acquisition directly engaged in coal production so that the merger did not have the effect of removing a direct and active competitor. But this is a factor which will be present in every conglomerate merger case, and it does not serve to remove the merger from the scope of § 7 of the Clayton Act; neither does it necessarily result in the use of different criteria, although it must be conceded that the criteria applicable to the horizontal merger furnish limited help in judging the validity of the conglomerate acquisition.[5] To the extent that these economics criteria are helpful they should, of course, be employed.[6]

[3] Still another differentiating unusual factor is that the market here is not presently an oligopolistic one. The Commission's decision is based on its predictions derived from the evidence that the market would become a tight oligopoly if action were not taken at what it considered to be the incipient stage. In the light of the general objectives of the Act we perceive no error in the Commission's approaching the case on the basis of assessing probabilities rather than present conditions. The Act contemplates this.

A. *The Commission's Potential Competition Concept.*

The actual terms of § 7 of the Clayton Act, as amended, sometimes called the Celler-Kefauver Act, are addressed not only to conditions which are presently apparent but contemplate the prevention of mergers which will lessen competition in the future. Section 7 has been frequently employed in the merger case. See *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964); *United States* v. *Penn-Olin*

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[5] See Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L.Rev. 1313, 1362 (1965):

> Even though an acquiring company has not been a direct competitor in the acquired firm's industry, a conglomerate acquisition may diminish competitive influences from outside the market that might otherwise exist. Such adverse effects may come about in three different ways. First, as previously discussed, the acquisition may diminish potential competition by raising barriers to entry. Second, a conglomerate acquisition may remove as a independent competitive force a firm that, although not actually selling in the market of the acquired firm, has had a substantial impact on the behavior of companies in that market because it was recognized as a likely entrant. Finally the merger may involve a firm that would actually have entered the acquired firm's market by internal expansion if the merger had not occurred. The latter two phenomena will often coincide: a firm that would have entered an industry by internal expansion will often be a firm that exerts an influence on market behavior even while it is an outsider. However, the two need not go together. It is not likely, for example, that the Ronson cigarette lighter company was recognized as a threat by the producers of electric razors before it expanded into that market. Therefore, the two possibilities deserve separate analytical treatment.

[6] These are at best guides and are not to be regarded as ends in themselves. There is some apparent danger in slavish adherence to criteria, whereby the terms and philosophy of the Act itself are submerged.

Chemical Company, 378 U.S. 158, 84 S.Ct. 1710, 12 L.Ed.2d 775 (1964) ; *Federal Trade Commission* v. *Procter & Gamble Company*. 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967) ; and see also *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963) and *United States* v. *Von's Grocery Company*, 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966).

Ordinarily the potential competition concept comes into play where the industry [76] is regarded as an oligopoly. Admittedly, the industry as it existed at the time of trial was not a tight oligopoly. Based, however, on the findings of the Commission that the industry is on its way to becoming highly concentrated, the Commission determined that it was justified in acting so as to prevent the development of a tightly concentrated industry. This approach has been generally approved in the cases. Thus, in *Federal Trade Commission* v. *Procter & Gamble Company*, *supra*, the Court said:

> [T]here is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before § 7 can be called into play. If the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated. 87 S.Ct. at 1229

The Court went on to say that since the important question is whether a merger may substantially lessen the competition, it is necessary to make a prediction as to the merger's impact on competition, present and future.

Also, in *United States* v. *Penn-Olin Chemical Company*, 378 U.S. 158, 84 S.Ct. 1710, 12 L.Ed.2d 775, it was said:

> The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated.

See also *United States* v. *Continental Can Company*, 378 U.S. 441, 84 S.Ct. 1738, 12 L.Ed.2d 953 (1964) and *United States* v. *El Paso Natural Gas Company*, *supra*.

Brown Shoe Company[7] clearly recognized that the government

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[7] The dissenting opinion of Justice Stewart in *United States* v. *Von's Grocery Company*, *supra*, in commenting on Brown Shoe Company ably sums up this concept:

Under § 7, as amended, a merger can be invalidated if, and only if, "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." No question is raised here as to the tendency of the present merger to create a monopoly. Our sole concern is with the question whether the effect of the merger may be substantially to lessen competition.

The principal danger against which the 1950 amendment was addressed was the erosion of competition through the cumulative centripetal effect of acquisitions by large is not required to stay its hand until the market has reached an oligopolistic stage or condition. Thus, there is ample authority for the Commission's potential competiton concept. The threat to potental competition approach can be employed in projecting the trend of the market and the probability of a future monopoly.

B. *Influence of Kennecott on the Edge of the Market.*

[4] The Commission found that Kennecott was indeed a substantial potential entrant into the coal industry. Its interest dated back to 1963, at which time it commenced to plan an extension of its activities so as to utilize its very substantial cash reserves. In the year 1963, it acquired the Knight Ideal Coal Company and did so for the purpose of obtaining a source of coal for its own use and, secondly, for the purpose of producing and selling coal on a commercial basis. The evidence establishes that at that time the company manifested an interest in entering the coal business on [77] a national basis. For a time, it is true, it considered entering the oil business, but even during this period did not abandon its intention to become a producer and seller of coal. Its dwindling copper reserves and the necessity for utilizing its cash surplus, together with its acknowledged and manifest interest in mining, furnished ample evidence to support the Commission's determination that it was a likely entrant. The Commission noted that the record was devoid of evidence to show that there were any other potential entrants possessing the necessary financial resources to build a substantial coal business.

Based on the evidence that Kennecott was peculiarly well qualified because of its long experience in hard rock mining and its acknowledged capabilities, its financial resources and its close proximity to the coal industry, it was found that Kennecott was not only a likely entrant but also the most likely entrant into the coal business. In this connection, the Commission noted that oil companies, natural gas companies, electric utilities and railroads are not to be regarded as likely entrants. The oil and gas companies are primarily interested in acquiring coal reserves for synthetic

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[7] (Continued)
corporations, none of which by itself might be sufficient to constitute a violation of the Sherman Act. Congress' immediate fear was that of large corporations buying out small companies. A major aspect of that fear was the perceived trend toward absentee ownership of local business. Another, more generalized, congressional purpose revealed by the legislative history was to protect small businessmen and to stem the rising tide of concentration in the economy. These goals, Congress thought, could be achieved by "arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency." *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 317, 82 S.Ct. 1502 at 1520, 8 L.Ed. 2d 510.

384 U.S. at 283, 284, 86 S.Ct. at 1485.

fuels and the sale of coal is a secondary objective. The record fully supports these findings.

C. *Kennecott as a Competitor Prior to the Merger.*

The Commission expressed the view that Kennecott was not only a potential entrant into the coal industry but exerted substantial influence on the market due to its interest in the coal business and its long-term plans. Its acquisition of the Knight Ideal reserves and its use of this Knight Ideal property as a lever in negotiating fuel contracts, both gas and coal, support the Commission's position; however, it is not shown actually to have engaged in the production of coal prior to the acquisition of Peabody. Peabody was shown to have been apprehensive about the possibility that Kennecott would become a producer, and in at least one instance this was a factor in a Kennecott-Peabody negotiation for the purchase of coal. Undoubtedly Kennecott was the most likely entrant, considering its resources and capabilities, and as such it exercised influence on the market and the industry.

Much documentary evidence was introduced to show Kennecott's long-range study of the coal business. A desire to engage in the coal business was expressed by high level management officials starting in 1963. This was undoubtedly influenced by the fact that Kennecott's main experience was not only in extracting ore but also in strip mining which has become the most important extractive method in the coal industry. This was coupled with the fact that the coal business did not have a *prohibitively* high entry price as did the oil business. Finally, it offered about the only outlet for Kennecott's growing cash resources. Thus, the Commission was justified in determining that Kennecott's entry into the coal business one way or another was almost certain. There is also the factor that no other likely entrants were shown to exist. These peculiar circumstances thus exerted influence on the market which offset the factor of direct or actual competition.

D. *Barriers to Entry by Expansion.*

[5] The evidence is clear that the coal industry had become so complex and specialized even before the instant merger that it was virtually impossible for a company with fewer resources than Kennecott to start a coal company by the acquisition of reserves and equipment. The experiences of Kerr-McGee and Utah Mining and Construction Company demonstrate that there is a basic time requirement of from 10 to 15 years to which must be added the necessity to obtain the large utility contracts which justify the

large scale operations. The removal of Kennecott, which was shown to have been a most likely entrant had the effect of raising the entry barriers even further, since it removed a potential entrant.[8] The Commission's finding that [78] Kennecott intended to enter the coal industry by one means or another is supported by the evidence.

E. *The Effects of the Acquisition on Competition.*

[6] Kennecott takes strong exception to the Commission's consideration of the anticompetitive effect of its great financial resources. The Commission reasoned that it was likely that this "deep pocket" of funds would be employed to acquire vast coal reserves and massive mining developments to enable Kennecott to compete for long-term utility supply contracts and thus to gain more market share. As we view it, this did not, as Kennecott contends, introduce a new and untried issue. It was proper for the Commission to consider the actual effect on competition of the merger of two very large corporations with their tremendous resources and to place major emphasis on this factor. The trend towards high concentration is material. Moreover, the preservation of the possibility of future deconcentration is a legitimate aim, and the inhibition of that possibility, because of the acquisition, is a relevant factor in assessing illegality. See *United States* v.

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[8] Kennecott objects strenuously to the Commission's determination that Kennecott could have entered the industry in a way other than by internal expansion. The Commission ruled on the other hand that a finding of illegality does not depend on this; that Kennecott was admittedly a potential entrant by acquisition and that it could have entered the industry by acquiring a small company rather than the industry leader. The result, according to the Commission, was that a new competitive force was lost and the high concentration of the coal industry was accelerated.

The possibility of new rivals coming into the industry by internal expansion, or by acquisition of a firm too small to compete by itself against the largest firms, is essential to effective competition. The Report of the Attorney General's Committee (1954) states:

> The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new or potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements, so long as the profits to be anticipated in the industry are sufficiently attractive in comparison with those in other employment, when all risks and other deterrents are taken into account. The result would be to force the seller who sought to increase his profits above this level by employing a high-price, limited-output monopoly policy either to give it up, or to lose ground to his rivals at a rate sufficient to reduce his profits, thus defeating his policy. (The inducements referred to are those of quantity, quality, time and place of delivery, incidental services, selling effort and price.)

Oppenheim, Cases on Federal Antitrust Laws 66 (2d ed. West 1959).

When a market consists of a relatively few sellers each with a significant share of a market which is isolated from such competitive pressures, there is greater possibility that the firms will not compete against each other strenuously. The preservation of the opportunity for entry of new rivals is a fundamental requisite for effective competition in the long run. *Id.* at 72–74. Added vigilance is necessary where true economies of scale permit only a relatively few sellers in the market.

Continental Can Company, 378 U.S. 441, 461–462, 84 S.Ct. 1738, 12 L.Ed.2d 953 (1964); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 365 n. 42, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963).

Justice Harlan in his concurring opinion in *Federal Trade Commission* v. *Procter & Gamble Company*, *supra*, recognized that the anticompetitive effects are properly to be considered. The Justice concluded that the Commission in the *Procter & Gamble Clorox* case was justified in concluding that the merger carried with it a reasonable probability of a substantial increase in barriers to entry and of enhancement of pricing power in the industry.

In our case it was reasonable for the Commission to conclude that Kennecott would use its immense resources to gain for Peabody, already the number one producer in the industry, an even larger share of a market which promises to be a concentrated one in a relatively short time.

We have weighed the possible effect of competing fuels, natural gas, petroleum and nuclear energy, but are of the opinion that the price of competition does [79] not detract from our conclusion that the Commission correctly determined that it was a violation of § 7. The coal industry is a distinct submarket which has characteristics which are not shared by the other fuel industries. It has shown its ability to maintain prices at a level which allows it to compete successfully against natural gas, its closest rival. Within its own ambit, however, its price structures are now, and promise to be in the future, subject to the peculiarities of the coal business. Thus, other fuels appear to have a limited effect.

In summary we conclude:

1. The product market which is mainly directed to supplying electric utilities was and is well defined and at the same time is a somewhat structured one trending toward concentration.

2. Due to the specialized nature of the industry requiring as it does particular knowledge and highly developed equipment, the entry barriers are formidable. Lengthy effort and great resources are necessary.

3. Kennecott was prior to the merger the most likely entrant and as such exerted a substantial influence based on the likelihood of its entrance rather than on its actual competition.

4. The removal of Kennecott from the edge of the market and the substitution of it within the market for Peabody, the leading producer and distributor, eliminated a substantial potential competitive force.

5. The merger brought together the largest copper producer and the largest coal producer. The combined financial and other resources of the merging companies resulted in a merged company with a real potential to accelerate the already remarkable trend toward oligopoly.

6. "The acquisition may substantially lessen competition in the coal industry."

IX

WHETHER KENNECOTT WAS DEPRIVED OF A FAIR HEARING

The final contention is that the Commission was in effect disqualified from extending to Kennecott a fair and judicious hearing because of varied other duties, including its numerous contacts with members of Congress and others in matters related to the very subject matter of the case. Kennecott also challenges the fairness of the hearing on the ground that Commissioner Mary Gardiner Jones refused to disqualify herself following her giving an interview to a magazine reporter.

[7] On the first point this court pointed out in an early case, *Brinkley* v. *Hassig*, 83 F.2d 351, 357 (10th Cir. 1936), that the Federal Trade Commission combines the functions of investigator, prosecutor and judge and that Congress designed it in that manner. Thus Kennecott's complaint goes to the nature of the law itself. As to this, the courts have uniformly held that this feature does not make out an infringement of the due process clause of the Fifth Amendment. See the discussion in *Federal Trade Commission v. Cinderella Career and Finishing Schools, Inc.*, 131 U.S.App.D.C. 331, 404 F.2d 1308, 1315 (1968). It has been pointed out, however, that a Commissioner who had previously acted in an investigatory or prosecutory capacity in a case cannot sit as a member of the Commission in deciding it. See *Amos Treat & Co.* v. *Securities and Exchange Commission*, 113 *U.S.App.D.C.* 100, 306 F.2d 260, 263 (1962).

In support of its contention that it could not get a fair trial, Kennecott has tendered a vast quantity of documents accompanied by a motion to supplement the record. We have examined these *in camera*, and although we see no reason why they should not be made a part of the record, with the exception of the Wier Report (Appendix XI),[9] we do not believe after reading these documents that they furnish reason in support of the Kennecott position that the cause should be reversed for unfairness. These are routine communications pertaining to Commission studies of the energy field, including coal, together with communications from congressmen and other interested groups seeking action against concentrations [80] in these fields. The Commission is charged with the performance of certain public interest functions, and these documents appear to be incident to these functions. We agree with Kennecott to the extent that this places an extra burden on a Commissioner to avoid policy issues and to make a special effort to focus exclusively on the issues of the case. Undoubtedly, the Commissioners are mindful of this and are accustomed to evaluating matters before them in accordance with the issues and the evidence. The Commissioner does not, of course, enjoy any immunity because of his broad scale obligations. He must conduct himself circumspectly and with fairness and must at all times maintain the outward posture as well.

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[9] Kennecott's motion to supplement the record is granted except for the mentioned report.

[8] This brings us to Kennecott's second challenge pertaining to the public interview given by Commissioner Jones which reads as follows:

> COMM. JONES. When we look at the structure of a market, we must look at the barriers to entry. We have to determine whether the acquired company could have gone into the market on its own or whether its new presence might keep others out. Perhaps it's easier to see in a case like the *Kennecott Copper-Peabody Coal complaint*. We have here an instance of a copper company that was actually moving into the coal industry on its own. Kennecott was experimenting with a small, previously acquired coal property. The *complaint says* that Kennecott, in effect, eliminated itself as a probable new entrant into the coal industry when it went out and bought a major coal company. (Emphasis added.)

The rule is that a Commissioner must be disqualified if he or she has prejudged the case or has given a reasonable appearance of having prejudged it. See *Federal Trade Commission* v. *Cinderella Career and Finishing Schools, Inc.*, 131 U.S. App.D.C. 331, 404 F.2d 1308, 1315 (1968) and *Texaco, Inc.* v. *Federal Trade Commission*, 118 U.S.App.D.C. 366, 336 F.2d 754, 760 (1964):

We have examined the cases and in each instance in which the courts considering the facts ruled that the Commissioner had to be disqualified, action was entirely justified based on comments showing what appeared to be a prejudice or a viewpoint. No such commenting or editorializing is present here. From a reading of the statement in its entirety, it is clear that Commissioner Jones was discussing the *complaint* and was doing so in an effort to illustrate a point. Thus, it does not appear that she stepped over the line, whereby she showed even a slight commitment. For this reason, we hold that the expressions do not violate the standard which is set forth in the cases. In other words, she is not shown to have prejudged the central issue of the case, namely, whether "the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." See *Skelly Oil Company* v. *Federal Power Commission*, 375 F.2d 6 at 17–18 (10th Cir. 1967).

Effort was there being made to show that one of the Commissioners was disqualified based upon a public address. It was there said:

> * * * In our opinion no basis for disqualification arises from the fact or assumption that a member of an administrative agency enters a proceeding with advance views on important economic matters in issue. * * * 375 F.2d at 18.

Public expressions with regard to pending cases cannot, of course, be approved because regardless of what is said such expressions tend not only to mar the image but to create embarrassment and to subject the proceedings to question. We do not, however, perceive any evidence of prejudging or the appearance of it.

The petition for review is denied, and it is directed that the orders of the Commission be affirmed and enforced.

APPENDIX I

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[a]

CONSOLIDATED ASSETS, SALES REVENUES AND PRODUCTION OF COAL* PRODUCERS WITH PRODUCTION OF 3,000,000 TONS OR MORE IN 1967 (RANKED BY COAL* PRODUCTION)

Tonnage Production Rank	Coal Producer	Parent Company	Total Assets	Sales Revenues	Production
			——$ Million——		(1,000 tons)
(1)	(2)	(3)	(4)	(5)	(6)
1	Peabody^{2}	Kennecott Copper^{2}	1,489^{1}	757^{1}	59,407
2	Consolidation	Continental Oil	2,354	2,083	56,460
3	Island Creek	Occidental Petroleum	779^{1}	826^{1}	25,880
4	Pittston	Pittston	299^{3}	387^{3}	19,681
5	U.S. Steel	U.S. Steel	5,606	4,006	19,010
6	United Electric and Freeman	General Dynamics	920	2,253	14,124
7	Bethlehem Mines	Bethlehem Steel	3,084	2,594	12,623
8	Eastern Associated	Eastern Gas & Fuel	290	203	12,339
9	Old Ben Coal^{3}	Standard Oil of Ohio	736^{1}	724^{1}	10,272
10	Pittsburg & Midway	Gulf Oil	6,458	4,202	8,974
11	North American Coal	North American Coal	45^{3}	37^{3}	8,692
12	Ayrshire Collieries	Ayershire Collieries	94^{3}	62^{3}	8,604
13	Southwestern Illinois	Southwestern Illinois	N.A.	N.A.	7,527
14	Westmoreland Coal	Westmoreland Coal	35^{3}	32^{3}	6,337
15	Valley Camp	Valley Camp	N.A.	N.A.	5,487
16	Republic Steel	Republic Steel	1,523	1,266	4,646
17	Jones & Laughlin Mining and Gateway Coal^{4}	Jones & Laughlin Steel	1,093	904	4,440^{4}
18	Carbon Fuel	Carbon Fuel	N.A.	N.A.	4,136
19	Central Ohio and Central Appalachian	American Electric Power	2,156	524	4,095
20	Bell & Zoller and Ziegler Coal & Coke	Ziegler Coal & Coke	20^{3}	16^{3}	4,079

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[b]

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CONSOLIDATED ASSETS, SALES REVENUES AND PRODUCTION OF COAL* PRODUCERS WITH PRODUCTION OF 3,000,000 TONS OR MORE IN 1967 (RANKED BY COAL* PRODUCTION) (CONTINUED)

Tonnage Production Rank	Coal Producer	Parent Company	Total Assets	Sales Revenues	Production
			—$ Million—		(1,000 tons)
(1)	(2)	(3)	(4)	(5)	(6)
21	Winding Gulf	Winding Gulf	N.A.	N.A.	4,067
22	Rochester & Pittsburgh	Rochester & Pittsburgh	42[3]	31[3]	3,863
23	Ranger Fuel Corp.	Ranger Fuel Corp.	N.A.	N.A.	3,451
24	Amherst Coal	Amherst	N.A.	N.A.	3,443
25	Barnes & Tucker	Barnes & Tucker	N.A.	N.A.	3,220
26	Youghiogheny & Ohio	Youghiogheny & Ohio	N.A.	N.A.	3,074
TOTAL OF PRODUCTION LISTED					317,931
TOTAL INDUSTRY PRODUCTION					552,626
TONNAGE LISTED ABOVE AS PER CENT OF TOTAL INDUSTRY PRODUCTION					57.53%

* Coverage includes bituminous, sub-bituminous and lignite, as in Bureau of Mines statistics.

N.A.: Not Available

[1] Coal company acquired in 1968. Assets and revenue figures are for combined coal company and parent company in 1967.

[2] Data obtained from corporation annual reports.

[3] As reported in *Moody's Industrial Manual*, 1968.

[4] Gateway Coal is owned 64.5% by Jones & Laughlin, 22.5% by Pittsburgh Steel (remaining ownership not given). Gateway leases its coal properties, but the production from them is distributed to the steel companies in proportion to their ownership interests in Gateway. Production shown is for Jones & Laughlin Mining Co. (3,021,000 tons) plus 64.5% of the production by Gateway Coal Co. (1,419,000 tons).

Source: (Cols. 2, 6): *Coal Production in the United States*, 1967, compiled by *Keystone Coal Buyers Manual* and *Coal Mine Directory* (New York: McGraw-Hill, Inc., 1968).

(Cols. 3, 4, 5): "Fortune Directory of the 500 Largest U.S. Industrial Corporations," *Fortune*, June 15, 1968 (except as noted in footnotes).

APPENDIX II

HISTORY OF PEABODY COAL COMPANY AND THE MERGER

[**84**] Prior to 1955, Peabody Coal operated principally underground mines, most of them in Illinois; as of that year, it was producing on the order of eight to nine million tons of coal per year, and running at a loss (*i.e.*, in 1954 it lost over $1,000,000). Its stock sold for under $3.00 per share.

In 1955, Peabody merged with a group of mines run by several related corporations, called the Sinclair group; this group had production roughly equivalent to that of Peabody at that time, but secured all its coal from strip mines and was run profitably. Merl Kelce, who was chairman and chief executive officer of Peabody until 1964, and then again from 1965 to the Kennecott merger, came into the new Peabody in 1955 from Sinclair as executive vice-president, assuming his duties as chief operating officer in 1957 upon the death of his older brother. During this period Peabody operations went from a production of 19 million tons to one of over 60 million tons; its stock price went from under $3.00 per share to over $47.00 per share, and it became one of the two largest coal companies in the country. Mr. Kelce attributed this principally to the growth in demand for coal by utilities, coupled with his practice of acquiring all reserves he could and closing down underground mines in favor of strip operations (there is currently only one underground mine left in the Peabody structure).

Mr. Kelce outlined the difficulties the company faced in the 1950's and 1960's in getting capable young men to enter the coal business, which everyone assumed to be moribund; he also stated that he encountered considerable opposition to and derision regarding his policy of putting all available funds into acquisition of reserves, which everyone assured him he would never be able to use. He wished he had been able to acquire more reserves, but felt the supply achieved to be adequate; on the other hand, the shortage of capable executives he felt to be a most serious problem for the company and for the industry in general.

Mr. Kelce resigned from Peabody in 1964, but reassumed his post as chairman and chief executive officer somewhat reluctantly in 1965. One of his thoughts at that time was to secure the sale of Peabody, and he let it be known that the company was for sale, conducting several negotiations to that end over the next few years. When asked why he wished to sell Peabody (the Kelce family had the largest share of stock in the company by a wide margin; although it was in itself fairly small—15 percent roughly—it gave the family effective control), he responded thus:

A. There were several reasons: air pollution, the threat of nuclear power, and our share price had been going down. When I made the agreement with Milliken of Kennecott, I think our shares were less than $30.

He explained each of the above considerations: air pollution was a considerable worry, not for the expense of developing clean-up technology but because there was considerable talk of the government's limiting the permissible use of coal to that having a sulphur content of one percent or less. This would have been a severe blow to Peabody, for just about all the coal it mined was "in the high range" of three and one-half to four percent sulphur content.

The nuclear power problem arose particularly from the fact that Peabody's two largest customers, Commonwealth Edison of Chicago and the TVA, both told Peabody that they were planning to make substantial investments in nuclear power—from which, they said, they could secure fuel costs which Mr. Kelce testified were "substantially lower than we had been delivering coal for"—and then went ahead and made some actual investments therein. Sales to these two companies **[85]** accounted for up to 40 percent of Peabody's production.[1]

The significance of the decline in price of Peabody's stock—which Mr. Kelce attributed principally to investor worry about pollution and nuclear power, as earnings remained high and even increased—was explained by him thus:

Q. At that time—and I am now talking about '65—'66—were these people you gave stock to when you opened mines back in your early days still shareholders of the company?

A. They had sold some of it, but the majority of them had held their stock.

Q. Was consideration for the investments of those people any factor in your decision to sell the company?

A. Well, my older brother had had a heart attack. Then other shareholders who had gotten stock through the old Sinclair Coal Company had come to me and said, "Well, why don't you sell the company?" Then, myself, I had gotten to the point where I wasn't a young man any more. I quit once, and then I came back into the business. I didn't want to have to spend as much time as I had been spending in the business running Peabody Coal Company.

Mr. Kelce had seriously discussed sale of Peabody with the Cerro Corporation, with Texas Gas Transmission of Owensboro, Kentucky, with Sunray DX Oil Co. of Tulsa, and with Atlantic

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[1] The full advent of nuclear power on the scene has been delayed, and both TVA and Commonwealth Edison have since brought coal-burning plants. The potential still remains, of course.

Richfield of Philadelphia. He had also discussed things informally with Dean McGee of Kerr-McGee, but did not feel that to have been on the same level as negotiations with the other companies.

Finally, Mr. Kelce testified that the entrance of the oil companies into the coal business had had an adverse effect on Peabody:

> A. After the oil companies got in, it was pretty difficult for a company like Peabody, with a limited amount of cash, to go in and complete. Prices went up two and three times what we had been paying. (A–1825)

The first direct contact anyone from Peabody had with anyone from Kennecott took place in April of 1966, when Kelce, Jim Taylor (former general counsel of Peabody) and Harry Burgess (vice-president of Kennecott) got together following Peabody's annual meeting. This meeting was set up following a contact made by Paul Weir to Kelce between two and three weeks earlier. At this meeting, Kelce confirmed to Burgess that Peabody was for sale, and Burgess so reported to Milliken, Kennecott's president.

In this regard, there is a memorandum from Burgess to Milliken dated March 24, 1966, regarding a conversation between Burgess and Paul Weir and one Clayton Ball, an associate of Paul Weir. The Paul Weir Company is a consulting operation which is in the business of locating executives and generally helping make contacts and expediting the flow of information in industry; Kennecott has used them frequently.

The memorandum states that the subject of the conversation was specifically "coal opportunities," and says that both Weir and Ball stressed the dearth of much in the way of currently exploitable coal reserves to be bought from scratch, and the non-advisability of going after "cats and dogs" of companies in any effort to get into the coal business. It then states that Weir mentioned that if Kennecott were interesed in "going overboard" it might consider Peabody, which might be for sale. Burgess concludes the memo by stating that he told Weir—who is described as a good friend of Kelce—to ask Kelce if he might be interested in working something out, and appends a few sketchy facts about Peabody (gross sales, net profits, estimated reserves, and a brief comparison to Consolidated Coal, then being acquired by **[86]** Continental Oil). The memo is dated some three weeks before the meeting between Burgess and Kelce.

Following that latter meeting, merger negotiations began in earnest; Kennecott's Board was advised three months later, in July of 1966, of the state of affairs, and was asked for its approval to carry on negotiations to conclusion. Enclosed with that request was a rather detailed report on Peabody and the coal industry in general, as well as Kennecott's embarrassment of then-current riches. The report predicts that in the long run the acquisition will materially increase Kennecott's assets and the stockholders' equity over what they could be expected to be in the same period without the acquisition. The report anticipates a rosy future for the coal industry, and never mentions Knight Ideal.

In all events, the Kennecott Board approved continued negotiations at its meeting on July 15, 1966, and the acquisition was consummated on March 29, 1968.

SEVEN-UP COMPANY v. ANDREW C. GOODHOPE, ET AL.*

No. 72 C 285(2)—F.T.C. Docket 8857

(United States District Court, E.D. Missouri, September 12, 1972)

DISTRICT COURT HELD WITHOUT JURISDICTION ON SOFT DRINK MANUFACTURER'S ACTION FOR INJUNCTIVE AND DECLARATORY RELIEF

> [552] Federal district court was without subject matter jurisdiction of soft drink manufacturer's action for injunctive and declaratory relief challenging propriety of interlocutory order of Federal Trade Commission denying motion to dismiss proceeding, in which manufacturer was charged with engaging in unfair methods of competition by reason of license provision whereby bottlers agreed not to sell product outside of designated geographical area, for failure to join bottlers as indispensable parties.

(The syllabus, with substituted captions, was taken from 349 F. Supp. 551)

On action for injunctive and declaratory relief, Court held that it was without jurisdiction and denied the motion for summary judgment while granting defendants' motion to dismiss.

John T. Tabor and *J. Stewart Bakula*, St. Louis, Mo., *Earl W. Kintner, Mark R. Joelson, Eugene J. Meigher* and *I. C. Waddey, Jr., Arent, Fox, Kintner, Plotkin & Kahn,* Washington, D.C., for plaintiff.

Daniel Bartlett, Jr., U.S. Atty., and *David W. Harlan,* Asst. U.S. Atty., *Ronald M. Dietrich,* Gen. Counsel, *Harold D. Rhynedance, Jr.,* Asst. Gen. Counsel, *James P. Timony,* Atty., F.T.C., Washington, D.C., for defendants.

ORDER

REGAN, *District Judge.*

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*Reported in 349 F. Supp. 551 (1972). See also *Seven-Up Company v. F.T.C.*, 8th Cir., 478 F. 2d 755 (1973), p. 670 herein, *cert. denied* 414 U.S. 1013, 94 S. Ct. 379 (1973). For case before the Commission, see ____ F.T.C. ____.

Presently pending before the Federal Trade Commission is a proceeding charging plaintiff, a soft drink manufacturer, with engaging in unfair methods of competition in violation of the Federal Trade Commission Act, 15 U.S.C., Section 45, by reason of provisions in licenses granted to its bottlers whereby the bottlers agree not to sell the product outside of a designated geographical territory. Similar complaints were filed and are pending against other soft drink manufacturers, including Coca Cola and Pepsi Cola. Plaintiff moved to dismiss the Commission proceedings on the ground of non-joinder of plaintiffs' many bottlers as indispensable parties.

This action for injunctive and declaratory relief challenges the propriety of the interlocutory order of the Commission denying the motion to dismiss. Similar orders in the Coca Cola and Pepsi Cola proceedings have been unsuccessfully attacked in other United States District Courts. See *The Coca-Cola Company* v. *Federal Trade Commission*, N.D.Ga., 342 F.Supp. 670, and *Pepsi-Co., Inc.* v. *Federal Trade Commission*, S.D.N.Y., 343 F. Supp. 396. Appeals have been taken from both rulings.

Defendants have moved to dismiss, or in the alternative for summary judgment. Plaintiff has moved for summary judgment. After full consideration, we agree with the rationale of the district court rulings in the *Coca Cola* and *Pepsi Cola* cases dismissing the complaints therein for lack of subject matter jurisdiction.

Accordingly, it is hereby ordered that the defendants' motion to dismiss be and the same is hereby sustained and the complaint is dismissed for lack of subject matter jurisdiction. Plaintiff's motion for summary judgment is denied.

STANLEY WORKS v. FEDERAL TRADE COMMISSION*

No. 11, Docket 71—1742—F.T.C. Docket 8760

(United States Court of Appeals, Second Circuit, October 17, 1972)

1. TO PERMIT COURT TO PROCEED TO QUESTION OF WHETHER COMPETITION GROUND WAS ADEQUATELY SUSTAINED, FTC DECISION DISCLOSED THAT MERGER WAS INVALIDATED ON GROUNDS OF POTENTIAL COMPETITION AND THAT ACQUIRING CORPORATION HAD NOTICE OF COMPETITION THEORY.

Federal Trade Commission decision sufficiently disclosed that merger was invalidated on ground of actual competition as well as on ground of potential competition, and that acquiring corporation had notice of

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*Reported in 469 F. 2d 498 (1972), *cert. denied*, 412 U.S. 928 (1973). For case before the Commission, see 78 F.T.C. 1023.

actual competition theory, to permit reviewing court to proceed to question of whether actual competition ground was adequately sustained by substantial evidence.

2. ANY MERGER BETWEEN MARKET LEADERS SUSPECT WHERE MARKET IS CONCENTRATED

Where market is already concentrated any merger between market leaders is suspect.

3. INDUSTRY SUFFICIENTLY CONCENTRATED WHERE FOUR LEADING FIRMS DOMINATED 49–51% OF THE MARKET

Where four leading firms in cabinet hardware industry dominated 49–51% of market, industry was sufficiently concentrated to invoke proscriptive sanction of Clayton Act, under circumstances of case.

4. FTC JUDGMENT AS TO MARKET CONCENTRATION FOR ANTITRUST PURPOSES IS ENTITLED TO SUBSTANTIAL WEIGHT

Judgment of Federal Trade Commission as to what type of market is concentrated for antitrust purposes is entitled to substantial weight.

5. MARKET IS "CONCENTRATED" WHERE MERGER BETWEEN FIRST AND TENTH RANKING FIRMS THREATENS ANTICOMPETITIVE CONSEQUENCES

Where merger beween first and tenth ranking firms in market threatens substantial anticompetitive consequences, market is "concentrated" by any measure.

6. INVOLVED SECTION'S INCIPIENCY STANDARD PROVIDES PREVENTIVE AS WELL AS REMEDIAL THERAPY FOR AN AILING INDUSTRY

Incipiency standard of antimerger provision of Clayton Act, which requires not merely appraisal of immediate impact of merger on competition but prediction of its impact on competitive conditions in future, provides preventive as well as remedial therapy for ailing industry, and its salutary medicines need not be withheld until diagnosis reads "terminal."

7. COURT BOUND BY STIPULATED FACTS AND CANNOT PICK AND CHOOSE AT WILL

Parties and court were bound by stipulated facts in antitrust case, and court could not pick and choose at will.

8. WHERE CORPORATION RANKS TENTH IN MARKET, ACQUIRING CORPORATION'S 1% SHARE OF MARKET WAS NOT *DE MINIMIS*.

Acquiring corporation's 1% share of cabinet hardware market was not *de minimis* where such corporation was tenth ranking corporation in market.

9. SUBSTANTIAL ELIMINATION OF COMPETITION RESULTED FROM ACQUISITION OF CORPORATION WITH 22% OF MARKET BY CORPORATION WITH 1% OF MARKET IN VIEW OF EXISTING LEVEL OF CONCENTRATION

Acquisition, by corporation with 1% share of cabinet hardware market, of corporation with more than 22% of market resulted in substantial elimination of competition, in view of existing level of concentration and of likelihood that acquiring corporation would have been more active competitor in future but for merger.

(Syllabus, with substituted captions, was taken from 469 F.2d 498.)

On petition to review and set aside, Court held that acquisition, by corporation with 1% share of cabinet hardware market, of corporation with more than 22% of market resulted in substantial elimination of competition in view of existing level of concentration. Order affirmed and enforced.

[**499**] *John W. Douglas*, Washington, D.C., for petitioner.

Alvin L. Berman, Washington, D.C., for respondent.

Before KAUFMAN, SMITH and MANSFIELD, *Circuit Judges.*

IRVING R. KAUFMAN, *Circuit Judge:*

This appeal presents important questions of antitrust law. The central issue is whether the August 1966 acquisition of Amerock Corporation by The Stanley Works violated § 7 of the Clayton Act[1] and § 5 of the Federal Trade Commission Act.[2] The Federal Trade Commission held that it did and ordered divestiture.[3] Stanley filed a petition asking this Court to review and set aside the Commission's order. *See* 15 U.S.C. § **45(c)**. For the reasons given below, we believe the effect of the merger may be substantially to lessen actual competition in the national cabinet hardware market. Accordingly, we affirm the decision of the Commission and direct that its order be enforced.

I.

As always, resolution of a question of antitrust illegality requires us to describe the companies involved, analyze the product and geographic market in which they compete, and explore the structure of the industry affected by the merger, to the end that we may properly assess the probable effects of the merger on competition.

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[1] 15 U.S.C. § 18. Section 7 as amended, provides:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[2] 15 U.S.C. § 45(a)(1). That section provides:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce. are declared unlawful."

The complaint in this case, issued against Stanley on April 30, 1968, charged a violation of Clayton § 7 and Federal Trade Commission Act, § 5. The Commission found that the merger transgressed both statutes. Although a violation of § 5 is not necessarily a violation of § 7, *see Federal Trade Commission* v. *Sperry Hutchinson*, 405 U.S. 233, 246, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972). It is the case that every violation of § 7 is also a violation of § 5. Since we hold that the Stanley-Amerock merger is illegal under § 7, and therefore illegal under § 5, we need not give special consideration to § 5 analysis.

[3] The Commission's decision was rendered on May 17, 1971.

The Companies

Stanley is a Connecticut corporation engaged in the manufacture and sale of hand and power tools, hardware products, steel and steel strapping, with its principal place of business in New Britain, Connecticut. It is a large, multi-plant, multi-product concern with a history of expanding sales. In 1965, a year prior to the merger, Stanley's domestic sales were $123,000,000, an increase of $29,000,000 over its 1963 sales figures. For the period 1963–65, its net earnings after taxes rose from $4,200,000 to $6,600,000, an advance of more than 57%. In 1965 Stanley's sales in the relevant product market[4] were $814,000. It operated numerous production facilities, including plants located in California, Connecticut, Florida, New Jersey, North Carolina, Ohio, Tennessee, Vermont and Illinois.

Amerock was incorporated in 1928 and maintains its principal place of business in Rockford, Illinois. At the time of this merger, Amerock was engaged in the manufacture and sale of certain hardware products for use primarily in kitchens, in addition to a broad line of window, appliance, furniture and general household hardware products. Its domestic **[500]** sales in 1963 totaled $23.8 million, and increased by 1965 to $29.4 million, an advance of more than 23%. Amerock's 1965 net earnings after taxes were $2.8 million, a gain of over 47% over its 1963 earnings figures. Amerock's 1965 sales in the relevant product market were in excess of $18,000,000.

The Industry

Since Section 7 of the Clayton Act forbids mergers between companies "in any line of commerce in any section of the country," when the merger may result in substantial lessening of competition, determination of the relevant product and geographical markets is of critical significance. *See, e.g., Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). Here the task of isolating the relevant markets has been made simpler for us, since Stanley and the Commission stipulated that within the general hardware industry, sales of cabinet hardware products in the Nation constitute the appropriate product and geographic markets. The parties agreed also that for purposes of this case, there are no relevant product or geographic submarkets. The Examiner and the Commission grounded their findings of fact on these stipulations; their findings are conclusive, if supported by substantial evidence. 15 U.S.C. § 45(c).

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[4] For our discussion of the relevant product market see p. 500.

The parties are agreed that cabinet hardware includes pulls, knobs, hinges, latches, catches and similar products, including drawer slides and shelving hardware, used principally in kitchen cabinets. The cabinet hardware market comprises two related lines, residential cabinet hardware and architectural, or institutional, cabinet hardware.[5] Residential cabinet hardware is used in houses and apartments. At one time, residential cabinet hardware was made primarily of metal stampings and extrusions, and was essentially functional in nature, with simple lines and designs. In the years folowing World War II, as the American home began to reflect post-war economic affiuence, consumer demand for more highly ornamented cabinet hardware designs increased, and the industry underwent a dramatic change. Manufacturers of residential cabinet hardware turned to a zinc die-casting process, and, as a result, products in this line were transformed into highly stylized, fashion-oriented items, which were offered in a wide variety of designs and finishes to complement the motifs of contemporary cabinet work. Virtually all residential knobs and pulls are now made by the die-casting method. This enables manufacturers to produce the intricate styles and designs demanded by consumers of residential cabinet hardware.

Architectural cabinet hardware is produced for use in institutional and commercial buildings, such as schools, recreational centers and office buildings. The marketing watchword of architectural cabinet hardware is embodied in the phrase, "form follows function;" products in this line must be more durable than residential cabinet hardware in order to withstand the heavier wear to which they are subject in an institutional or commercial setting. As a result, architectural cabinet hardware is rarely made by the die-cast method but is stamped out of bronze, brass, aluminum or steel. These metals are more durable than zinc die-cast material and also more expensive.

Market Shares

Cabinet hardware sales in the United States in 1965, a year prior to the merger, were between $76,000,000 and $80,000,000. The record discloses that in 1965, Stanley ranked as the tenth leading producer of cabinet hardware products with sales of $814,000, representing a market share of 1%. Amerock, the acquired company, ranked first as the seller **[501]** of cabinet hardware products in the United States. Its 1965 sales exceeded

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[5] We stress that neither of these lines constitutes a separate product market for purposes of this case, an element ignored in the dissenting opinion. Our division of the market at this point is designed to serve descriptive, not analaytic, purposes.

$18,000,000, and the company controlled 22–24% of the market.[6]

The Commission upheld the Trial Examiner's finding that the cabinet hardware industry was concentrated. As the table in the margin indicates, the four leading firms in the industry accounted for total sales ranging from 49% to 51% of the market.[7]

II.

[1] Our attention initially must focus on a threshold dispute between the parties. It is Stanley's contention that the rationale and critical findings of the Commission's decision indicate that the Stanley-Amerock merger was declared illegal *solely* on the ground that the merger eliminated *potential* competition in the cabinet hardware market. The Commission opposes this characterization of its decision and insists that elimination of both actual and potential competition triggered application of Clayton § 7 to the merger. The Commission's position on appeal is that either ground for its decision adequately made out a violation of the Clayton Act in this case. The argument is of central importance because under the rule enunciated in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 92, 63 S.Ct. 454, 87 L.Ed. 626 (1943), we must find that the considerations urged on appeal in support of the Commission's order are those upon which the Commission's acquisition was based, if we are to sustain the order.

Chenery instructs that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *Chenery, supra,* 318 U.S. at 94, 63 S.Ct. at 462. It is clear to us that the Commission's decision was dual pronged and that the Stanley-Amerock merger was invalidated on both actual and potential com-

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[6] The respective totals in cabinet hardware sales, and Stanley's and Amerock's percentage market shares, were agreed to by stipulation.

[7]

	1965	
	Cabinet Hardware Sales in U. S.	*Total Assets*
1. Amrock Corp.	$18,218,474	25,133,914
2. National Lock Company	$11,499,445	37,992,215
3. Ajax Hardware Corp.	$ 6,798,000	3,338.412
4. Knape & Vogt Mfg. Co.	$ 6,013.304	7.968,450
5. Jaybee Mfg. Corp.	$ 3,056.673	1.710,989
6. Grant Pulley & Hardware Corp.	$ 2.168.397	2,369,165
7. David Allison Co., Inc.	$ 1.500,000	1,500.000
8. Tassell Industries. Inc.	$ 1.408,600	2,483.424
9. Hyer Hardware Mfg. Corp.	$ 1,344.464	524,452
10. Stanley Hardware Division	$ 814,000	125,926.000

petition grounds. And in our view, the actual competition case was "clearly disclosed" within the meaning of *Chenery*.[8]

[502] We do not develop a "new ground" for the Commission's holding, as the dissent mistakenly suggests, but find the actual competition case clearly underscored in the proceedings before the Examiner, and also in the opinion rendering the Commission's decision. The complaint charged that as a result of the merger "substantial actual and potential competition has been, or may be, eliminated." Stanley's clear perception that an actual competition theory had been litigated before the Trial Examiner is evident from its brief on appeal to the Commission which discussed the merits of the actual competition case at some length.[9]

To preserve the integrity both of judicial review and of agency procedures we must be persuaded not only that Stanley had notice of the actual competition theory, but that the Commission specifically adopted the actual competition case as a reason for its decision. Any doubts on that score, however, are convincingly dispelled by a careful reading of the Commission's opinion, which repeatedly relates the effect of the merger on actual competition.

The Commission adopted at the outset the Examiner's finding that "the merger between Stanley and Amerock led to increased concentration in the already concentrated cabinet hardware market as well as eliminating Amerock as the leading independent producer of cabinet hardware * * *." Unmistakably this is the argot of an actual competition case.

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[8] Stanley's position is that the Commission's potential competition theory is inadequate to support a finding of merger illegality in this case. The Commission held that Stanley was a reasonably probable entrant into the residential cabinet hardware market, and that Stanley would have entered by internal development had it not acquired Amerock. In the Commission's view, the merger eliminated Stanley as a potential entrant, removed the "disciplining effect" it exercised on the market, and raised barriers to entry in an already concentrated market. The Commission did not find that Stanley was the "most likely entrant," *see FTC* v. *Procter & Gamble*, 386 U.S. 568, 581, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967); *cf United States* v. *El Paso Natural Gas*, 376 U.S. 651, 658–659, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964). In addition, the Commission did not point to any evidence indicating that Stanley exercised a "disciplining effect" on the market, nor did it illustrate how Stanley's acquisition of Amerock would contribute to raising barriers to entry in the residential cabinet hardware industry. Inasmuch as we conclude that the Stanley-Amerock merger is illegal because it eliminated substantial actual competition and thereby may lessen competition in the cabinet market as a whole, we need not decide the merits of the potential competition case.

Thus, in this part of our opinion, we consider Stanley's argument that the actual competition theory was not "adequately disclosed." In Part III, we shall treat the question whether that ground is "adequately sustained" by substantial evidence.

[9] Thus, to note only a few examples, at page 23 of its brief Stanley argued that "[t]he so-called 'horizontal' aspects of the case, *i. e.*, the amount of actual competition in cabinet hardware eliminated by the merger, is *de minimis*, and the Examiner erred in not so finding." At pages 25–26 of its brief, Stanley argued that the examiner had incorrectly assessed "the amount of actual competition in fact eliminated by the merger." And finally Stanley asserted that "[i]n view of all the considerations summarized above [at pages 23–30 of its brief], it is clear that the horizontal aspect of this case is quite different from the situations involved in the leading horizontal cases. . . ."

Moreover, that portion of the Commission's opinion which discussed the competitive effects of the Amerock acquisition articulated the Commission's overall view of the case in language that indicates beyond doubt the mix of actual and potential competition theories underlying the Commission's decision. It was the Commission's view that the "case presents * * * a mingling of the effects which are traditionally cognizable under the discrete categories of actual and potential competition." After reviewing Stanley's role in the cabinet hardware market, the Commission characterized Stanley as both "an actual and potential competitor in the stipulated market." "Viewing the case in this light, the Commission concluded, "and within the general confines of the established analytical framework relating to actual and potential competition, we are convinced from the present record that the examiner was correct in concluding that the merger of Stanley and Amerock had significant anticompetitive consequences proscribed by Section 7 * * * "

In addition, the Commission's opinion (footnote 12), establishes clearly that the elimination of actual competition was a ground on which the Commission's decision rested. Noting that the examiner had concluded that the cabinet hardware market was concentrated, the Commission [**503**] cited two studies[10] which bolstered that finding. The opinion sets forth the view shared by a number of scholars that "any horizontal acquisition involving a firm with more than 20% of the relevant market [Amerock's share was 22–24%] should be deemed illegal," and refers to authorities which support that view.[11] Both sources, at the cited pages, clearly address themselves to cases in which mergers eliminated actual competition.

Finally, and most convincingly, the Commission emphasized the importance of closely scrutinizing mergers in markets that are already concentrated, relying on *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). The question in that case was whether a merger between Philadelphia National Bank and Girard Trust Corn Exchange Bank, the second and third largest commercial banks in the Philadelphia metropolitan area, violated § 7 by lessening competition in the commercial banking business. The Court held that it did, and grounded its decision on the elimination of actual competition. The Commission clearly understood and considered the rationale of the case, and applied it to the Stanley-Amerock merger.

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[10] K. Kaysen & D. Turner, Antitrust Policy: An Economic and Legal Analysis 72 (1959), and J. Bain, Industrial Organization 14–41 (2d ed. 1968).

[11] K. Kaysen & D. Turner, *supra,* at 133; Stigler, Mergers and Preventive Antitrust, 114 U.Pa.L.Rev. 176, 182 (1955).

In light of the above, we would be remiss in our duty as a reviewing court if we abstained from considering the merits of the actual competition theory and remanded the case to the Commission, as Stanley urges us to do. The record contains ample evidence to enable this Court to assess the merits, and it is abundantly clear that the Commission relied on the actual competition theories, among others, in reaching its conclusion. *Chenery* does not predicate judicial review of an agency finding on the correctness of that finding, nor does it require an agency to crystallize its basis of decision into a single, rarefied reason. All that is required is that "[i]f the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable." *SEC* v. *Chenery Corp. (Chenery II),* 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947). We believe the Commission's decision with respect to the actual competition case satisfies that test.

III.

Having reached the merits, we must decide whether the effect of the merger "may be substantially to lessen competition" in the cabinet hardware market. Mindful of the admonition that questions of antitrust laws are not always "susceptible of a ready and precise answer," *United States* v. *Philadelphia National Bank*, *supra*, 374 U.S. at 362, 83 S.Ct. at 1741, we take as our starting point, and touchstone of analysis, that "[t]he dominant theme pervading congressional consideration of the 1950 amendments [to § 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 315, 82 S.Ct. 1502, 1518, 8 L.Ed.2d 510 (1962). And we recognize "that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was [§ 7's] provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum." *Id.* at 317–318, 82 S.Ct. at 1520.

[2] Unlike the factual settings presented in *Brown Shoe*, *supra*, *United States* v. *Von's Grocery*, 384 U.S. 270, 86 S.Ct. 1478, 16

L.Ed.2d 555 (1960), and *United States* v. *Pabst Brewing Co.*, 384 [**504**] U.S. 546, 86 S.Ct. 1665, 16 L.Ed.2d 765 (1966), where an analysis of the relevant market structure revealed only a *trend* toward concentration, the Commission clearly found here that the relevant market was *already* concentrated. Stanley argues, however, that the failure to find a trend toward concentration takes this case out of the line of *Brown*, *Von's* and *Pabst*, decisions which held horizontal mergers between *actual* competitors invalid. But *United States* v. *Continental Can*, 378 U.S. 441, 84 S.Ct. 1738, 12 L.Ed.2d 953 (1964), teaches that where a market is already concentrated any merger between market lenders is suspect. The court said:

> [W]here there has been a "history of tendency toward concentration in the industry" tendencies toward further concentration "are to be curbed in their incipiency." *Brown Shoe Co.* v. *United States*, 370 U.S., at 345, 346, 82 S.Ct. [1502] at 1535. Where "concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 365, n. 42, 83 S.Ct. 1715, 1742 [10 L.Ed.2d 915]; *United States* v. *Aluminum Co. of America*, [377 U.S. 271, 84 S.Ct. 1283, 12 L.Ed.2d 314 (1964)]. *United States* v. *Continental Can*, *supra*, 378 U.S. at 461–462, 84 S.Ct. at 1749.[12]

[3] We have indicated that the four leading firms in the cabinet hardware industry dominated 49–51% of the market. The Examiner and the Commission thought these figures reflected market concentration. We agree that the industry is sufficiently concentrated to invoke the proscriptive sanction of the Clayton Act under the circumstances of this case.[13]

The relevant literature strongly supports this view.[14] To mention only one example. Kaysen and Turner describe a "tight oligopoly" as an industry in which eight firms or less supply 50% of the market, with the largest firms controlling 20% or more.[15] Under their analysis, the cabinet hardware market falls **[505]** well within the economic parameters which describe a concentrated market.

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[12] Our dissenting brother ignores this admonition, and would confine the power of antitrust enforcement agencies to cases where a "trend" toward concentration in the industry has been proven. In doing so, he disregards the teaching of *Continental Can* that actual concentration is a far more insidious base upon which to build a merger. This would seem to pay greater heed to the symptom than the disease.

[13] Stanley insists that such a market is not "concentrated." They cite Justice Department Merger Guidelines, *see* 1 Trade Reg. Law Rep. ¶ 4510, which indicate that a market is highly concentrated when shares of the four largest firms account for 75% or more of the market. But as often proves true, reading on to the end of a sentence can be instructive. It appears that the Department of Justice will ordinarily challenge mergers in a "highly concentrated market" where the acquired and acquiring firm account for 1% and 15% of the market respectively. 1 Trade Reg. Law Rep. ¶ 4510 at 6884. But the Department also characterizes some markets as "less highly concentrated"—markets in which the four leading firms account for less than 75% of the market. Under such conditions the Department will ordinarily challenge mergers when the parties account for 1% and 25% of the market. Stanley controlled 1% of the cabinet hardware market; Amerock 22–24%. It should be evident that market shares in this case are sufficiently close to the Department guidelines to cause us to hesitate before accepting Stanley's view.

[14] Although the teachings of scholars cannot be dispositive, it would be foolhardy, in an area as complicated as this, to wholly disregard the lessons they have learned in a lifetime of study.

[4] Most persuasive of all in our view, however, is the unanimity reached by the trial examiner and the Commission in holding this market concentrated. In view of the Commission's expertise in assessing the impact of business practices on economic market forces, we believe its judgment as to what type of market is concentrated for antitrust purposes is entitled to substantial weight.[16]

Upon its review of all the evidence, the Commission concluded that

> * * * the very reasons leading Stanley to acquire Amerock are the same reasons which support the charge in this case that the merger will have significant anticompetitive effects. Stanley acquired Amerock precisely because it *was* the dominant company in the market . . . and because it believed that the acquisition would further entrench Amerock's already dominant position, while any other course designed to achieve Stanley's goals in the cabinet hardware market—internal expansion by Stanley or acquisition of a smaller company in the industry—would only stir up competition.

There was substantial evidence in the record to support that view. Among the evidence we find a Stanley Hardware Division task force report, prepared on June 10, 1964, as part of a study of possible new ventures for the Hardware Division, which concluded:

> it is felt that a strong Stanley entry into parts of the cabinet hardware market via product development could be expected to accentuate industry-wide declines in prices and profits. A strong properly oriented Stanley entry into the market via acquisition could, on the other hand, be designed to contribute to a reversal in the downward trend in prices and profits.

In the general hardware industry, in which most of Stanley's business was transacted, it was not only the leading firm, but a price leader as well. A long-range Stanley Hardware Division report, prepared in mid-1965, stated: "As the largest firm in the industry, the Hardware Division must continue to show leadership in the important area of pricing policy. As conditions warrant, we must continue to take the initiative and corresponding risks of being the first within the industry to raise prices and attempt to keep them at such higher levels." This policy undoubtedly presented a threat to the future competitive vitality of the industry, which had recently experienced price decreases.

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[15] Kaysen & Turner, *supra*, at 72. The authors define economic markets in terms of four levels of concentration. A "dominant firm" or "partial monopoly" market is one in which a single large firm supplies 60% of the market and no other seller supplies a significant portion of the demand. "Tight oligopoly" is the next level of concentration. *See also* Bain, Industrial Organization 131 (2d ed. 1968). (Market in which four firms control 50% reflects high-moderate concentration.)

[16] Stanley's own partial reliance on Justice Department Merger guidelines, discussed at note 13, *supra*, reflects this same view. Stanley concedes that the Justice Department's view expressed in its guidelines should be given special weight; so too, we believe, should the Commission's views.

[5, 6] In light of these disclosures, the Commission justifiably was apprehensive that the Stanley-Amerock merger, by increasing concentration at the top of the market, might have a "tipping effect" in the cabinet hardware industry, turning a concentrated market manifesting limited signs of price competition into a rigid, lifeless market tending toward even greater concentration and economic enervation. A market as delicately balanced as this, such that a merger between the first and tenth ranking firms threatens substantial anti-competitive consequences, is "concentrated" by any measure. Section 7's incipiency standard, which "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future",[17] provides preventive as well as remedial therapy for an ailing industry; surely its salutary medicines need not be withheld until the diagnosis reads "terminal."

[7, 8] Stanley argues that foreclosure of a *de minimis* share of a market **[506]** bars application of § 7, and that the competitive overlap between Stanley and Amerock in this case was *de minimis.* Our dissenting brother has adopted this view, but has based his conclusion on an altogether erroneous analysis of market shares. After parsing the stipulated product market, he proceeds to treat residential cabinet hardware and institutional cabinet hardware as distinct lines of commerce, thereby ignoring the clear agreement between the parties that no product or geographic submarkets exist in the cabinet hardware industry. He then announces, virtually *ex cathedra*, that the degree of competitive overlap existing between Stanley and Amerock amounted to a mere .35% of the market. The dissent concludes that the percentage of the market affected by the merger is *de minimis* and, on that account, Stanley's acquisition of Amerock survives even the most critical antitrust scrutiny. In light of the stipulation, we regard the dissent's method of analysis as puzzling. It is also dangerous for it may have the effect of both dissuading litigants from agreeing upon facts and deterring agencies from acting on those agreed stipulations of fact. No amount of statistical legerdemain justifies disregarding the binding stipulation that controls this case, under which the relevant product market is defined as the entire cabinet hardware industry and Stanley's market share is agreed to as constituting 1% of total sales. The parties conceded those facts, the Examiner acted upon those facts, and the Commission based its decision on those facts. There may have been strategic litigation tradeoffs that led to the adoption of the stipulation; but we shall never know. Nor can we guess what posture this case would have assumed had there been no stipulation. What constellation of facts might have emerged, but for the stipulation, is wholly a matter of surmise, in which we may not permit ourselves to engage. Having agreed on a set of facts, the parties, and this Court, must be bound by them; we are not free to pick and choose at will. While we recognize that § 7 can tolerate *de minimis* foreclosure, *Brown Shoe Co.* v. *United States*, 370 U.S., at 329, 82 S.Ct. 1502, 8 L.Ed.2d 510, we cannot agree that the competition eliminated by this merger was sufficiently insubstantial to purge it of illegality under the Clayton Act.

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[17] *United States* v. *Philadelphia National Bank*, *supra*, 374 U.S. at 362, 83 S.Ct. at 1741.

Although the market shares involved here do not precisely match market shares in any case cited to us by either Stanley or the Commission—rarely are two antitrust cases alike—we believe that the rationale underlying at least two Supreme Court decisions indicates that Stanley's 1% is not a *de minimis* share of the cabinet hardware market. Most persuasive is *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 86 S.Ct. 1665, 16 L.Ed.2d 765 (1966), in which a merger between two companies engaged in the manufacture, sale and distribution of beer was held invalid under § 7 because it eliminated competition in three markets, including the national market.[18] In the national market, Pabst ranked tenth among the leading firms, with 3.02% of the market; Blatz, the acquired company, ranked eighteenth with 1.47%. The relevant product market, though tending toward concentration, was not nearly as solidified as the market in this case: in 1957, one year prior to the Pabst-Blatz merger, 10 companies controlled 45.06% of the market; in 1961, ten companies controlled 52.6% of the market. Even after taking into account the trend toward concentration, competition in the product market in *Pabst* appears robust in comparison to the cabinet hardware market, in which four firms control approximately 50% of the **[507]** market. In view of this market concentration in the sale of cabinet hardware products, we cannot assume, as Judge Mansfield does, that a difference of less than one-half of one per cent—the difference between Blatz's 1.4% and Stanley's 1% market shares—is of decisive significance for a question of such controlling importance as whether 1% market control is, or is not, *de minimis.*

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[18] The relevant geographic markets in *Pabst* were Wisconsin, the Tri-State market consisting of Wisconsin, Michigan and Illinois, and the Nation. The Court held that "the evidence as to the probable effect of the merger on competition in Wisconsin, in the three-state area, and in the entire country was sufficient to show a violation of § 7 in each and all of these three areas." 384 U.S., at 552, 86 S.Ct., at 1669.

Stanley's rank in the industry also contributes to the conclusion that its 1% share of the market is not insubstantial. The Supreme Court noted in *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 84 S.Ct. 1283, 12 L.Ed.2d 314 (1964), that central to the underlying philosophy of § 7, as amended, is the principle "that competition will be most vital 'when there are many sellers, none of which has any significant market share.' *United States* v. *Philadelphia National Bank*, 374 U.S. at 363, 83 S.Ct. 1715, 10 L.Ed.2d 915." *United States* v. *Aluminum Co. of America, supra*, 377 U.S. at 280, 84 S.Ct. at 1289. But the greater the concentration in the market "the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge. That tendency may well be thwarted by the presence of small but significant competitors." *Ibid.*[19] In *Alcoa*, the Court specially noted that no more than a dozen companies could account for as much as 1% of industry production and therefore Rome, ranking ninth with 1.3% of the market, was a substantial competitor.[20] Stanley, like Rome, is a small but significant competitor in a market with few sellers. Based on the record in this case, only ten companies, of which Stanley was tenth, accounted for 1% or more of the cabinet hardware market. We cannot say, therefore, that under the circumstances involved here, Stanley's 1% share was insubstantial.[21]

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[19] The Court found that Alcoa's acquisition of Rome Cable Corporation was reasonably likely to result in a substantial lessening of competition in the highly, concentrated aluminum conductor industry where 5 companies controlled 76% of the relevant market. Alcoa was the leading producer of aluminum conductor, with 27.8% of the market; Rome was ninth with 1.3%.

[20] *United States* v. *Aluminum Co. of America, supra*, 377 U.S. at 281, 84 S.Ct. 1283.

[21] Stanley relies on *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961) to support its assertion that 1% is a *de minimis* share of the market. *Tampa* was brought under § 3 of the Clayton Act, which forbids certain types of exclusive dealing contracts where the effect of such a contract may be substantially to lessen competition or tend to create a monopoly in any line of commerce. 15 U.S.C. § 14. Tampa and Nashville had entered into a requirements contract under which Nashville agreed to supply Tampa's coal requirements for a period of twenty years. The District Court and the Court of Appeals held the contract invalid under § 3, and the Supreme Court reversed. The Court said: " . . . the proportionate volume of the total relevant coal product as to which the challenged contract preempted competition, less than 1%, is, conservatively speaking, quite insubstantial. A more accurate figure, even assuming pre-emption to the extent of the maximum anticipated total requirements . . . would be .77%." 365 U.S., at 333, 81 S.Ct., at 631. Justices Black and Douglas dissented.

[508] [9] Finally, we note that though a market may be concentrated, forces may operate so as to maintain some level of competition and thus preserve the possibility of eventual deconcentration. That is why the continued independence of companies with relatively small market shares is so crucial to the health and vitality of a market threatening to become oligopolistic.[22] Not only was Stanley an active competitor in the cabinet hardware market at the time it acquired Amerock but the record indicates that Stanley would have been a more active competitor in the future, absent mergers.[23] For all the reasons set forth, it is clear to us that the elimination of competition resulting from the merger was substantial and not *de minimis*, within the meaning of § 7's prohibitions.

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[21] (Continued)

"Stanley and our dissenting brother," ignore the significance of the fact that *Tampa Electric* involved the validity of a contract under Clayton § 3, not § 7. The parameters of analysis in § 7 cases are not the same as in § 3 cases. Courts are cautioned to exercise greater care before upholding a merger under § 7 inasmuch as "integration by merger is more suspect than integration by contract, because of the greater permanence of the former." *United States* v. *Philadelphia National Bank, supra,* 374 U.S., at 366, 83 S.Ct., at 1743. Furthermore, the Court in *Tampa* thought it necessary to distinguish *Standard Fashion Company* v. *Magrane-Houston Company,* 258 U.S. 346, 42 S.Ct. 360, 66 L.Ed. 653 (1922), a prior § 3 case which had invalidated a two-year exclusive agency contract between Standard, a manufacturer and distributor of patterns, and Margane, a Boston retail dry goods store. *Standard Fashions,* the Court said, involved a market with a dominant seller and there was no evidence of any concentration in the *Tampa* product market. Because the instant case calls into question the validity of a merger under § 7, not the legality of a contract under § 3, and because of the concentrated structure of the cabinet hardware market, we find Stanley's reliance on *Tampa Electric* misplaced.

Stanley has also cited to us, without discussion, several district court cases, which, it says, involved *de minimis* foreclosures. We have carefully considered these cases and find them inapposite.

[22] In fact, some scholars are of the view that any horizontal acquisition involving a firm with more than 20% of the relevant market—Amerock's share is 22–24%—should be *prima facie* illegal. See K. Kaysen & D. Turner, supra, at 133. Stigler, Mergers and Preventive Antitrust, 104 U.Pa.L.Rev. 176, 182 (1955).

[23] The Commission found that it was reasonably probable that Stanley would have become increasingly more active in the residential cabinet hardware segment of the relevant market by way of internal expansion had expansion not been effected by merger. Stanley disputes this finding and says that top level Stanley management rejected the option of internal expansion in residential cabinet hardware. Instead, however, Stanley concedes that in January, 1965, approximately nine months prior to initial merger contacts between Stanley and Amerock, it was decided that Stanley would expand its production of architectural cabinet hardware. Donald Davis, then Executive Vice-President and now President of Stanley, in testimony before the Trial Examiner, stated: "I was convinced that the best thing for the Hardware Division to do was to try to maximize their sales and profits in their existing product lines rather than spending their time and efforts looking for . . . new growth areas . . ." And he asserted that Stanley had decided "to concentrate [its] efforts in the area where [it] had some strength, namely, architectural cabinet hardware . . ."

Whether we accept the Commission's or Stanley's view, once it is understood that the parties agreed that the cabinet hardware market as a whole is the relevant product market for this case, it is clear that Stanley had plans to become an even more significant competitor in the market. Therefore maintenance of its independence in the concentrated market, even as a 1% competitor, was of great importance in holding open the possibility of future deconcentration.

We cannot conclude without observing that our dissenting brother incorrectly reads our opinion as announcing a rule of *per se* illegality for horizontal mergers. This is regrettable for nothing we decide today remotely hints at such a conclusion. The law is clear in its teaching that in an already concentrated industry with few sellers, in which the four leading companies dominate aproximately 50% of the market, a merger involving the leading firm, controlling 22–24% of the market, with a firm like Stanley, would seriously threaten substantial anti-competitive consequences. This merger cannot survive in the face of the Clayton Act and its history. Accordingly, we affirm the Commission's order and direct its enforcement.[24]

[509] MANSFIELD, Circuit Judge (dissenting):

I respectfully dissent for the reason that in my view the majority, which adopts a new ground (the horizontal impact of the Amerock-Stanley merger on actual competition) for upholding the Commission's decision (which was squarely bottomed on elimination of potential competition), has automatically applied an oversimplified quantitative "rule of thumb" instead of recognizing economic realities of the market. It ignores the fact that the actual competitive overlap between the two companies is less than ½ of 1% of the market, that there has been a complete absence (1) of any trend toward concentration in the industry, (2) of any parallel action by leading producers, or (3) of any appreciable enhancement in the market power of the merged enterprise as compared with that of its two components.

The court's decision, therefore, amounts to a holding that a horizontal merger is *per se* unlawful even where one party controls but an infinitesimally small percentage of the market and there is a complete absence of indicia indicating a possible anti-competitive impact. The effect is to repeal the principle that

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[24] In view of our decision in this case, we have no occasion to pass on the merits of the Commission's "toe-hold theory" which would have declared this merger illegal for the reason that even if Stanley were permitted to expand in the market via acquisition, it should have purchased one of the lesser firms in the industry, and not the market leader. Stanley urges that the "toehold theory" was not raised in the complaint, never litigated at the hearing, nor considered by the Examiner. It contends therefore, that any judgment based on the "toehold theory" would be violative of Fifth Amendment Due Process, and Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554. We agree that the "toehold theory" was not litigated before the Examiner, and that the Commission was without authority to consider it. *Cf.* Bendix Corp. v. FTC, 450 F.2d 534 (6th Cir. 1971). Because the "toehold theory," however, was an alternative basis of illegality, and since the actual competition case adequately established the finding of invalidity under the Clayton Act by substantial evidence, the Commission's error worked no prejudice to Stanley.

Finally, Stanley contends that the Commission prejudged the facts of the case thereby denying petitioner its right to a fair hearing. We have given this charge the serious attention it deserves but find it to be without merit.

"foreclosure of a *de minimis* share of the market will not tend 'substantially to lessen competition' ", *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 329, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). Since the record further establishes, as the majority implicitly recognizes, that the merger cannot be upset on the ground adopted by the Commission, *i.e.*, elimination of potential competition, I would reverse the Commission's decision.

I further believe that the majority decision is unfortunate for the reason that by adopting a new ground for affirmance it has indulged in *post hoc* rationalization of agency action, a course condemned by the Supreme Court as incompatible with the functioning and integrity of judicial review. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196–197, 67 S.Ct. 1575, 1760, 91 L.Ed. 1995 (1947); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168–169, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962). The Hearing Examiner limited himself to a finding that the merger might lessen competition in the cabinet hardware market because of the elimination of Stanley as a potential competitor.[1] Upon review his decision was summarized by the Commission as being based on this potential competition ground.[2] After a lengthy discussion **[510]** of the competitive effects of the Amerock acquisition the Commission concluded:

> Accordingly, we conclude that the fact of its entry by acquisition eliminated the substantial possibility that Stanley itself would become a significant competitor in the cabinet hardware market, with all of the increase in competitive vitality which Stanley's presence would have implied. (Appendix at 128).

Apparently recognizing the weakness of the case based upon elimination of potential competition the majority now turns to elimination of actual competition as a ground for affirmance. This substitution of a horizontal basis, not invoked by the Commission, constitutes a departure from well established principles of review.

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[1] The Hearing Examiner concluded:

"The acquisition and merger of Amerock the leading independent domestic manufacturer and seller by Stanley increased this high level of concentration and may result in a substantial lessening of competition in the said cabinet hardware market because of the elimination of Stanley as a reasonably probable, potentially capable and significant domestic manufacturer and seller in the residential cabinet hardware segment of the said market, and particularly in the decorative residential cabinet hardware sales area of the said market."

[2] The Commission described the Hearing Examiner's Initial Decision as follows: "Thus, the examiner found that respondent's acquisition of Amerock lessened competition because (1) absent the merger Stanley would probably have entered the cabinet hardware market on its own; (2) the elimination of Stanley as a potential competitor had the effect of increasing the barriers to entry; and (3) Stanley, as a potential competitor, had an influence on the performance of the cabinet hardware market.

"On the basis of these findings, the hearing examiner concluded that the effect of the merger may be to substantially lessen competition in the cabinet hardware market in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act."

It is true that in the course of its discussion the Commission alluded to the degree of concentration in the cabinet hardware market, citing some authorities which refer to horizontal acquisitions, and stating that "Stanley's acquisition did or could contribute to the degree of competition prohibited by the statute." However, it is apparent that these passing references were merely intended to buttress a decision focused entirely on potential competition. If the Hearing Examiner or the Commission had considered the merger unlawful because of the horizontal overlap between Amerock and Stanley, they would have so stated in plain language; only one sentence would have been required. They did not do so, undoubtedly because (as is shown below) the overlap was too miniscule and insignificant to warrant such a finding. Indeed the Commission said, "Thus, it is not the 1% increase in market share brought about by the Stanley-Amerock merger by itself which posits the anti-competitive aspect of this merger." Although the Commission referred to Stanley's actual competition as a fact to be considered, the real basis of its decision was its finding of foreclosure of potential competition.

Actual Competition

Even assuming that the Commission's decision permits our consideration of the horizontal impact of the merger, undisputed market facts demonstrate that the merger's effect on actual competition was entirely too diminutive to violate § 7 of the Clayton Act. The majority concludes that since the cabinet hardware industry is concentrated, with four firms controlling 49–51% of the market, a merger of the first ranking firm, Amerock (23%), and the tenth ranking firm, Stanley (1%), though bordering on *de minimis*, may have a "tipping effect" in the industry, which might tend to lessen competition. In support of this conclusion it relies upon an isolated report by subordinate marketing personnel employed by Stanley, prepared on June 10, 1964, and invokes Supreme Court decisions outlawing mergers by giants of industry in the fields of beer, aluminum, containers, shoes and banking, where there was either a higher market concentration or a trend toward such concentration in the industry under review.[3]

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[3] *United States v. Pabst Brewing Co.*, 384 U.S. 546, 86 S.Ct. 1665, 16 L.Ed.2d 765 (1966); *United States v. Aluminum Co. of America*, 377 U.S. 271, 84 S.Ct. 1283, 12 L.Ed.2d 314 (1964); *United States v. Continental Can Co.*, 378 U.S. 441, 84 S.Ct. 1738, 12 L.Ed.2d 953 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *United States v. Philadelphia National Bank*, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963).

At first blush this traditional approach seems reasonable enough, particularly since antitrust law, at least with respect to the legality of mergers, has been characterized by decisions based on differences **[511]** in degree rather than upon sharp, crystallized lines. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). However, we are not here dealing with industrial giants threatening to gobble up lesser competitive fry but with modest participants in a relatively small industry. Unlike the cases relied upon by the majority, there is here a complete absence of any trend toward concentration. Although the industry is somewhat concentrated, other characteristics of the market, including the existence of a large number of strong and thriving competitors, demonstrate that the instant merger cannot have the possible anti-competitive impact attributed to it. As for the evidence relied on by the majority, it is undisputed that the Stanley task force report referred to by it was neither seen nor approved by Stanley's management. On the contrary, the possibility of entry by either acquisition or by internal expansion was thoroughly rejected. On this record, therefore, I fail to find substantial evidence that would adequately sustain the view that the merger posed actual anti-competitive consequences which might tend to lessen competition. On the contrary, undisputed evidence with respect to competitive realities of the relevant market, including an overlap compels me to conclude that neither the actual nor the potential competitive effects of the merger are unlawful and it should therefore be upheld.

Product markets and market percentages, whether or not stipulated, are of significance in determining the probable effect of a merger on competition where they reflect actual competition between the parties. But to determine whether a merger forecloses *actual* competition, one looks to the *actual* competitive facts (the competitive overlap between the parties) within the given product market rather than halt at overall market percentages and look no further. This process does not, as the majority suggests, change the parties' stipulation as to the overall market, or create distinct lines of commerce or submarkets. It merely judges actual competitive effects according to economic realities within the stipulated market rather than ignore undisputed competitive facts of record.

Applying this standard the record is clear that in this case the stipulated overall market percentages, while useful for some purposes, do not reflect the actual competition, *i.e.*, the competitive overlap, between the parties within the stipulated market.

Undisputed facts with respect to the actual competition between Stanley and Amerock reveal, on the contrary, that the competitive overlap between them is far less than the 1% accepted by the majority and that the merger is thus governed by the accepted principle that "foreclosure of a *de minimis* share of the market will not tend 'substantially to lessen competition,'" *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 329, 82 S.Ct. 1502, 1526, 8 L.Ed.2d 510 (1962). The *de minimis* impact of the Stanley-Amerock merger is due mainly to three factors: (1) the differing types of business conducted by each of the two participants, which for the most part do not compete, (2) the differing channels of distribution used by each, which likewise do not substantially compete, and (3) the fact that size does not carry any competitive advantages in this industry, where small companies thrive and have increased in number.

To appreciate the diminutive effect of the merger under review, certain facts about the industry, in addition to those described by the majority, should be known. Cabinet hardware comes in two kinds, (1) Residential, which is used in both houses and apartments, and (2) Architectural (Institutional) which is used in commercial or institutional structures. Residential hardware is highly stylized. Its production requires die-casting machinery, which is used to fashion intricate ornamentation. Architectural cabinet hardware, on the other hand, is primarily functional in design. Since sturdiness and durability are **[512]** paramount, it is generally stamped out of metal.

Residential cabinet hardware is the vastly more significant part of the cabinet hardware industry, accounting for approximately 90–95% of the $76–$80 million total market—or about $72 million. The architectural market constitutes the remaining 5–10%, or approximately $8 million.

Distribution of cabinet hardware moves through six channels:

(1) *Full Line Wholesalers*, which carry predominately residential cabinet hardware for sale to retail hardware and department stores and, to a lesser extent to local builders and contractors;

(2) *Specialty Wholesalers*, which specialize in either architectural or residential cabinet hardware and sell to lumberyards, retail hardware stores, cabinet shops, and to small companies which build and sell finished cabinets, including the attached hardware;

(3) *National Accounts* (e.g., Sears, Montgomery Ward, J. C. Penny), which purchase residential cabinet hardware

directly from the manufacturer and distribute it through their own retail outlets;

(4) *Original Equipment Manufacturers of Residential Cabinets* (Residential OEM's), which sell finished kitchen and bathroom cabinets. These companies are larger and more likely to be automated than residential cabinet shops; they avoid the wholesaler by purchasing directly from the manufacturer;

(5) *Original Equipment Manufacturers of Architectural Cabinets* (Architectural OEM's) the analogue to Residential OEM's in the architectural market. They purchase the hardware directly from the manufacturer and in turn sell finished institutional cabinets primarily to contractors for institutional structures;

(6) *Contract Hardware Distributors*, which sell the whole range of architectural hardware to institutional builders, generally on a bid basis.

Residential cabinet hardware is distributed through Full Line Wholesalers, National Accounts, Specialty Wholesalers and Residential OEM's. The latter two are used to distribute ⅔ of all residential cabinet hardware. Architectural hardware, on the other hand, is distributed through Specialty Wholesalers, Architectural OEM's and Contract Hardware Distributors. Each channel is aimed at particular kinds of ultimate buyers. There is little inter-channel competition. Thus, the method of distribution is crucial and represents an important guage by which to measure competitive impact.

Amerock is the largest firm in the industry with approximately 23% of the market in 1965, the year immediately preceding the merger. Its 1965 sales totalled $18,218,474, with all but approximately $200,000 derived from the residential market. In contrast, Stanley's 1965 sales in the cabinet hardware industry totalled $814,000 or only 1% of the cabinet hardware market. More crucial, however, is the fact that only $200,000 of this figure, was derived from the residential market; the remaining $614,000 stemmed from architectural cabinet hardware sales.

Even these low figures do not accurately reflect Stanley's minimal competitive impact. Stanley owned no die-casting machinery —a *sine qua non* for full scale activity in the residential market. Several of its attempts to expand its share of the residential market had failed, giving it a poor reputation with distributors of residential hardware (i.e., Full Line Wholesalers, National Accounts, Specialty Wholesalers, and Residential OEM's).

In fact, Stanley's sales in the cabinet hardware market were on decline. Thus, within the boundaries of the cabinet hardware market, which mark the outer limits of the "area of effective competition" under review, *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 324, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962) (quoting from *United States* v. *E. I. Du Pont De Nemours & Co.*, 353 U.S. 586, 593, 77 S.Ct. 872, 1 **[513]** L.Ed.2d 1057 (1957), Stanley was definitely not a significant competitive force.

To determine whether the joinder of the market shares held by Stanley and Amerock posed an anticompetitive threat one must look beyond wooden percentage figures to live economic realities in the market itself, including such indicia as reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it . . . the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510 (1962).

Applying these practical criteria, the record is clear that the percentage of actual competitive overlap between Stanley and Amerock prior to the merger was far less than Stanley's 1% of the overall cabinet hardware market. Stanley's sales of residential cabinet hardware, $200,000 out of total residential cabinet hardware sales of approximately $70,000,000, amounted to about ¼ of 1% of the residential market, which is *de minimis* by any standard. Moreover, when one takes into consideration the channels of distribution used by the two parties to the merger, as required by *Brown Shoe's* mandate to consider "distinct customers" and "specialized vendors," the level of competition between them further decreases. Of Stanley's $200.000 derived from residential cabinet hardware sales, $8,041 was distributed via a single National Account, with the remainder directed to hardware and lumber outlets, mostly through Full Line Wholesalers. In contrast, ⅔'s of Amerock's residential sales were through OEM's and Specialty Wholesalers, with ⅓ going to Full Line Wholesalers and National Accounts. Thus, while there was a $200,000 competitive overlap, Stanley afforded no competition to Amerock's major channels of distribution.

As for the vastly less important area of institutional sales, which comprise only 5% to 10% of the aggregate cabinet hardware market, Stanley's percentage share is concededly higher.[4] However, its larger share is misleading. Examination of competition within the relevant channels of distribution reveals that while Amerock's sales of institutional hardware totalled $200,000 and Stanley's were $614,000 each sold through non-competing channels of distribution except for an overlap of $84,000.[5]

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[4] Stanley's $600.000 sales constituted 7½% of all institutional cabinet hardware sales; Amerock's $200,000 equalled about 2½%.

In summary, the total actual competition between Stanley and Amerock amounted to an overlap of only $284,000 ($200,000 of residential sales and $84,000 of institutional sales), or approximately .35% of the market. Even if we disregard other relevant factors (discussed below) which militate against the likelihood of competition being diminished, the percentage of the market affected by the merger is simply too small. See, *e.g., Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 329–334, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961) (under analogous language of § 3 of the Clayton Act); *American Smelting and Refining Co.* v. *Pennzoil United, Inc.*, 295 F.Supp. 149, 157 (D.Del.1969) (1% increase in concentrated industry reduced in significance because of the nature of industry); *United States* v. *First National Bancorporation, Inc.*, 329 F.Supp. 1003, 1019 (D.Colo.1971), juris. noted, 407 U.S. 902, 92 S.Ct. 2431, 32 L.Ed.2d 679 (1972) (even 1.2% insubstantial).

Other indicia traditionally considered in determining the legality of a merger allegedly violative of § 7 of the Clayton Act confirm that the impact here was to miniscule to be of antitrust significance. [514] For example, the instant merger completely lacks a factor found to be of controlling significance in most leading horizontal cases,[6] *i.e.*, an industry-wide trend toward concentration either before or after the merger. It is uncontested that Amerock's share of the market remained constant through the 1965–1968 period. Moreover, there is no evidence of any other mergers between manufacturers in the industry at any time prior to or since the Amerock-Stanley merger.

Competition in the cabinet hardware industry has been vigorous, due in no small measure to the fact that it is a business in which numerous small companies, which can cater effectively to frequently changing stylistic demands of a specialized market, thrive. Thus size offers no effective competitive advantages. The market structure, regardless whether it be characterized as a

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[5] The $84,000 overlap is based on the fact that Stanley's sales through Architectural OEM's was only $44,000 (compared with Amerock's sales of $160,000) and Amerock's sales of institutional hardware to Contract Hardware Distributors only $40,000 (compared with Stanley's sales of $570,000).

[6] E. g., *United States* v. *Philadelphia National Bank, supra; United States* v. *Von's Grocery Co.*, 384 U.S. 270, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966); *United States* v. *Aluminum Co. of America, supra; Brown Shoe Co.* v. *United States, supra; United States* v. *Continental Can Co., supra; United States* v. *Pabst Brewing Co., supra.*

"loose" oligopoly, satisfies "Congress' desire to promote competition through the protection of viable, small, locally owned businesses", *Brown Shoe, supra*, 370 U.S. at 344, 82 S.Ct. at 1534. In 1965 the four (4) largest firms comprised approximately 50% of the market, and the nine (9) largest totalled 65%. However, smaller firms, operating within limited geographical areas, have continued to offer vigorous competition, often enjoying a lion's share of the business within their respective locales. In fact, during the period 1963–1968, the number of firms in the market actually increased to a total of 97.[7] At the same time prices and profits remain low. Such modest price increases as have occurred have been attributable largely to inflation, and have been at a slower pace and lower rate than prices of other building products. There is no evidence of price leadership or price uniformity. Nor is there any showing that the merger might tend to maximize profits for the members of the so-called oligopoly.

The healthy competitive climate in the industry may also be attributed in part to other factors. Unlike other markets (e.g., Clorox, beer, containers, banking), advertising plays but a minor role in the sale of cabinet hardware. Hence, a large advertising budget that might be provided by a financially powerful entrant is superfluous. This unusual characteristic is due in part to the highly specialized, style-oriented nature of cabinet hardware and to the fact that before it reaches the consumer it has been incorporated into a cabinet which is usually sold to the consumer without reference to the brand identity of the hardware forming part of it. From the standpoint of the hardware manufacturer, the significant buyers are the different types of distributors described above, which are relatively few in number. In the dominant residential hardware market, where style is a vital competitive factor, the small manufacturer offering aesthetically pleasing designs to distributors within a limited geographical area, can successfully compete without an enormous expenditure on consumer advertising that would be required to sell a homogeneous product purchased directly by the consuming public, such as Clorox.

Of further competitive significance is the fact that among the many successful smaller manufacturers in the cabinet hardware market, several possessed the resources to expand in size if they considered such a move to be economically advantageous. At least four were subsidiaries or divisions of large diversified companies with substantial capital.[8] In **[515]** addition, several leaders in the manufacture of decorative furniture hardware, with die-casting facilities capable of being used to make residential cabinet hardware virtually identical with that made by those already in the field, had entered the residential hardware market, and others stood at its edge.

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[7] Based upon figures published in the trade magazine Kitchen Week.

In such a commercial milieu, marked by robust and energetic competition, it is not surprising to find that Stanley's prior attempts at fullscale entry into the residential hardware market, where over 90% of all cabinet hardware is sold, had proved a failure. Indeed its sales in the hardware industry generally were on the decline.

The decisions cited by the majority in support of its conclusion that the horizontal impact of the merger might substantially lessen competition are all clearly distinguishable in legally significant respects. To the extent that "substantial" lessening of competition is measurable in terms of gross dollar volume Stanley's $814,000 annual sales of cabinet hardware, which involved a compettiive overlap of $284,000, stands like a tiny pigmy in sharp contrast to the huge overlaps of $750,000,000 in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 331, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963); $79,000,000 in *United States* v. *Continental Can Co.*, 378 U.S. 441, 450, 84 S.Ct. 1738, 12 L.Ed.2d 953 (1964); $84,000,000 in *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 297, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966); $2,200,000 in *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 84 S.Ct. 1283, 12 L.Ed.2d 314 (1964); and many millions of dollars in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); and in *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 86 S.Ct. 1665, 16 L.Ed.2d 765 (1966), where the precise dollar volumes are not reported. Taking into account that the relevant market in the present case is the entire United States a holding that a $284,000 competitive overlap constitutes substantial lessening of competition in violation of § 7 of the Clayton Act amounts to an unwarranted overkill, hardly the type of target Congress intended to reach.

A comparison of other relevant circumstances confirms the inapplicability to the present case of the "horizontal" decisions relied on by the majority, in each of which the market was tainted by anti-competitive forces not found here. In *Brown Shoe*, which

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[8] National Lock, Tassell, Faultless and Bossick-Sack, for example, are respectively subsidiaries of Keystone Consolidated Industries, Gulf & Western Industries. Bliss & Laughlin Industries, and Stewart-Warner Corporation. In addition Yale & Towne, Embart Corp., and Eaton Corp., all large companies produce their own lines of cabinet hardware either directly or through subsidiaries.

involved a merger of *Brown Shoe Co.*, the third largest seller of shoes in the United States, and Kinney, the eighth largest company by dollar volume, there had been a steady and long-continued trend toward concentration in the relevant markets, characterized by vertical acquisition by manufacturers of retail outlets, which then sold a greater share of the new parent's shoes than formerly, and by horizontal mergers of these integrated behemoths. Hand in hand there went an equally relentless decrease in the number of shoe-manufacturing plants. "Brown Shoe was found not only to have been a participant, but also a moving factor, in these industry trends." 370 U.S. at 302, 82 S.Ct. at 1511. In six cities the combined share of children's shoe sales by the merged companies, Brown Shoe Co. and Kinney, exceeded 40%, and in one city their combined share of women's shoe sales exceeded 57%, 370 U.S. at 343.

In *Philadelphia National Bank, supra*, the merger, which was between the second and third largest competitors in the market area, would have resulted in one bank controlling 34–36% of a market in which the four largest banks would control 77–78%. Here also there had been a market trend toward concentration, with the number of competitors plummeting and the merger participants repeatedly playing a major role in that trend. The Court observed that the number of commercial banks had declined from 108 in 1947 to 42 in 1962, with [**516**] Philadelphia National Bank having acquired nine formerly independent banks and Girard, the other party to the merger, six.

In *Continental Can Co., supra*, the top two firms, of which Continental Can was one, controlled nearly 49% of the $3 billion market (combined metal-glass containers) and the top six firms controlled 70.1%. Continental had a history of growth by horizontal acquisitions, having acquired no less than 35 firms in various interrelated container markets since 1913. 378 U.S. at 445, 84 S.Ct. 1738. Lastly, the company acquired under the challenged merger, Hazel-Atlas, ranked sixth largest with 3.1% of the market and had competed vigorously against Continental Can, competition which would be eliminated by the merger.

Von's Grocery, supra, which involved the third and sixth ranking firms in the market, is another example of one more merger in an industry marked by a precipitous trend toward increasing concentration of ownership, in which the larger firms played an active role in the continuing acquisition process. Of these firms the present participants were two of the most aggressive, each having doubled in size during the ten years immediately preceding the merger under attack.

Another decision referred to by the majority, *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 86 S.Ct. 166, 16 L.Ed.2d 765 (1966), also cannot fairly be relied upon as governing the present case. It involved the merger of two huge brewers, which competed against each other in 40 states, in "an industry marked by a steady trend toward economic concentration." 384 U.S. at 550, 86 S.Ct. at 1668. Furthermore, there had been a steady increase in the size of the industry leaders, with a corresponding decrease in the overall number of competitors. The total number of competitors selling beer had declined from 206 to 162 in the five-year period from 1957 to 1962. Once again a strong anticompetitive trend had to be curtailed in its incipiency.

Lastly, the majority's heavy reliance upon *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 84 S.Ct. 1283, 12 L.Ed.2d 314 (1964), amounts to a wooden-like acceptance of substantially similar market percentage figures without making an analysis of the market structure to determine the true significance of the figures. Although the acquisition by Alcoa, with 27.8% of the aluminum conductor market, of Rome, with 1.3%, appears at first flush to be superficially similar as the merger here under review, a glance at the market there reveals how vastly different it is from that here. Unlike the present case, the top two competitors, including Alcoa, the industry leader, controlled 50% of the market and nine firms controlled 95.5%, foreclosing all but a tiny fraction from other competitors. More important, there had been a rapid trend toward concentration. "The absorption of Rome by Alcoa was one of the five acquisitions by producers of primary aluminum since 1957. . . . These moves, and the threat they were thought to pose, were specifically identified as factors influencing Alcoa's 1959 decision to acquire Rome. . . . As a result of this series of mergers, there now remain only four nonintegrated fabricators of aluminum conductor whose individual shares of total industry production . . . amounted to more than 1%." 377 U.S. at 279, n. 6, 84 S.Ct. at 1288. Since Rome had been an aggressive competitor, it is not surprising to find a judicial willingness to curtail the predatory conduct of the industry's leader, a giant by almost any standard, in attempting to absorb it. No case has gone beyond *Alcoa.* In view of the disparity in market concentration and the insubstantiality of the competitive overlap between Stanley and Amerock, which amounts to less than ½ of 1% of the stipulated market, extension of *Alcoa* to the instant facts is unwarranted.

Thus, even assuming that more stringent rules may be applied to horizontal mergers, because of the greater probability of their having an anti-competitive [517] effect, than that to vertical or conglomerate mergers, in this case, unlike those relied upon by the majority, we have undisputed "evidence clearly showing that the merger is not likely to have such anticompetitive effects." *United States* v. *Philadelphia National Bank*, *supra*, 374 U.S. at 321, 83 S.Ct. at 1718.

Potential Competition

Having concluded that the Commission's decision should not be affirmed on the ground adopted by the majority, *i.e.*, that the horizontal aspects of the merger may tend substantially to lessen competition, there remains the question of whether it should nevertheless be sustained on the ground advanced by the Commission, *i.e.*, that the merger might substantially lessen competition by eliminating Stanley as a potential significant competitor in the manufacture and sale of residential cabinet hardware in that Stanley might have expanded either internally or by "toe-hold" acquisition of a smaller manufacturer, and that the merger therefore had the effect of increasing barriers to entry, and of destroying Stanley's disciplining effect at the edge of the market.

Although the majority opinion purports not to reach the potential competition issue, it does not hesitate to denigrate the Commission's position in several respects.[9] In these views I concur. It further appears that none of the grounds advanced by the Commission in support of its potential competition theory is supported by substantial evidence. Indeed, in reviewing the record we are confronted with a rather extraordinary infirmity, bordering upon a denial of due process. The Commission's case before the Hearing Examiner rested heavily upon the testimony of officials of two of Stanley's competitors, supported by documents from the files of Stanley and Amerock. The two witnesses testified over Stanley's objection that it had not been allowed the opportunity to complete relevant discovery that would be material in its cross-examination of them. Nevertheless their testimony was taken and Stanley was later refused the right to recall the witnesses for the purpose of cross-examining them with evidence that had been adduced through intervening discovery. The Examiner's decision relied heavily upon the testimony of the two witnesses, which he quoted at length. When the unfairness of this procedure was raised upon appeal to the Commission, it decided to treat the testimony of the Commission's witnesses as stricken rather than permit cross-examination, with the result that it relied solely upon documentary evidence. Undisputed facts of record demonstrate that this reliance on the documentary evidence was improper, especially in view of the inconclusiveness of its contents.

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[9] See footnotes 8 and 23 *(supra)* of the majority opinion. Footnote 8 rejects the Commission's contention that it proved that Stanley was the most likely potential entrant, that it served to discipline the market and that the merger raised barriers to entry. Footnote 23 similarly disparages the Commission's toe-hold theory.

The linch-pin of the Commission's opinion is its conclusion that but for the merger it was reasonably probable that Stanley would have entered the residential cabinet hardware market by internal expansion. This finding was bottomed entirely upon a series of reports and studies prepared by subordinate staff marketing personnel in the Stanley organization, which considered the possibility of internal expansion substantially prior to Stanley's acquisition of Amerock. As is often the case in large organizations, including governmental agencies such as the Federal Trade Commission and the Department of Justice, subordinates who are not invested with any decision-making responsibility will sometimes make colorful statements that do not reflect the views of the management. Ever since the famous "charnel house" letters used in *United States* v. *Hartford-Empire Co.*, 46 F.Supp. 541 (N.D.Ohio 1942), *modified*, 323 U.S. 386, 65 S.Ct. 373, 89 L.Ed. 322 (1945), and the "Treanor" letter in *Aetna Portland* **[518]** *Cement Institute* v. *FTC*, 157 F.2d 533, 577 (7th Cir. 1946), *reversed*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1009 (1948), such gems have been seized upon as the darlings of the government investigator. Even in cases where the contents have been unauthorized and indeed are directly contrary to management decisions, they are paraded as if they had been approved. That is the case here.

Out of scores of studies prepared by low-level members of the staff of Stanley's Hardware Division, some of whom did not even have decision-making authority within that division and none of whom had the power to determine whether or not Stanley should expand its residential cabinet hardware production or acquire a competitor, the Commission has culled a few juicy comments such as the suggestions that acquisition of another manufacturer "Would knock out a competitor" or enable it "To obtain a dominant role in the hardware market." The Commission has committed the error of repeatedly mischaracterizing these studies as "management documents," "management reports," and "decisions made by Stanley's management," ignoring the undisputed fact that the documents were, by and large, neither seen nor approved by Stanley's management and that the management made unequivocal decisions to the contrary, which post-dated the studies and pre-dated its acquisition of Amerock.

Even if some weight is given to the studies of Stanley subordinates relied upon by the Commission, a careful review of all such reports (as distinguished from the few quoted from by the Commission) reveals beyond question that their overall thrust was to reject internal expansion into the residential market and to concentrate on Stanley's existing product line, which was devoted mainly to architectural hardware. Furthermore, when action was finally taken by those corporate officers responsible for determining the company's basic policies, the decision was to reject the views of subordinates who advocated expansion into the residential field and to adopt the view that the Hardware Division should concentrate on improving its existing architectural hardware line. More specifically, although the so-called "task force report," dated June 10, 1964, upon which the Commission relies, made by a group of relatively low-level staff personnel in the Hardware Division, suggested that acquisition of two cabinet hardware manufacturers, Ajax or Jaybee, be considered, it explicitly urged that internal expansion be rejected as unprofitable. Thereupon the Department Managers of the Hardware Division, albeit still a stratum below the decision-making level, rejected entry by either route (acquisition or internal expansion), taking the position that internal expansion in the residential hardware field was not justified after weighing the size of the investment that would be required against the losses or limited profit that could be anticipated.

July 10, 1964, was the first time when Stanley's management became involved in the review of the question whether the company should expand its cabinet hardware division, acquire a competitor, or take some other course. On that date the Department Managers of the Hardware Division advised D. W. Davis, Executive Vice President, of their conclusions and recommended that the Hardware Division limit itself to concentrating on development of an improved line of architectural hardware, for which diecasting equipment would not be needed. In the meantime independent management consultants, Stewart, Douglas & Associates, were retained to identify new product areas in which the Hardware Division might expand. On December 23, 1964, it rendered its "think-tank" report which reinforced the conclusions of the Hardware Division by recommending against product expansion.

Armed with the foregoing reports and recommendations Davis held a meeting on January 8, 1965, with the various Managers of the Hardware Division, at which the final basic policy decision was reached that instead of expanding in the cabinet hardware field Stanley would **[519]** concentrate on improving its existing product lines and maximizing sales and profits from those lines. Toward that objective responsibility for cabinet hardware was transferred to the Manager responsible for Contract (architectural) Products.

Despite overwhelming proof to the contrary the Commission, apparently proceeding on the erroneous assumption that the burden was on Stanley rather than on Commission counsel, see *United States* v. *Penn-Olin Chemical Co.*, 246 F.Supp. 917, 919 (D.Del. 1965), *aff'd* by an equally divided court, 389 U.S. 308, 88 S.Ct. 502, 19 L.Ed.2d 545 (1967), concluded, notwithstanding Stanley's unequivocal rejection of acquisition or expansion, that "[t]here is no persuasive indication in the record that respondent irrevocably abandoned either of these alternatives [acquisition of a competitor or internal expansion into resident hardware] in January of 1965." (Appendix at 126). This crucial finding, unsupported by any substantial evidence, reflects administrative zeal which, while generally desirable, was misdirected in the present case. In a belated effort to support it with record proof, Commission counsel point to some rather euphemistic generalities in the Hardware Division's Long Range Plan, dated June 17, 1965, and in accompanying working papers, to the effect that during the latter part of the next five years the Division would "give increasing attention to the residential market." These statements by lesser personnel, however, are a far cry from reversal or modification of the final decision taken by Stanley's management on January 8, 1965. It was against this background that executives of Amerock in October, 1965, approached Stanley's Executive Vice President regarding the possibility of a merger. Faced with "a whole new ball game" Stanley for the first time reconsidered its earlier decision and finally decided in favor of the newly proposed merger.

Viewed in the light of Stanley's January 8, 1965 decision, it is clear that there is no substantial evidence to support the Commission's conclusion that but for the merger Stanley was a "reasonably probable" entrant into the residential hardware market. The Commission's evidence is far less persuasive than that in *Penn-Olin*, *supra*, where the district court concluded on remand that despite Olin's staff reports recommending entry

> The government has failed to sustain its burden of establishing by a preponderance of the evidence that . . . there would have been a reasonable probability that Olin would have constructed a chlorate plant in the Southeast. *United States* v. *Penn-Olin Chemical Co.*, 246 F.Supp. 917, 928 (D.Del.1965), *aff'd* by an equally divided court, 389 U.S. 308, 88 S.Ct. 502, 19 L.Ed.2d 545 (1967).

The Commission next asserts that the elimination of Stanley as a potential competitor may have substantially reduced competition by removing it as a disciplining force on the edge of the market. To exercise such an effect a minimum requirement is that "the merging firm at the edge of the market must be recognized by those in the market as the most likely entrant or one of a very few likely entrants. * * *" Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv.L.Rev. 1313, 1363 (1965). A careful search of the record discloses no evidence that firms in the residential market recognized Stanley as a likely entrant.[10] On the contrary, the record indicates that Stanley's position on the edge of the residential market had no competitive effect on those in the market. This is in dramatic contrast to potential competition cases in which the doctrine has been applied. See, e. g., *United States* v. *El* [**520**] *Paso Natural Gas Co.*, 376 U.S. 651, 659, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1960); *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967).[11] Thus, another peg upon which the Commission relies must fall.

The Commission's conclusion that the instant merger raised barriers to entry is likewise not supported by substantial evidence. The Commission found three barriers to entry: (1) the cost of the initial investment in die-casting equipment and design which would be required (approximately $600,000); (2) the need for a full line of up-to-date product styles; and (3) the cost of sales promotion and advertising in trade journals. At the same time the Commission rejected the Hearing Examiner's reliance as a factor on the difficulty of securing channels of distribution.

There is no direct or circumstantial evidence in the record that the $600,000 initial start-up costs, $400,000 of which might be needed to acquire machinery, would be increased by the Stanley-Amerock merger. Nor is there any substantial evidentiary support for the conclusion that the need for product differentiation might be increased. Stanley was not a style oriented company; its history was grounded in the production of non-ornamental hardware and tools. Finally, there is no substantial evidence to support the conclusion that the merger would increase the need for sales promotion and advertising. The Commission conceded that "advertising at the consumer level may be small" but relied on the cost of advertisements in trade publications—somewhere in the vicinity of $50,000–$100,000. These figures are a far cry from the $80,000,000 per year found to be a decisive element in the landmark case of *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967); see also *General Foods Corp.* v. *FTC*, 386 F.2d 936 (3d Cir. 1967), *cert. denied,* 391 U.S. 919, 88 S.Ct. 1805, 20 L.Ed.2d 657 (1968). Furthermore, the Commission fails to point to any evidence indicating that the instant merger would increase an entrant's need for, or cost of, advertising. What is crucial is that unlike *Proctor & Gamble* and *General Foods*, which dealt with consumer items where massive advertising was the crucial competitive factor, the role of advertising and sales promotion here is of minor significance and hence does not pose a barrier to entry.

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[10] Compare footnote 8 of the majority opinion, which reaches substantially the same conclusion. The Examiner made no finding that Stanley, as a potential competitor at the market's edge, had any competitive effect upon those in the market, and witnesses representing competitors in the cabinet hardware market testified that it did not have such an influence.

[11] It may well be, as the majority opinion suggests, that *FTC* v. *Procter & Gamble*, 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967), requires a finding that the acquiring firm was "the most likely entrant." *Id.* at 581, 87 S.Ct. 1224. Since we conclude that under any standard there is no substantial evidence to indicate that Stanley exercised a disciplining effect, that issue is not reached. Similarly, we need not discuss the significance of other potential entrants on the market.

The concept that a merger may operate to raise barriers of entry is based upon the assumption that price levels and profit margins in the industry would, but for the merger, be sufficiently high to overcome the cost of entry and thus attract new entrants. Here that is not the case. Prices were low, profits were modest at best, and there is no evidence that ease of entry, which existed before the merger, was in any way affected by it.

In support of its conclusion that the merger eliminated Stanley's potential competition, the Commission advanced for the first time a new theory, namely, that but for the merger Stanley might have entered the residential market by a so-alled "toe-hold" acquisition, which here means that it might have acquired control over one of the smaller, non-dominant firms in the cabinet hardware market instead of merging with Amerock. This theory was neither suggested in the complaint nor advanced in the hearings before the Examiner. Nor was any mention of it made by the Hearing Examiner. Indeed it was not suggested, either by the Commission or any other body, until a year after the record in the case had been closed and three months after the parties had submitted their briefs to the **[521]** Commission. Then for the first time, the idea was advanced by the Commission in *Bendix Corp.*, v. *FTC* (FTC Dkt. No. 8739), 3 Trade Reg. Rep. ¶19,288 (June 18, 1970), which was reversed by the Sixth Circuit on the ground that "Bendix had no notice that it was charged under the toe-hold theory . . .and . . . no opportunity to present evidence in defense against this theory." *Bendix Corp.* v. *FTC,* 450 F.2d 534, 537 (6th Cir. 1971).

Since Stanley was never given timely notice of the toe-hold theory or an opportunity to be heard and to introduce evidence with respect to it, I concur in Judge Kaufman's view [12] that the Commission was precluded from basing its decision on that ground. See *Bendix Corporation* v. *FTC*, 450 F.2d 543 (6th Cir. 1971); cf. *Rodale Press, Inc.* v. *FTC*, 132 U.S.App.D.C. 317, 407 F.2d 1252 (1968). To countenance such a procedure would be to deny Stanley the due process that is mandated by the Fifth Amendment and by § 5 of the Administrative Procedure Act.[13]

In any event the Commission's newly espoused post-hearing "toe-hold" theory is not supported by substantial evidence. The record is clear that the June 10, 1964 recommendation of subordinate Hardware Division personnel that Ajax or Jaybee be acquired was rejected later that month by the Department Managers of that Division, who recommended to D. W. Davis, Executive Vice President, that no such acquisition be made. This recommendation was accepted and approved by the company's management.

Conclusion

Vigorous enforcement of antitrust laws to bar mergers that may substantially lessen competition is essential to the economic lifeblood of this nation. But Congress has not outlawed all mergers. Nor has it, despite recommendations of some distinguished experts in the field, prescribed arbitrary standards for illegality which would prohibit every merger falling within a precise definition, even those in which the market percentage of one of the parties may be *de minimis*. On the contrary, Congress has recognized that antitrust flexibility is essential, since not all mergers threaten harm to the public, some even have the effect of promoting competition, and the issues turn on an understanding of the complexities of any given market.

The Commission assumes the burden of proving that any merger attacked by it will have the probable effect of substantially lessening competition or tending to create a monopoly. This it has failed to do in the present case. After a Hearing Examiner erred in denying Stanley the right to cross-examine those witnesses relied upon by him as the basis of his decision, the Commission, rather than remand for cross-examination, sought to sustain his decision upon a different evidentiary basis. Apparently recognizing the weakness of the grounds chosen by the Commission, the Court has affirmed on still different grounds. In view of the undisputed evidence as to the extremely limited actual competitive overlap, the vigorous competition in the marketplace, the absence of any trend toward concentration and the small percentage of the market controlled by Stanley (whether it be labelled .35% or 1%), the effect is automatically to hold such a merger illegal, thus in substance declaring it to be a *per se* violation because of the percentages involved.

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[12] Compare footnote 23 of the majority opinion.

[13] Section 5 of the APA provides in relevant part:
"Persons entitled to notice of an agency hearing shall be timely informed of . . . (3) the matters of fact and law asserted." 5 U.S.C. § 554.

Since the Commission's decision is not supported by substantial evidence, I would reverse.

BRISTOL-MYERS COMPANY v. FEDERAL TRADE COMMISSION ET AL.*

No. 304, Docket 72–1969.—F.T.C. File 99–130

(United States Court of Appeals, Second Circuit, Nov. 10, 1972)

1. **FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES WAS PROPER GROUNDS FOR DISMISSAL OF CLAIMS, PREMATURELY ASSERTED, SEEKING TO COMPEL F.T.C. TO ISSUE SUBPOENAS**

   Claim seeking to compel Federal Trade Commission to issue subpoenas was asserted prematurely and was properly dismissed for failure to exhaust administrative remedies where subpoenas were sought during informal negotiations looking toward mutually satisfactory consent order agreement, following notification of intention to issue formal complaint charging drug manufacturer with allegedly deceptive advertising, it was not clear that formal complaint would ever issue on basis of present investigation and it was even less certain that cease and desist order would enter the following formal adjudication; claim could be litigated on review following entry of cease and desist order and, in such case, it could not be assumed that the Commission would fail to follow any order requiring reopening of informal negotiations.

2. **COURT MAY PROPERLY CARVE AN EXCEPTION TO THE ADMINISTRATIVE EXHAUSTION DOCTRINE WHERE AN IMMEDIATE APPEAL IS NECESSARY TO GIVE PROTECTION TO CLAIMED RIGHT**

   The administrative exhaustion doctrine is less an inflexible command than a general guideline; where an immediate appeal is necessary to give realistic protection to the claimed right a court may properly carve an exception to the doctrine.

3. **ONLY RARELY WILL AGENCY ACTION THREATEN AN INJURY SO AS TO JUSTIFY CORRECTIVE PROCESS**

   Only rarely will preliminary or procedural agency action threaten so irreparable an injury as to justify interlocutory resort to corrective judicial process.

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* Reported in 469 F.2d 1116 (1972).

4. **Wish to Litigate Issue Raised by F.T.C. Proposal is not Adequate Basis for Seeking Judicial Redress**

Fact that a party may wish to litigate issue raised by proposal of Federal Trade Commission to issue formal complaint charging unfair or deceptive acts or practices in commerce is not an adequate basis for seeking preliminary judicial redress for Commission's failure to issue subpoenas.

(Syllabus, with substituted captions, was taken from 469 F.2d 1116)

On appeal, court held that claims seeking to compel Federal Trade Commission to issue subpoenas was asserted prematurely and was probably dismissed for failure to exhaust administrative remedies. Following notification of intent to issue formal complaint charging drug manufacturer with allegedly deceptive advertising, it was by no means clear that formal complaint would ever issue on basis of present investigation and it was even less certain that cease and desist order would enter following formal adjudication. Affirmed.

Mansfield, *Circuit Judge*, concurred and filed opinion in which Lumbard, *Circuit Judge*, concurred.

Gilbert H. Weil, New York City (*Weil, Lee & Bergin*, New York City, on brief), for plaintiff-appellant.

[1117] *Christopher Roosevelt, Asst.* U.S. Atty. (*Whitney North Seymour, Jr.*, U.S. Atty., S.D.N.Y., *William R. Bronner,* Asst. U.S. Atty., *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, Federal Trade Commission, *Alvin L. Berman*, Atty., Washington, D.C., on brief), for defendants-appellees.

Before LUMBARD, FEINBERG and MANSFIELD, *Circuit Judges.*

FEINBERG, *Circuit Judge*:

Bristol-Myers Company appeals from an order of the United States District Court for the Southern District of New York, Arnold Bauman, J., dismissing a complaint which sought to compel the Federal Trade Commission to issue certain subpoenas allegedly required by 5 U.S.C. § 555(d).[1] We hold that the district court properly refused to grant the relief requested, and we affirm.

The factual background is not disputed. In April 1972, the Commission notified Bristol-Myers of its intention to issue a formal complaint charging the company with having employed unfair or deceptive acts or practices in commerce, in violation of Sections

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[1] The statute provides in part: Agency subopenas authorized by law shall be issued to a party on request and, when required . . . . on a statement or showing of general relevance . . . .

5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45, 52. Specifically, the proposed complaint alleged deceptive advertising for three Bristol-Myers analgesics—Bufferin, Excedrin, and Excedrin PM.[2] Following a suggestion from the Commission, Bristol-Myers availed itself of the opportunity, authorized by statute [3] and afforded by Commission rule,[4] to negotiate a mutually satisfactory consent order agreement. Although the time apparently contemplated in the rule for consent negotiations is 30 days, Bristol-Myers received extensions beyond this limit. After negotiations had commenced, Bristol-Myers petitioned the Commission to make subpoenas available to the company during these informal negotiations in order to facilitate the gathering of evidence relevant to the Commission's proposed remedy. The Commission denied the request on June 26, 1972, and Bristol-Myers brought this action in the district court on June 29.

[1] We believe that the claim is asserted prematurely and was properly dismissed for failure to exhaust administrative remedies. Judicial review of Federal Trade Commission proceedings is governed by section 45(c) of Title 15, United States Code, which limits the power of review to final cease and desist orders and which makes review available in the courts of appeals. Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, provides:

> Agency action made reviewable by statute . . . [is] subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

If formal adjudicative procedures subsequently result in a cease and desist order directed against Bristol-Myers, it seems clear that on review by this or any other court of appeals the company will have an opportunity to press the claim that it was entitled by statute to subpoenas during the informal negotiating process.[5] See

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[2] The Commission's proposed remedy would require Bristol-Myers to expend 25% of its advertising budget, over a two-year period, on advertisements subject to FTC approval which "correct" the misimpressions fostered by past deception. "Corrective advertising" has received considerable attention in recent commentary. See *e.g.*, Note, "Corrective Advertising" Orders of the Federal Trade Commission, 85 Harv.L.Rev. 477 (1971).

[3] 5 U.S.C. §554(c)(1).

[4] 16 C.F.R. §§ 2.31–2.34 (1972 Supp.)

[5] The company's statutory claim is an intricate one. It primarily argues that "any party" is entitled to subpoenas; that a party, under 5 U.S.C. § 551(3) is a person named as a party in an agency proceeding, including adjudication; that "adjudication," defined by 5 U.S.C. § 551(7), is "agency process for the formulation of an order"; and that the consent settlement procedure here looks to formulation of an order. Bristol-Myers attempts to bolster this syllogism by references to legislative history; and it finally argues that denial of subpoenas effectively deprives it of its right to engage in meaningful settlement negotiations.

Frito-Lay, Inc. v. [118] *FTC*, 380 F.2d 8 (5th Cir. 1967); cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49–50, S.Ct. 459, 82 L. Ed. 638 (1938).

[2–4] Of course, the administrative exhaustion doctrine is less an inflexible command than a general guideline, see, *e. g.*, *McKart* v. *United States*, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969); where "an immediate appeal is necessary to give realistic protection to the claimed right," L. Jaffe, Judicial Control of Administrative Action 429 (1965), a court may properly carve an exception to the doctrine. Only rarely, however, will "preliminary [or] procedural . . . agency action" threaten so irreparable an injury as to justify interloctory resort to corrective judicial process, see *Texaco, Inc.* v. *FTC*, 301 F.2d 662 (5th Cir.) (per curiam), *cert denied*, 371 U.S. 822, 83 S.Ct. 40, 9 L. Ed.2d 62 (1962); and Bristol-Myers has failed to persuade us that judicial intervention would here be appropriate.[6] Although the company may have to litigate the issues raised by the proposed complaint, it concedes that this is an inadequate basis for seeking judicial redress at this juncture. *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*, 303 U.S. at 51–52, 58 S.Ct. 459. Moreover, as the Commission points out, it is by no means clear that a formal complaint will ever issue on the basis of the present investigation. It is still less certain that a cease and desist order will be entered following formal adjudication [7]—during which, in any event, the company will have access to the precise investigatory tools it now seeks.

If after judicial review authorized by 15 U.S.C. § 45(c), a court of appeals agrees with the statutory claim here urged, we fail to see why the company would not receive adequate relief from an order remanding the case to allow informal negotiations to be reopened, if then desired. The company claims in effect that by that time the Commission will be so set in its views that realistic negotiation will be impossible. We do not agree. The company itself points out that the Commission has been attempting for "more than a decade" to rule unlawful the advertising claims involved here. Yet the company apparently assumes that it is still worthwhile to negotiate with the Commission, because that is the very purpose of the relief now sought. More to the point, we do not believe that the Commission will fail **[119]** to follow in good faith an order of a court of appeals requiring reopening of informal negotiations, assuming arguendo that such an occasion might arise. Finally, negotiations at that time might be more, rather than less, fruitful: They would be based upon complete knowledge of the opponent's case, and the prospect of a second, subsequent judicial review of the merits of a contested order would provide an additional incentive to compromise.

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[6] We have carefully considered *Bannercraft Clothing Co.* v. *Renegotiation Board*, 466 F.2d 345 (D.C.Cir.1972), on which Bristol-Myers heavily relies, but find that case to be distinguishable. *Bannercraft* involved the validity of preliminary injunctions issued by district courts against continuation of administrative renegotiation of government contracts, pending determination of contractor claims to disclosure of information under the Freedom of Information Act. 5 U.S.C. § 552. Judge Wright's opinion strongly emphasizes the unusual procedure before the Renegotiation Board, *id*, at 349–351, and the requirements of the Freedom of Information Act. *Id.* at 352. Of even greater significance was the fact that the Court of Claims, to which review of the Renegotiation Board decisions is committed, had no power to afford the necessary relief. *Id.* at 357. Finally, the *Bannercraft* court expressly contrasted the issues before it with Federal Trade Commission proceedings which confronted the Fifth Circuit in *Frito-Lay*, *supra*. *Id.*

[7] At oral argument Bristol-Myers itself called our attention to administrative disposition of the proposed complaint issued against *American Home Products Corp.*, 3 Trade Reg.Rep. ¶ 19,673 (FTC, June 29, 1971). In the consent order finally promulgated, *id.* ¶ 20,071 (FTC, August 8, 1972), the "corrective advertising" remedy, to which Bristol-Myers here objects, was apparently not included, although it had been originally proposed.

Application of the exhaustion doctrine makes it unnecessary to resolve the merits of the company's statutory claim to subpoenas. My brothers, in their concurring opinions, go on to decide that issue, but it seems more appropriate to me to postpone full consideration of that claim until review of a final cease and desist order, should one eventuate. Cf. K. Davis, Administrative Law Treatise § 20.02, at 649 (1970 Supp.). This by no means indicates that I disagree with Judge Mansfield's persuasive analysis; I simply do not believe that we should reach the merits at this stage of the proceeding.

Finally, we have the impression that the company has not been unaware of the benefits of the delay in the administration proceeding caused by the action in the district court and by this appeal. At oral argument, one member of the panel felt sufficiently positive about the company's intent to delay to raise the appropriateness of taxing double costs on appeal. Fed.R.App.P. 38. Our failure to do so should not be taken as an encouragement to further attempts to prolong the administrative proceedings through efforts to obtain premature judicial review. The mandate shall issue forthwith.

Judgment affirmed.

LUMBARD, *Circuit Judge* (concurring):

I concur in Judge Mansfield's separate concurring opinion insofar as it reaches and resolves the medits of this dispute.

MANSFIELD, *Circuit Judge* (concurring):

I concur in the majority opinion. However, I would also reject on the merits Bristol-Myers' statutory claim to issuance of subpoenas during informal negotiations. While a cease and desist order may not issue, history indicates the probability of such issuance and if past delay is any criterion this will inevitably be followed by a future appeal, at which time another panel will be required once more to review the same record and arguments in order to resolve the issue. Rather than countenance such shuffling back and forth, with its consequent duplication and waste, I would decide it now.

As the majority option indicates, fn. 5, Bristol-Myers' statutory claim is labyrinthian. Reduced to simplest terms the claim is that at an informal negotiating stage it is a "party" as that term is used in the subpoena statute, 5 U.S.C. § 555 and defined in 5 U.S.C. § 551, *i.e.*, a "person" named in an "agency proceeding." The latter term is claimed to be a step in "adjudication," which is defined as an "agency process for the formulation of an order," 5 U.S.C. § 551(7). An "order," in turn is defined as a "final disposition," 5 U.S.C. § 551(6). Since an informal negotiation can result in the issuance of an order, Bristol-Myers contends that it is a "party" within the meaning of 5 U.S.C. § 555(d).

The fatal defect in this tortuous syllogistic reasoning is that informal negotiations under 5 U.S.C. § 554(c) are not adjudicative in nature. See *The Seeburg Corp.* v. *FTC*, 8 F.T.C. Stat & Dec. 393 (E.D.Tenn.1966), *aff'd.*, 425 F. 2d 124 (6th Cir.), *cert. denied*, 400 U.S. 866, 91 S.Ct. 104, 27 L.Ed.2d 105 (1970).

> Nothing in the Administrative Procedure Act or in the basic principles of fair procedure precludes the Commission from creating and following a procedure for settling disputes without recourse to adjudication. Consent [1120] negotiations are not a stage in adjudication but a means of establishing whether adjudication can be avoided altogether. Like investigations, consent negotiations are distinct from the adjudicative process and hence not governed by the standards which control adjudicative procedure. William H. Rohrer Inc., 64 F.T.C. Dec. 1446, 1447 (1964).

Congress intended such negotiating proceedings to be informal, without the procedures inherent in trial-type hearings (right of examination and cross-examination, findings of fact and conclusions of law). Recognizing that the formalism of trial-type proceedings might not be conducive to successful settlement negotiations, Congress left to the agencies the power to develop the precise nature of the informal proceedings that might be used to implement the statute. See S.Doc. 248, 79th Cong., 2d Sess. 24 (1946), Atty. Gen.'s Manual on the Administration Procedure Act (1947). Pursuant thereto the FTC enacted § 3.2 of its Rules of Practice for Adjudicative Proceeding, 16 C.F.R. § 3.2, which provides in pertinent part:

> Adjudicative proceedings are those formal proceedings conducted under one or more of the statutes administered by the Commission which are required by statute to be determined on the record after opportunity for an agency hearing. The term . . . does not include other proceedings such as negotiations for the entry of consent orders . . . .

In an informal consent negotiation pursuant to 5 U.S.C § 554 there is no examination or cross-examination of witnesses, no findings of fact and no conclusions of law. If the negotiations are unsuccessful, no order at all can be entered. At that stage only if the Commission decides to file a complaint does an adjudicatory stage commence. If, on the other hand, the negotiation is successful, the parties present an agreement with a staff report to the full Commission, which remains on record for 30 days. If the Commission approves the agreement, a formal complaint is issued together with a consent order which recites the history of the informal negotiations. The resulting order is final for the reason that the respondent waives further adjudicatory proceedings.

The conclusion that a company engaged in informal consent negotiations is not a "party" entitled to issuance of subpoenas accords with practical experience. At such a stage the issues have not been framed. Under such circumstances to permit a person under investigation to engage in a roving subpoena expedition upon the speculation that he *might* discover something that *might* persuade the agency to consent to his proposal could lead to substantial abuse, waste and delay.

Since Bristol-Myers' contentions are meritless, I would act now to foreclose the renewal of the issue upon a later appeal from a final cease and desist order.

PEPSICO, INC. v. FEDERAL TRADE COMMISSION, ET AL.[*]
and
PEPSI-COLA BOTTLING COMPANY OF CORVALLIS, INC. v. FEDERAL TRADE COMMISSION, ET AL.

Nos. 294, 295. Dockets 72-1911, 72-1912. F.T.C. Docket 8856.

(United States Court of Appeals, Second Circuit, November 20. 1972)

1. Intervening Bottlers would have All Rights of a Party, Except Scope of Proceeding and Possibilities of Delay Might Make More Vigorous Policing Against Dilatory Tactics Reasonable

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[*] **Reported in 472 F. 2d 179, *cert. denied,* 414 U.S. 876, 94 S. Ct. 44 (1973). For case before the Commission, see ______ F.T.C. ______ . See also p. 295 herein.**

On complaint filed by Federal Trade Commission alleging that plaintiff had hindered competition in distribution and sale of premix and postmix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside a designated geographical area, intervening bottlers before administrative agency would have all rights of a party except that scope of proceeding and consequent possibilities of delay might make it reasonable to undertake more vigorous policing against dilatory tactics than would ordinarily be necessary in the courts.

2. INCLUSION OF FIVE PARTICULAR RIGHTS IN ORDER DID NOT IMPLY AN EXCLUSION OF ALL OTHER RIGHTS

On complaint by Federal Trade Commission alleging that plaintiff had hindered competition in distribution and sale of premix and postmix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside a designated geographical [180] area, specific inclusion of five particular rights in order granting leave to intervene to three bottlers and a bottlers' association did not imply an exclusion of all other rights and intervenors could make motions or argue orally and Commission would withhold a right to appeal from examiner's initial decision at its peril where intervenors were persons whose contract rights were at stake.

3. THOUGH HEARING EXAMINER'S ORDER GRANTED LEAVE TO INTERVENE, NOTHING COMMISSION HAD DONE WOULD PREVENT FURTHER INTERVENTION BY BOTTLERS

On complaint by Federal Trade Commission alleging that plaintiff had hindered competition in distribution and sale of premix and postmix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside a designated geographical area, nothing Commission had done would prevent further intervention by bottlers though hearing examiner's order granted leave to intervene to three bottlers and a bottlers' association.

4. ORDER DENYING MOTION TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTIES WAS NOT REVIEWABLE BY PETITION TO COURT OF APPEALS

Fact that order of Federal Trade Commission denying plaintiff's motion to dismiss for failure to join indispensable parties was not one requiring plaintiff to cease and desist from anything did not lead inexorably to the conclusion that it was not reviewable but only that it was not reviewable by petition to Court of Appeals.

5. COURT OF APPEALS WOULD ALLOW BOTTLERS TO INTERVENE IF REVIEW OF PRESUMED ORDER IS SOUGHT BY PLAINTIFF MANUFACTURER; IF APPEAL NOT SOUGHT, REVIEW AVAILABLE TO BOTTLERS IN DISTRICT COURT WHETHER OR NOT THEY ARE PARTIES TO AGENCY PROCEEDING SINCE THEY WOULD BE ADVERSELY AFFECTED OR AGGRIEVED

Though any order on complaint filed by Federal Trade Commission alleging that plaintiff had hindered competition in distribution and sale of premix and postmix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside a designated geographical area would presumably run only against plaintiff, if plaintiff manufacturer sought review, a court of appeals would surely allow bottlers to intervene and if plaintiff manufacturer did not appeal review would be available to bottlers in a district court whether or not they had been full-fledged parties before the Commission since they would be adversely affected or aggrieved by agency action within meaning of relevant statute.

6. RIGHT TO JUDICIAL REVIEW IS NOT AUTOMATICALLY CONFERRED ON A PARTY TO AN AGENCY PROCEEDING

   Being a "party" before an agency neither automatically confers nor is a necessary condition of right to judicial review.

7. GROUNDLESS FEARS OF PLAINTIFF DO NOT ENTITLE REVIEW OF COMMISSION'S ORDER EVEN UNDER PRINCIPLE THAT ONE CAN FIND "FINAL AGENCY ACTION FOR WHICH THERE IS NO OTHER ADEQUATE REMEDY IN A COURT."

   Where fears of plaintiff manufacturer of soft drink syrups of determinations in private suits inconsistent with a Federal Trade Commission cease and desist order were groundless and plaintiff bottler's dilemma whereby if it intervened to present its case it would be bound but non-intervening bottlers would not be was of its own making, plaintiffs were not entitled to review of Commission's order denying motion to dismiss for failure to join indispensable parties even under possibly overgenerous principle that one can find "final agency action for which there is no other adequate remedy in a court" if an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law or is being conducted in a manner that cannot result in a valid order.

8. GROUNDLESS FEARS OF DETERMINATIONS IN PRIVATE SUIT INCONSISTENT WITH F.T.C. CEASE AND DESIST ORDER AND AN ORDER DIRECTED TO EVERY BOTTLER ARE INSUFFICIENT TO SUPPORT CONCLUSION THAT ANY ORDER EMANATING FROM PROCEEDINGS WOULD BE VOID

   On complaint filed by Federal Trade Commission alleging that plaintiff had hindered competition in distribution and sale of premix and postmix [181] syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside a designated geographical area, fact that plaintiff manufacturer's and plaintiff bottlers position vis-á-vis supposititious future private litigation would be more comfortable if they could proffer in bar an order in a proceeding in which every bottler had been made a party was not enough to support a conclusion that any order emanating from proceeding otherwise would be void and would not show right to review of Commission's denial of motion to dismiss for failure to join indispensable parties.

9. DECISION WHETHER TO ACCEDE TO PLAINTIFF'S REQUEST FOR JOINDER WAS WITHIN COMMISSION'S DISCRETION

   On complaint filed by Federal Trade Commission alleging that plaintiff had hindered competition in distribution and sale of premix and postmix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside a designated geographical area, since a cease and desist order in proceeding wherein bottlers could intervene would in fact bind them, decision whether to accede to plaintiff's request for joinder was within Commission's discretion and Commission was entitled to weigh added comfort which all-out joinder would give plaintiff against mountain of paperwork and delay that would result from joining 513 bottlers of plaintiff and the bottlers in six other proceedings and also to precedent that such action would create in cases where even larger numbers were involved.

10. CHOICE BETWEEN ALLOWING JOINDER TO BOTTLERS AND USING INTERVENTION WAS TO BE MADE BY AGENCY AND NOT BY COURT SO LONG AS FUNDAMENTAL RIGHTS OF PLAINTIFF AND BOTTLERS WERE ADEQUATELY PROTECTED

On complaint filed by Federal Trade Commission alleging that plaintiff had hindered competition in distribution and sale of premix and postmix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside a designated geographical area, apart from fact that a proceeding allowing joinder to bottlers and imposing restrictions would not differ essentially from what could be accomplished through intervention, choice was to be made by the agency and not by the court so long as the fundamental rights of plaintiff manufacturer and the bottlers to be heard in opposition and not to be exposed to liability for complying with any order that might ultimately issue were adequately protected.

11. WHERE NO EFFORT HAD BEEN MADE TO CONVINCE F.T.C. THAT MOTION OF COMPLAINT COUNSEL NOW CALLED FOR JOINDER OF BOTTLER, THERE HAD BEEN NO EXHAUSTION OF ADMINISTRATIVE REMEDIES

On complaint filed by Federal Trade Commission alleging that plaintiff had hindered competition in distribution and sale of premix and postmix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside a designated geographical area, where no effort had been made to convince Federal Trade Commission that, however matters previously stood, motion of complaint counsel now called for joinder of bottlers if metro area bottler handicap provision was to be imposed, there had been no exhaustion of administrative remedies with regard to that issue.

12. F.T.C. MIGHT PROPERLY CHOOSE TO PERMIT JOINDER OF BOTTLERS BUT IT WAS NOT BOUND TO DO SO AND WAS ONLY BOUND TO AFFORD FURTHER OPPORTUNITY FOR INTERVENTION

Where proposed metro area bottler handicap provision would have net effect of assuring that several bottlers could compete effectively for business in largest locations while temporary protection was afforded small bottlers, Federal Trade Commission might properly choose to permit joinder of bottlers but it was not bound to do so and was only bound to afford further opportunity for intervention by metro area bottlers, individually or as a group, since it appeared that proceeding might have more adverse consequences for them than under form of order initially proposed.

(Syllabus, with substituted captions, was taken from 472 F.2d 179 (1972))

On appeal, Court held that on complaint by F.T.C. alleging restraint of competition, plaintiffs were not entitled to review of Commission's order denying motions to dismiss for failure to join indispensable parties.

Order dismissing complaint affirmed.

Medina, *Circuit Judge*, dissented and filed opinion.

[182] *Milton Handler*, New York City *(Kaye, Scholer, Fierman,*

Hays & Handler, and *Fred A. Freund, Elizabeth Head, Herbert Schreiber*, and *Robert A. Burka*, New York City, of counsel), for plaintiff-appellant.

Robert J. Sisk, New York City (*Hughes Hubbard & Reed*, and *James B. Kobark, Jr.*, New York City, of counsel), for plaintiff-intervenor-appellant.

Frank H. Wohl, Asst. U.S. Atty. (*Whitney North Seymour, Jr.*, U.S. Atty., S.D.N.Y., and *T. Gorman Reilly*, Asst. U.S. Atty., of counsel), for defendants-appellees.

Harold D. Rhynedance, Jr., and *James P. Timony*, Washington, D.C., of counsel, for defendant-appellee, the Federal Trade Commission.

Before FRIENDLY, *Chief Judge*, and MEDINA and ANDERSON, *Circuit Judges.*

FRIENDLY, *Chief Judge*:

On July 15, 1971, the Federal Trade Commission (FTC) filed a complaint against PepsiCo, Inc. under § 5 of the Federal Trade Commission Act.[1] The essential allegation was that PepsiCo had "hindered . . . competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside of a designated geographical area." Annexed to the complaint was a form of order which the FTC proposed to issue if the evidence warranted. The order would prohibit PepsiCo, among other things, from entering into, continuing, enforcing, or renewing any contract that would limit the territory in the United States wherein bottlers might sell, or from refusing to sell to any bottler because of the territory wherein he sold. Also annexed was a letter which PepsiCo would be directed to send its bottlers within 60 days after issuance of the proposed order. PepsiCo's answer, dated August 23, 1971, included "as a complete defense" an allegation "that the complaint herein is fatally defective in that it fails to join as parties respondent persons needed for a just adjudication, to with the soft drink bottlers who have entered into the challenged agreements . . . and made substantial investments in plant, manufacturing and distribution facilities in reliance thereon and upon the territorial security afforded them thereunder, and ignores the property and procedural rights of these indispensable parties whose economic interests would be most directly and adversely affected by the proposed order accompanying the complaint."

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[1] A summary of the complaint was unofficially published in 3 Trade Reg.Rep. ¶¶ 19,443, 19,740. Similar complaints were filed against six other manufacturers of soft drink syrups: Dr. Pepper Co.; The Seven-Up Co.; Royal Crown Cola Co.; and the Coca-Cola, Cott and Crush groups.

Meanwhile the Pepsi-Cola bottlers had not been idle. Two motions to intervene, both dated August 11, 1971 and signed by the same counsel who have represented the intervening plaintiff in this action, Pepsi-Cola Bottling Company of Corvallis, Inc., were submitted to the Hearing Examiner. One of these was on behalf of Pepsi-Cola Albany Bottling Company, Inc., Pepsi-Cola Bottling Company of Central Virginia, and Pepsi-Cola Bottling Company of Tampa. An affidavit supporting the motion set forth the facts concerning the movants' exclusive contracts and alleged that there was no assurance that their interests would be adequately represented by PepsiCo. The other was on behalf of Pepsi-Cola Bottlers' Association. This motion alleged that the Association "effectively represents the interests of all the franchised Pepsi-Cola Bottlers in the **[183]** United States." A supporting affidavit stated that 512 of the 513 Pepsi bottlers were members of the Association, repeated the allegation that the interests of PepsiCo and the bottlers were not identical, denied that the franchises had an anti-competitive effect, and contended that, absent the enforcement of territorial exclusivity, "a relatively few, large Bottlers, each serving extensive geographical areas and catering almost exclusively to large retail customers, will drive local Bottlers out of the business." On November 18, 1971, the two motions were granted by the Hearing Examiner whose order is quoted in relevant part below.[2] He characterized his action as "the granting of the right of full participation" which might "aid the examiner and the Commission in properly resolving the issues presented."

During the same period, PepsiCo, relying in considerable part on the analogy of F.R.Civ.P. 19, had moved to dismiss the complaint because of the nonjoinder of the 513 Pepsi bottlers. The

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[2] It is ordered that the applicants, Pepsi-Cola Bottlers' Association; Pepsi-Cola Albany Bottling Company, Inc.; Pepsi-Cola Bottling Company of Central Virginia, and Pepsi-Cola Bottling Company of Tampa, motion to intervene in this matter be granted, including the following:

1. The right to cross-examine witnesses proffered by counsel in support of the complaint and counsel for respondent.
2. The right to cross-examine witnesses proffered by counsel in support of the complaint or counsel for respondent.
3. The right to offer evidence, both documentary and testimonial, at the conclusion of respondent's defense.
4. The right to object and cross-examine will be granted subject to strict control of the hearing examiner and the right to proffer evidence will be limited to that relevant evidence which is not repetitious of that proffered by counsel in support of the complaint or counsel for respondent.
5. The right to file proposed findings of fact and briefs with the hearing examiner as he orders.

Hearing Examiner denied the motion, finding that joinder of all the bottlers "would create a completely unmanageable situation for trial purposes" and that his grant of intervention to the Bottlers' Association had not been "on a limited basis."

PepsiCo then sought leave to file an interlocutory appeal to the Commission. The FTC chose instead to treat the question as if it had been certified to it with the Hearing Examiner's recommendation. In an opinion dated March 23, 1972, also dealing with similar motions by the other soft drink syrup manufacturers against which the FTC was proceeding, see fn. 1, the Commission denied the motions to dismiss for failure to join indispensable parties.

Shortly thereafter PepsiCo instituted this action in the District Court for the Southern District of New York to enjoin the FTC from continuing the proceeding unless it joined all the bottlers. The plaintiffs moved for a preliminary injunction, the defendants for dismissal of the complaint. While these motions were pending, Pepsi-Cola Bottling Company of Corvallis, Inc., an Oregon bottler, moved to intervene as a plaintiff, and this motion was granted. Judge Cannella then granted the defendants' motion to dismiss, 343 F.Supp. 396, holding that since review was premature, the court lacked jurisdiction over the subject matter.

These appeals followed and, on appellants' request, were given expedited treatment. We shall deal first with the case as it stood before the FTC and the district court, and will later consider the effect of a motion, made after the filing of notices of appeal, by FTC complaint counsel which sought summary judgment with respect to the invalidity of the exclusive territorial clauses and gave notice of counsel's intention to propose a "Metro Area Bottler Handicap" provision as a remedy.

I.

It is desirable to consider at the outset what status the FTC has accorded **[184]** the bottlers who have intervened and would accord others who might seasonably seek to do so. The governing statute, 15 U.S.C. § 45(b), provides: "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person." The FTC's Rules of Practice, 16 C.F.R. § 3.14, state, in relevant part, that "[t]he hearing examiner or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper."

[1] If this had been a civil action, intervention by the bottlers

would have been not a matter of grace but of right, F.R.Civ.P. 24(a), and such an intervenor would have had all the rights of a party subject only to reasonable provisions designed to assure against repetitious evidence and argument. We see no reason why a different principle should prevail before administrative agencies, except that the scope of the proceeding and the consequent possiities of delay may make it reasonable to undertake more vigorous policing against dilatory tactics than would ordinarily be necessary in the courts. Indeed, we think the Supreme Court has held precisely this. *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 231–239, 59 S.Ct. 206, 83 L.Ed. 126 (1938).; *FCC* v. *National Broadcasting Co., Inc.*, (KOA), 319 U.S. 239, 63 S.Ct. 1035, 87 L.Ed. 1374 (1943).

[2, 3] There is no reason to believe that the status accorded the four intervenors was anything less than is required. Although the appellants have made much of the fact that the Hearing Examiner's order granting leave to intervene provides for only five paticular rights, see fn. 2, the specific inclusion of these rights does not imply an exclusion of all others. We therefore have no cause to think that, if the intervenors wished to make motions or argue orally, the Examiner would prevent them from doing so. A more serious question is whether they could appeal to the Commission from the Examiner's initial decision. Rule 3.52(a), 16 C.F.R. § 3.52(a), limits this right to parties, and Rule 3.41(c), 16 C.F.R. § 3.41(c), is ambiguous on whether an intervenor is a party.[3] Contrast the FCC's Rules of Practice, 47 C.F.R. §§ 1.223, 1.302. However, in light of the Supreme Court decisions cited, the Commission would withhold such a right at its peril in a case such as this where the intervenors are persons whose contract rights are at stake.[4] Furthermore, we do not construe anything the Commission has done as preventing further intervention; the Examiner announced at a prehearing conference that, if other bottlers wished to intervene, "they will be most welcome by me."[5]

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[3] The opinions of the Hearing Examiner denying the motion to dismiss the complaint for nonjoinder of indispensable parties and granting intervention indicated that the intervenors would not be parties. In addition, the Examiner stated at a prehearing conference that, if the intervenors wished to appeal his initial decision, they should seek leave to intervene from the Commission.

[4] Agencies could well consider revision of their rules on intervention to distinguish between persons whose property rights are at stake and are thus entitled to all the rights of a party, and persons with a more generalized interest, a sort of super *amici curiae*, whose participation can well be restricted to avoid undue prolongation of the hearing. See generally, MacIntyre & Volhard, Intervention in Agency Adjudications, 58 Va.L. Rev. 230 (1972). For rules making such a distinction, see 14 C.F.R. §§ 302.14 (b), 302.15 (Civil Aeronautics Board). See also 47 C.F.R. §§ 1.223, 1.225 (Federal Communications Commission).

[5] The FTC might consider revision of its rules to provide for publication of its com-

[185] We thus predicate our discussion on the basis that, subject to reasonable limitations to avoid repetition and delay, the four intervenors and other bottlers who may seasonably apply will receive from the FTC all those rights "provided by law" that are essential to a fair hearing. 16 C.F.R. § 3.14.

II.

[4] Although the Federal Trade Commission Act limits review by a court of appeals to "any person, partnership, or corporation required by an order of the Commission to cease and desist," 15 U.S.C. § 45(c), we agree with appellants that the fact that the order here assailed is not one requiring PepsiCo to cease and desist from anything does not lead inexorably to the conclusion that it is not reviewable, but only that it is not reviewable by petition to a court of appeals. *Elmo Division of Drive-X Co.* v. *Dixon,* 121 U.S.App.D.C. 113, 348 F.2d 342, 344 (1965). Whether it was reviewable by suit in a district court depends on the construction given to the first two sentences of § 10(c) of the APA, now 5 U.S.C. § 704:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

Since the order was not one "made reviewable by statute," its reviewability hinges on whether it constitutes "final agency action for which there is no other adequate remedy in a court . . ."

[5, 6] If the APA uses the term "final agency action" in the same sense that the Judicial Code speaks of a "final decision" of a lower court, 28 U.S.C. § 1291, there could be little doubt about the answer. It is clear that "[d]enial of a motion to dismiss is not a final order and is therefore not appealable," 2A Moore, Federal Practice ¶12.14, at 2338 & n. 16 (2d ed. 1968) and this principle has been applied to a refusal to dismiss for failure

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[5] (Continued)

plaints in the Federal Register whenever the complaint seeks to invalidate provisions of contracts between the respondent and others. Compare the FCC's Rules, 47 C.F.R. §§ 1.221, 1.223. This may well be required by *Consolidated Edison Co.* v. *NLRB, supra,* 305 U.S. at 233–234, 59 S.Ct. 206, and, indeed, by §5(a) of the APA, now 5 U.S.C. § 554(a). But it is not here contended that the Pepsi bottlers have not in fact received notice. All but one are members of the Bottlers' Association, and Bottler No. 513 would have to possess a naivete not normally encountered in business affairs not to be aware of this proceeding which has been so extensively publicized and so vitally affects the structure of the industry—if, indeed, PepsiCo has not itself notified him. The absence of formal notice thus does not require an injunction, *cf .United States* v. *Aarons,* 310 F.2d 341 (2 Cir. 1962), although as indicated it would be preferable if the FTC were to provide this in cases like the present.

to join indispensable parties. *Ritter* v. *Wyoga Gas & Oil Corp.*, 110 F.2d 524 (3 Cir.), *cert. denied*, 311 U.S. 669, 61 S.Ct. 29, 85 L.Ed. 430 (1940). Many of the considerations supporting the final judgment rule with respect to appeals from decisions of lower courts are equally present in the case of agency action: The agency may find in favor of the respondent; the case may be settled; the reviewing court, in any event, will be in a better position to assess the matter when all the cards have been played. There can be no question that, under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(c), PepsiCo can obtain review by a court of appeals of any cease and desist order that may emanate from the proceeding. The right of the intervenors to obtain judicial review of a cease and desist order, although somewhat less clear, is clear enough. The problem arises from the fact that, as indicated, the Federal Trade Commission Act limits review by a court of appeals to "any person, partnership, or corporation required by order of the Commission to cease and desist," etc., and any order in this proceeding would presumably run only against PepsiCo. However, if PepsiCo sought review, a court of appeals would surely allow the bottlers to intervene. FRAP 15(d). If PepsiCo did not appeal, review **[186]** would be available to the bottlers in a district court, whether or not they had been full-fledged parties before the FTC, since they would be "adversely affected or aggrieved by agency action within the meaning of a relevant statute . . ." 5 U.S.C. § 702. The notion that being a "party" before an agency either automatically confers or is a necessary condition of the right to judicial review has in fact been dead since *Pittsburg & W. Va. Ry.* v. *United States*, 281 U.S. 479, 486, 50 S.Ct. 378, 74 L.Ed. 980 (1930), see 3 Davis, Administrative Law Treatise § 22.08, at 241–243 (1958), although courts have not always appreciated this. The provisions of § 10(a) of the APA, now 5 U.S.C. § 702, should have dispelled any lingering doubt generated by earlier Supreme Court pronouncements.

The legislative history of the APA sheds little light on what the framers meant by "final agency action for which there is no other adequate remedy in a court." S.Rep.No.752, 79th Cong., 1st Sess. 27 (1945), says that the phrase "includes any effective agency action for which there is no other adequate remedy in any court." H.R.Rep.No.1980, 79th Cong., 2d Sess. 43 (1946), U.S.Code Cong. & Admin.News 1946, p. 1195, speaks of "any effective or operative agency action." The adjectives tend against a construction that would include denial of a motion to dismiss a complaint. A quick reading of the second sentence of § 10(c) might suggest that interlocutory rulings were never to be reviewed until there had been final agency action in the usual sense. However, the phrase "[a] preliminary, procedural, or intermediate agency action or ruling *not directly reviewable*" (emphasis supplied) suggests that some action may be directly reviewable, although it does not explain by what authority unless the reference is to special statutory review procedures. Perhaps the second sentence could best be read as designed to insure that, like similar orders in civil actions, see 9 Moore, Federal Practice ¶110.07, at 108–09 (2d ed. 1972), preliminary orders in administrative proceedings which are not immediately reviewable do not remain beyond review forever. *Cf.* 3 Davis, Administrative Law Treatise § 20.08, at 101 (1958). It is arguable also that the framers must have been familiar with the well-known decision in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938) and that, if they intended to overrule it, they would have spoken more clearly.[6] The decisions on the subject, both by the Supreme Court and by lower courts, are conflicting, as Professor Davis has pointed out, 3 Administrative Law Treatise §§ 20.01–.05 (1958). Moreover, most of them do not address themselves to what one would suppose to be the crucial issue, *i.e.*, the proper interpretation of § 10(c).[7]

[187] We find no need to proffer a definitive solution to the question of the reviewability of agency orders which are not "final" in the ordinary sense—something which, in any event, is beyond the capability of an inferior court. Rather we shall accept for the sake of argument, despite possible contrary implications from the per curiam in *Arkansas Power & Light Co.* v. *F.P.C.*, 330 U.S. 802, 67 S. Ct. 963, 91 L.Ed. 1261 (1947), rev'g 81 U.S.App.D.C. 178, 156 F.2d 821 (1946), see also *Bristol-Myers Company* v. *FTC*, 469 F.2d 1116 (2 Cir. 1972) that we can extrapolate from cases such as *Leedom* v. *Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 110 (1958), and *McCulloch* v. *Sociedad Nacional de Marineros*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963), a principle that one can find "final agency action for which there is no other adequate remedy in a court" if an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law or is being conducted in a manner that cannot result in a valid order.[8] The injury against which a court would protect is not merely the expense to the plaintiff of defending in the administrative proceeding, which *Myers* held not to be enough, 303 U.S. at 51–52, 58 S.Ct. 459, but, in a case like this, the enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry. While PepsiCo and its bottlers cannot be heard to complain of the Commission's attempt to accomplish this restructuring, arguably they should not be placed under that threat in a proceeding that must prove to be a nullity.

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[6] Attorney General Clark and Representative Walter, sponsor of the House bill, indicated that § 10(c) was intended to enact existing law, S.Doc.No.248, 79th Cong., 2d Sess. 230, 369 (1946), and the Attorney General's Manual on the Administrative Procedure Act 103 (1947) suggests that § 10(c) enacted the *Myers* rule.

[7] The courts instead speak of "exhaustion." This case shows how little help that term offers in the context here relevant. If the rule is simply that plaintiff must have "exhausted" administrative remedies with respect to the issue for which judicial review is sought, as he clearly must, PepsiCo has done that. The real question is under what circumstances a court should review an order which, in Mr. Justice Brandeis' famous phrase, "does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." *United States* v. *Los Angeles & S. L. R. R.*, 273 U.S. 299, 309–310, 47 S.Ct. 413, 414, 71 L.Ed. 651 (1927). See the discussion in Jaffe, Judicial Control of Administrative Action 398–410 (1965). Compare also *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Toilet Goods Ass'n, Inc.* v. *Gardner*, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967); *Gardner* v. *Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967).

III.

[7] We are unable to conclude, however, that appellants have brought themselves within the possibly over-generous principle with respect to reviewability that we have put forward. PepsiCo says that, unless all the bottlers are joined, its compliance with an eventual cease and desist order, after full judicial review, might subject it to liability in a suit by an unjoined bottler whose territory had been invaded by another to whom PepsiCo had sold syrup. Pepsi-Cola Bottling Company of Corvallis says that, if a cease and desist order is issued, it might be held liable if it then sought to sell in territory now granted to an unjoined bottler.[9]

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[8] PepsiCo argues this to be the real thrust of *Interstate Broadcasting Co.* v. *United States*, 109 *U.S.App.D.C.* 255, 286 F.2d 539 (1960), and *American Communications Ass'n* v. *United States*, 298 F.2d 648 (2 Cir. 1962), holding orders denying intervention in administrative proceedings to be immediately appealable in circumstances where erroneous denial might invalidate any future order, although the decisions are technically distinguishable since the precise issue was whether the orders fell within the statute permitting review of "final" FCC orders, now 28 U.S.C. § 2342. See also *Public Service Comm'n* v. *FPC*, 109 U.S.App.D.C. 66, 284 F.2d 200 (1960); *Lynchburg Gas Co.* v. *FPC*, 284 F.2d 756 (3 Cir. 1960); *City of Houston* v. *CAB*, 115 U.S.App.D.C. 94, 317 F.2d 158 (1963).

[9] Counsel for Pepsi-Cola of Corvallis seeks to explain its own failure to intervene by arguing that, if it did, it would be the only Oregon bottler bound by a cease and desist order. Putting aside the point that the same counsel apparently entertained no such fear when moving for intervention on behalf of three other bottlers, we think,

They contend that Congress could not have meant to allow the FTC to inflict such hardship when joinder of all the bottlers provides a means for avoiding it.

The proposition that a court would hold one person liable to another for doing something within the United [188] States which a federal administrative agency, acting within its jurisdiction, has found to be necessary for the enforcement of a federal regulatory statute arouses some astonishment. This is particularly so in a context where the persons who would seek to enforce liability know of the proceeding and have had an opportunity to intervene before the agency "in order to safeguard their interests." *Consolidated Edison Co.* v. *NLRB*, *supra*, 305 U.S. at 234, 59 S.Ct. at 219. The astonishment becomes greater in light of the Supreme Court's clear statement in *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 363, 60 S.Ct. 569, 577, 84 L.Ed. 799 (1940) that, in administrative proceedings devoted "to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights," then citing the very case of *Shields* v. *Barrow*, 58 U.S. (17 How.) 130, 15 L.Ed. 158 (1855), on which PepsiCo heavily relies. The Court declared, 309 U.S. at 365, 60 S.Ct. at 578, that, despite the nonjoinder of the employees with whom the employer had contracted, "it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it."[10] Even more to the point,

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[9] (Continued)

for reasons explained in the text below, that non-intervening bottlers will be effectively bound, and Pepsi-Cola of Corvallis thus need have no hesitancy about intervening in the FTC proceeding if it considers this to be necessary to protect its interests.

[10] PepsiCo advances two arguments to detract from the force of this seemingly controlling statement. One is that, in *National Licorice*, over the dissent of two Justices, the Court modified the NLRB order to provide that the notices required to be posted by the employer should include a statement that the invalidation of the contracts was "without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts." 309 U.S. at 367, 60 S.Ct. at 579. Apparently this was for the purpose of preserving employee rights, such as an irreducible wage scale, vacation with pay, extra compensation for overtime, etc., that had accrued prior to the effective date of invalidation. See Brief for Petitioner at 28. Compare *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 396 n. 3, 73 S.Ct. 361, 97 L.Ed. 426 (1953). The other is the portion of *Consolidate Edison Co.* v. *NLRB*, *supra*, 305 U.S. at 231–239, 59 S.Ct. 206, where the Court invalidated so much of a Board order directing the termination of contracts with independent unions, in part because the unions "were entitled to notice and hearing before [the contracts] could be set aside." *Id.* at 233, 59 S.Ct. at 218. But the Court was there dealing with a proceeding where the complaint had not challenged the validity of the contracts, and the opinion clearly indicates that, if it had and the unions had been given notice, the would have been "under a duty to intervene before the Board in order to safeguard their interests." *Id.* at 234, 59 S.Ct. at 219. Reading *National Licorice* and *Consolidated Edison* together,

Mr. Justice Stone went on to observe, citing many cases, 309 U.S. at 365–366, 60 S.Ct. at 578, that "the order does not go beyond those in suits brought by the United States to restrain violations of the Sherman Act, where the injunction was broad enough to prevent the offender from carrying out contracts with persons not parties to the suits" and that "in proceedings before the Federal Trade Commission, the order restraining unfair methods of competition may preclude the performance of outstanding contracts by the offender" and these "have never been challenged because the holders of the contracts were not made parties."

PepsiCo attempts to dispose of these references to the antitrust and FTC cases by saying that they related to situations where removal of the restrictions sought to be annulled was beneficial to the nonjoined parties. While this may often have been true, it has not always been. In *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30, 51 S.Ct. 42, 75 L.Ed. 145 (1930), *aff'g* 34 F.2d 984 (S.D.N.Y.1929), where the distributors but not the exhibitors were named as defendants, there was evidence that the arbitration provision there annulled [**189**] was favored by at least a minority of the exhibitors. See 282 U.S. at 43, 51 S.Ct. 42, 34 F.2d at 985, 988–989; Brief for the United States in the Supreme Court at 56. When such an exhibitor sought to defend a contract action by claiming that the distributor-plaintiff had not complied with the arbitration clause, this was refused. *Paramount Famous Lasky Corp.* v. *National Theater Corp.*, 49 F.2d 64 (4 Cir. 1931). Again, in *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 60 S.Ct. 618, 84 L.Ed. 852 (1940), an action in which only Ethyl was named a defendant, the Court affirmed an order invalidating provisions in Ethyl's licenses to refiners which required them to sell only to licensed jobbers at a certain price differential above the refiners' best non-premium grade of gasoline, a system which, as the Court found, had the effect of controlling prices to a degree beyond that permitted by Ethyl's patent monopoly. It is rather plain that some of the refiners and jobbers might have regarded the price-fixing as beneficial. We are unable to follow PepsiCo's argument that invalidation of price-fixing agreements is invariably beneficial to a wholesaler or retailer. While it is obvious that a price-fixing agreement with a single distributor operates adversely to the latter, since he would prefer freedom to do as he wishes, it is not at all clear that the more usual case of agreements with all of a manu-

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[10] (Continued)
we think the Court is clearly of the view that, in an agency proceeding seeking to vindicate public rights against a respondent, the private rights of other parties can be concluded if they have had notice and an opportunity to intervene.

facturer's competing distributors does; many of them very likely consider it a beneficial protection against price-cutting. Yet it would be news, indeed, that all such distributors must be joined in order for the manufacturer to be protected against subsequent suit. See *United States* v. *National Lead Co.*, 63 F.Supp. 513, 525, n.8 (S.D.N.Y.1945), *aff'd*, 332 U.S. 319, 67 S.Ct. 1634, 91 L.Ed. 2077 (1947); *cf. Paramount Lasky Corp.* v. *National Theatre Corp., supra*, 49 F.2d 64. Most pertinently, in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), the Court considered the legality of various types of territorial restrictions upon distributors and retailers, although only a distributors' association and B.F. Goodrich & Co. (both a retailer and a distributor), were named as defendants along with the manufacturer.[11]

[8–10] The upshot of all this is that the fears of PepsiCo and Pepsi-Cola of Corvallis of determinations in private suits inconsistent with a FTC cease and desist order are groundless and that Pepsi-Cola of Corvallis' dilemma whereby, if it intervenes to present its case, it will be bound but nonintervening bottlers will not be, see fn. 9, is of its own making. To be sure, the appellants' position *vis-a-vis* supposititious future private litigation would be more comfortable if they could proffer in bar an order in a proceeding to which every bottler had been made a party than if they were obliged to convince a court of what, on the basis of both authority and reason, we are confident the correct position is. But that is not enough to support a conclusion that any order emanating from the proceeding as now structured would **[190]** be void—the premise of our assumption that review at this stage may be proper. Since a cease and desist order in a proceeding wherein the bottlers could intervene would in fact bind them, decision whether to accede to PepsiCo's request for joinder was within the Commission's discretion. It was entitled to weigh the added comfort which all-out joinder would give PepsiCo against the mountain of paperwork and the delay that would result from joining the 513 Pepsi-

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[11] Other antitrust and FTC cases where the courts have invalidated or approved the invalidation of contract provisions arguably beneficial to the other party despite the failure to join the latter are *United States* v. *Univis Lens Co.*, 316 U.S. 241, 62 S.Ct. 1088, 86 L.Ed. 1408 (1942) (price-fixing provisions); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 64 S.Ct. 805, 88 L.Ed. 1024 (1944) (*id.*); *Butterick Co.* v. *FTC*, 4 F.2d 910 (2 Cir.), *cert. denied*, 267 U.S. 602, 45 S.Ct. 462, 69 L.Ed. 808 (1925) (resale price maintenance and exclusive dealing provisions); *Q. R. S. Music Co.* 1927) (resale price maintenance provisions). The last three cases were cited with approval in *National Licorice*, 309 U.S. at 366, 60 S.Ct. 569. While it is true that, as urged by PepsiCo's able counsel, the issue of non-joinder was not discussed, we have been cited to no case where a defendant or respondent has been held liable to an unjoined third party for complying with an antitrust decree or an FTC cease and desist order.

Cola bottlers and the bottlers in the six other proceedings, see fn. 1, and also the precedent this would create in cases where even larger numbers were involved.[12] It may be, as PepsiCo urges, that the Commission has exaggerated the burden that joinder would entail. It is by no means certain that all the bottlers would seek to offer evidence; if large numbers did, the FTC could properly impose restrictions that would limit proof to typical situations and avoid repetition. But, apart from the fact that a proceeding conducted under such restrictions would not differ essentially from what can be accomplished through intervention, this is a choice to be made by the agency and not by the courts, so long as the fundamental rights of PepsiCo and the bottlers to be heard in opposition and not to be exposed to liability for complying with any order that may ultimately issue are adequately protected.[13] See *Wolf Corp.* v. *SEC*, 115 U.S.App.D.C. 75, 317 F.2d 139, 142–143 (1963). We are convinced they have been.

IV.

Appellants urge that the already bad situation created by the FTC's initial refusal to join all the bottlers has since been altered for the worse by the motion of complaint counsel, filed on or about July 31, 1972, for partial summary judgment and, more particularly, for the inclusion in the order, if found warranted by the evidence of a Metro Area Bottler Handicap provision. Whereas the order proposed in the complaint would simply have enjoined PepsiCo from enforcing territorial restrictions, the Metro Area Bottler Handicap provision would add a proviso requiring PepsiCo, in the case of the bottlers in the 200 largest locations, to enforce for ten years a new restriction which would prohibit such bottlers from selling elsewhere than in his own territory, the territory of another similarly situated bottler, or unassigned territory. As complaint counsel argued, "the net effect of the provision is to assure that several bottlers can compete effectively for the business in [the largest locations] while temporary protection is afforded small bottlers during the period in which they adjust their marketing efforts to realize economies of scale." This, it is said, creates a clear conflict of interest between Metro Area bottlers which under the provision would remain subject to certain territorial restrictions, and the smaller bottlers which would not.

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[12] *In Eastman Kodak Co.* [1952–54 Transfer Binder] Trade Reg.Rep. ¶ 11,527 (FTC 1953), cited by the Commission, there were over 6,000 dealers; in the *Ethyl* case, *supra*, 309 U.S. 436, 60 S.Ct. 618, there were 11,000 jobbers.

[13] PepsiCo argues that the bottlers' right to intervene should not affect its right to have indispensable parties joined. Although this would be true in a civil proceeding involving only private rights, the Supreme Court decisions discussed above make it clear that the analogy does not hold in court or agency proceedings to vindicate public rights.

[11, 12] It is sufficient to answer that, with respect to this new aspect of the case, there has been no exhaustion of administrative remedies in the meaningful sense of that term, see fn. 7. No effort has been made to convince the FTC that, however matters previously stood, the motion of complaint counsel now calls for joinder of all bottlers if the Metro Area Handicap is to be imposed. While we could dismiss the point on that ground, we think it better to **[191]** dispose of it on the merits. Although the Commission might properly choose to reserve its position on joinder in light of the Metro Area Handicap proposal, it is not bound to do so. What it is bound to do is afford further opportunity for intervention by Metro Area bottlers, individually or as a group, since it now appears that the proceeding may have more adverse consequences for them than under the form of order initially proposed.

We thus conclude that even under the perhaps unduly liberal assumption that review would now lie if the proceeding as presently structured could not result in a valid cease and desist order, appellants have not brought themselves within that principle. The order dismissing the complaint is accordingly affirmed.

MEDINA, *Circuit Judge* (dissenting):

I respectfully dissent. I do not think we should leave the question of the subject matter jurisdiction of the District Court up in the air. I believe the District Court had subject matter jurisdiction in this case and that in the exercise of that jurisdiction the District Court on a remand should review the action of the Federal Trade Commission and enjoin it from continuing the PespiCo proceeding unless and until it provides notice of the issues to all the PepsiCo bottlers and affords them a meaningful right to a hearing. I think this is required as a matter of sound judicial administration, as a matter of constitutional law, and as a matter of plain common sense. In the discussion that follows I shall attempt to demonstrate:

(1) That the District Court had subject matter jurisdiction.

(2) Despite the fact that the threat of suits against PepsiCo, in the event of a final decision that the contracts with the bottlers are illegal, may prove to be illusory, the provisions made by the Federal Trade Commission for intervention by the bottlers and for the protection of their rights are inadequate. Elementary principles of due process require at the very least notice to all the bottlers of the precise charges of illegality of their contracts

with PepsiCo, including the Metro Area Bottler Handicap proposal of complaint counsel. It does not seem to me to make sense to go through this whole weary procedure again if the Commission accedes to complaint counsel's proposal.

(3) As a general rule courts should permit administrative agencies to exercise their expertise in deciding procedural questions affecting the administrative proceeding. Here, however, where constitutional issues of due process are present it is worth noting that the number of bottlers is no obstacle to an effective hearing. Further, the amount of paper work that has gone into this proceeding already, due to the determination of the Commission to deny full party status to the bottlers, far exceeds any necessary amount of procedural rulings and supervision the presence of any number of bottlers might be supposed to require. I find nothing "unmanageable" about the situation with the bottlers in; and this is especially true in a situation in which the Commission is endeavoring to restructure an entire industry.

I

The Facts and the Procedural Posture of the Case

On July 15, 1971 the Federal Trade Commission issued separate complaints charging PepsiCo and other soft drink manufacturers with engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. 15 U.S.C., Section 45. The complaint alleged that exclusive bottling agreements between PepsiCo and 513 bottlers violated the Act. The agreements grant the bottlers exclusive licenses to use PepsiCo's trademark in a specific territory on soft drinks prepared by the bottlers from the concentrate and syrups purchased from PepsiCo.

[**192**] On August 11, 1971 three of the 513 bottlers and the Pepsi-Cola Bottlers Association moved to intervene in the FTC proceeding. On August 23, 1971 PepsiCo filed its answer to the complaint and asserted as an affirmative defense the failure of the Commission to join the 513 bottlers as parties. On October 12, 1971, PepsiCo moved before the Hearing Examiner to dismiss the complaint for nonjoinder of indispensable parties. Then on November 18, 1971 the Hearing Examiner issued an order granting the Association and the three bottlers what I believe to be a limited right to intervene. On January 20, 1972 the Hearing Examiner denied PepsiCo's motion to dismiss for nonjoinder of the bottlers and this decision was sustained by the Commission.

On April 28, 1972 PepsiCo instituted this action in the Southern District of New York and applied for a preliminary injunction.

The FTC moved to dismiss. While these motions were pending, Pepsi-Cola Corvallis (a bottler) intervened in the District Court action in support of PepsiCo's position. On June 2, 1972 District Judge Cannella denied PepsiCo's application for a preliminary injunction and granted the Government's motion to dismiss the complaint (343 F.Supp. 396). Judge Cannella was of the view that the FTC order denying joinder of individual bottlers was not a final order and that the District Court lacked subject matter jurisdiction over the dispute. PepsiCo and Pepsi-Cola Corvallis both appealed from this decision and this Court heard the appeal on October 12, 1972.

After the notice of appeal to this Court had been filed, the complaint counsel in the FTC proceeding moved for partial summary decision on July 31, 1972. Included in this motion was a proposed remedy referred to as a "Metro Area Bottler Handicap" provision. The Commission has not at this time had the opportunity to rule on this motion generally or on the "Metro" clause specifically.

II

The District Court Had Subject Matter Jurisdiction

Questions of jurisdiction have always fascinated American judges and many of them, including the writer of this dissent, have failed at times to resist the temptation to seize upon any question of law affecting the jurisdiction of a court as presenting an opportunity for a learned treatise discussing at length every decision of every court having even a remote bearing on the particular point to be decided. In this way the volumes of Law Reports keep piling up with little benefit to anyone. I shall not now succumb to this temptation. On the contrary, I shall content myself with a statement of the reasons supporting my conclusion that the District Court had subject matter jurisdiction, and, without further discussion, cite a few cases which I think are in point.

Statutory authority sustaining the subject matter jurisdiction of the District Court is to be found in the provisions of Section 10(c) of the Administrative Procedure Act, 5 U.S.C., Section 704, that "final agency action for which there is no adequate remedy in a court are (is) subject to judicial review." There are numerous instances in which such review has been sustained, despite the interlocutory character of the administrative agency ruling sought to be reviewed. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963); *Leedom* v. *Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958); *Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155 (7th Cir. 1970); *American*

Communications Association v. *United States*, 298 F.2d 648 (2d Cir. 1962); *Interstate Broadasting Co.* v. *United States*, 109 U.S. App.D.C. 255, 286 F.2d 539 (1960). The only satisfactory test is that involving a pragmatic and flexible approach to insure that the ends of justice will be served. See, *Parisi* v. *Davidson*, 405 U.S. 34, 92 S.Ct. 815, 31 L.Ed.2d 17 (1972); *McKart* v. *United* **[193]** *States*, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969). Naturally, where the ruling complained of involves factual findings or the exercise of administrative expertise, review by a court is not allowed.

My reasons for an affirmative application of the pragmatic and flexible approach are:

(1) Every effort to persuade the FTC to join these indispensable parties and thus afford them proper and reasonable notice and an effective hearing has failed. In this sense the ruling of the Commission is final.

(2) The Commission admits that extensive and valuable property and contract rights of the bottlers are involved.

(3) The rulings of the Commission relative to intervention are in my opinion inadequate and illusory. That the rights of those permitted to intervene are limited is apparent on the face of the order which appears at page A–230 of the Appendix. It will not do for the Hearing Examiner to make a statement that he had granted to the intervenors "the right of full participation." We can read, and the order does not provide for "full participation." Those pemitted to intervene do not have the right to make motions or argue orally as guaranteed to parties under FTC Rule § 3.41(c), 16 C.F.R. § 3.41 (1972). FTC rules only permit a party to appeal an initial decision of the Heading Examiner, FTC Rule § 3.52(a), 16 C.F.R. § 3.52(a) (1972) and, as noted by Judge Cannella, these intervenors have no right of judicial review. It is, I think, no answer to say that an Appellate Court will probably permit them, on motion, to intervene. In these days of congested calendars some Appellate Courts are not always so accommodating.

(4) PepsiCo's position on the indispensable parties point is a strong one. If the Commission adopts the "Metro Area Bottler Handicap" proposal of complaint counsel, PepsiCo's position on the indispensable parties point will become impregnable.[1] It is not

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[1] The "Metro" provision goes much further than an order compelling PepsiCo to "cease and desist" from enforcement of certain features of the contracts with the bottlers. The "Metro" clause not only voids some of the contractual rights of the absent parties but imposes new obligations upon the parties to these contracts. Under the provision the larger bottlers now doing business in the 200 largest metro areas would be limited for ten years to selling in the metro area and forbidden to sell in

reasonable to take the risk that the whole proceeding will ultimately turn out to be nugatory when this risk can be avoided by the simple expedient of making the bottlers parties. If this is done, all the cumbersome intervention procedures will be avoided.

(5) The lack of notice to the bottlers and the failure to provide them with an effective hearing raise constitutional questions. It is not the interest of justice that determination of these questions be postponed until the entire proceeding is concluded, especially as these questions are ripe for decision now. I see that my brothers of the majority readily dispose of this question of subject, as they disposed of the question of subject matter jurisdiction, by making an "assumption." In this instance they assume "that all the PepsiCo bottlers have received notice of this proceeding." They naturally cannot order the District Court to direct the FTC to modify its order and provide such notice, as they have voted to affirm Judge Cannella's order dismissing the case for lack of subject matter jurisdiction. But the point cannot be swept under the rug in this cavalier fashion. The plain fact is that no formal notice of any kind has been given by the FTC to PepsiCo's 513 bottlers. It is hinted in the majority opinion that the complaint was not published in the Federal Register, see footnote [**194**] 5, and nothing in this record suggests that such publication was made. It is strange doctrine to me that constitutional requirements of notice [2] and a fair hearing are complied with if the persons entitled to notice are members of a trade association that has moved to intervene in the proceeding. One might just as well suggest that the proceedings have been reported in the newspapers which were probably or possibly read by the 513 PepsiCo bottlers. The affidavit of Robert J. Sisk filed in support of the motion to intervene by Pepsi-Cola Bottlers Association states that 512 of the 513 PepsiCo bottlers are members of the Association and it makes the gratuitous assertion that the Association "effectively represents the interests of all the Franchised Pepsi-Cola Bottlers in the United States." This means nothing. It is for the PepsiCo bottlers themselves to say who represents their interests, and, in some cases, these interests are adverse to one another. And how about PepsiCo bottler No. 513?

(6) At first I was inclined to suspect that the effort to have

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[1] (Continued)
non-metro areas presently not serviced by large bottlers. The small bottlers in the non-metro areas could sell in the metro areas. Thus it is proposed that by agency action new contracts be created and imposed upon an entire industry, although the interested parties are not represented in the adjudicatory process.

[2] See, as to basic notice doctrine required to meet the standards of due process, *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

the PepsiCo bottlers made parties and the bringing of this action were in the nature of dilatory maneuvers. But, in the light of the colloquy during the oral argument, and a study of the record as complete as the time would allow, I am now convinced that PepsiCo is doing everything it can to expedite the proper conduct of the FTC proceeding. This is no dilatory move, but a sincere attempt to make the FTC comply with the requirements of law in an orderly way, and to protect its own interests and those of the PepsiCo bottlers to whom it may well owe a moral duty of protection.

III

On the Merits the 513 PepsiCo Bottlers Should Be Brought in as Parties

I am still unable to understand why the FTC has taken such an adamant position against making the bottlers parties to this proceeding, unless it anticipates greater scope and control of the whole proceeding to restructure the soft drink industry if confusion reigns supreme. The equivocal manner in which the right of the bottlers to intervene has been granted; the complete failure to provide any form of notice to the separate bottlers or to afford them an effective hearing at which their substantial property and contractual rights may be determined in an orderly manner; and the insistence that, as the so-called right to intervene has been proffered, those who do not choose to come in will be bound by the final order in precisely the same manner and to the same extent as will be those who availed themselves of this so-called right to intervene —all these rulings obviously make for confusion. And, one may wonder, why? Unless there is something that does not meet the eye, it seems clear enough that giving reasonable notice and an effective opportunity to be heard to all interested parties would facilitate rather than hinder the prompt and efficient enforcement of the antitrust laws. Instead, we have all this weaving in and out of procedural niceties.

What puzzles me most is the insistence by my brothers of the majority and by the FTC that, in view of the rulings made by the Commission on the subject of intervention all those PepsiCo bottlers who do not choose to intervene will, nevertheless, be "bound" by the final decision of the FTC on the facts and on the law. Surely these absent PepsiCo bottlers will not be "bound" in the ordinary sense of the word, by the application of traditional rules of res judicata or collateral estoppel. This is probably another example of corner-cutting, as in the case of the assumption *arguendo* that the District Court had Subject matter jurisdiction, and the assumption that all the PepsiCo **[195]** bottlers had notice of the proceeding.[3] I say the record makes it plain that no formal notice whatever was given to the PepsiCo bottlers and that this important constitutional requirement of due process cannot be satisfied by mere divination or guesswork. Furthermore, I say the absent bottlers who may choose not to intervene will not be "bound." *Chase National Bank* v. *City of Norwalk*, 291 U.S. 431, 54 S.Ct. 475, 78 L.Ed. 894 (1934); *Western Union Tel. Co.* v. *Foster*, 247 U.S. 105, 38 S.Ct. 438, 62 L.Ed. 1006 (1918); *New Orleans* v. *Warner*, 175 U.S. 120, 20 S.Ct. 44, 44 L.Ed. 96 (1899); *Burke* v. *Morphy*, 109 F.2d 572 (2d Cir. 1940), *cert. denied*, 310 U.S. 635, 60 S.Ct. 1078, 84 L.Ed. 1404 (1940); *McGhee* v. *United States*, 437 F.2d 995, 194 Ct.Cl. 86 (1971).

Perhaps all that is meant by "bound" is the same argument advanced concerning the decision in *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed. 799 (1940), although this can scarcely be so because both in the majority opinion and in the FTC argument it is said that the absent parties will be bound because, whether they knew it or not, they had been proffered the right to intervene. No intervention whatever was involved in *National Licorice*.

So, I address myself now to the claim that does depend upon *National Licorice*, which claim, as I undersand it, is: that in the event the FTC decides that some part of PepsiCo's contract with its franchisees, the bottlers, is unlawful as a violation of the antitrust laws, no such bottlers could thereafter sue PepsiCo for violation of the terms of the contract, because the FTC was acting to enforce public as distinct from private rights. The difficulty with this argument is that it goes too far. There are numerous rights created by these contracts for the benefit of both PepsiCo and the bottlers. The fact that, after a federal Court of Appeals has enforced an FTC cease and desist order, other courts will not rule to the contrary, does not dispose of the issue under discussion. After final disposition of the case by the FTC, I think it will be open to individual bottlers, who are not made parties, to sue PepsiCo for the vindication of other rights inherent in the franchises and that, depending on the terms of the final order, the bottlers who had been joined as parties could not sue without being met by a defense of res judicata or collateral estoppel and a motion for summary judgment. It will, of course, be recalled that the Court in *National Licorice* specifically made the language of the opinion on which my brothers and the FTC rely inapplicable to rights of the individual employees not necessarily involved in the violation of the National Labor Relations Act.

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[3] Even if it be assumed that the PepsiCo bottlers or most of them knew that a proceeding against PepsiCo was pending in the FTC, this would not suffice. For example, the Supreme Court has declared as violative of due process a New Jersey non-resident motorist statute lacking a "provision for communication to the proposed defendant, such as to create reasonable probability that he would be made aware of the bringing of the suit." (*Wuchter* v. *Pizzutti*, 276 U.S. 13, 25, 48 S.Ct. 259, 262, 72 L.Ed. 446 (1928)). There the defendant actually received notice of the suit but the lack of a formal mechanism to insure the reasonable probability that he would receive notice of the pending suit, rendered the statutory scheme constitutionally defective. Thus, if this Court decides that the Commission must provide a method of notice best calculated to reach the bottlers in order to conform to due process, then the mere fact that most of the bottlers received some form of informal notice would not transform an unconstitutional procedure into a constitutionally permissible one.

There remains the contention that 513 bottlers are too many, especially as hundreds of others are involved in the proceedings against Crush International Limited, Dr. Pepper Co., Coca Cola Co., Seven Up Co., and National Industries Co. It is said that joining so many bottlers will make the proceeding "unmanageable." Back in the days of the Medes and the Persians this argument might have seemed plausible. But in a modern setting it has no merit whatever, **[196]** as appears to be recognized by my brothers of the majority. The advances made by judicial administration in recent years made it perfectly plain that the modest numbers here involved can readily be handled with justice to all. It seems unlikely that more than a few of the PepsiCo bottlers will take the trouble to hire lawyers and come in to defend their rights. Those who do come in, even in considerable numbers, can be formed into consolidated groups or otherwise directed in such fashion as to avoid repetition or confusion. In fact, as I have already said, making the PepsiCo bottlers parties to this proceeding will facilitate in every way the prompt and just disposition of the issues.

Accordingly, I would remand the case to the District Court with instructions to enjoin the FTC from further proceeding in its effort to restructure the soft drink industry until it had made the PepsiCo bottlers parties.

GOLDEN GRAIN MACARONI COMPANY v. FEDERAL TRADE COMMISSION*

No. 71-1570. F.T.C. Docket 8737

(United States Court of Appeals, Ninth Circuit, December 20, 1972)

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*Reported in 474 F. 2d 882 (1972), *cert. denied*, 412 U.S. 918 (1973). For case before the Commission, see 78 F.T.C. 63.

1. **IF DEFENDANT UNDERSTOOD ISSUE AND WAS GIVEN OPPORTUNITY TO JUSTIFY CONDUCT, THERE WAS NO VIOLATION OF DUE PROCESS**

   [883] Purpose of requirement of Administrative Procedure Act that persons entitled to notice of administrative hearing be informed of matters of fact and law asserted is satisfied and there is no due process violation if party proceeded against understood the issue and was afforded full opportunity to justify its conduct, but if issue was not litigated and party proceeded against was not given opportunity to defend himself, adverse finding on that issue by agency violated due process.

2. **NO VIOLATION OF DUE PROCESS WHERE SPECIFIC PRACTICES AS WELL AS ALLEGED OVERALL SCHEME OF MONOPOLIZATION WERE LITIGATED**

   Inasmuch as initial complaint charging monopolization and attempted monopolization under Sherman Act put defendant on notice that specific practices as well as alleged over-all scheme of monopolization were being challenged and issues concerning violation of Sherman Act and violation of Clayton Act proscription against acquisition where effect may be substantially to lessen competition or tend to create a monopoly were identical and were litigated, order compelling divestiture on finding of violation of Clayton Act did not violate due process on theory that original complaint gave no notice of reliance upon Clayton Act.

3. **WHATEVER THE SEMANTIC DIFFERENCE BETWEEN MONOPOLIZATION AND TENDENCY TO CREATE A MONOPOLY, THE BASIC POLICIES OF THE SHERMAN ACT AND THE CLAYTON ACT ARE THE SAME**

   Under both standards of section of Sherman Act proscribing monopolization and section of Clayton Act proscribing acquisitions where effect may be substantially to lessen competition or tend to create a monopoly, the degree of market foreclosure is determined as of time of suit and principal factual questions concern relevant product and geographic market affected by merger or acquisition and degree of resulting foreclosure of that market; the basic policies of the two prohibitions are the same, whatever the semantic difference between monopolization and tendency to create a monopoly.

4. **ENFORCEMENT OF ORDER MUST BE DENIED IN ABSENCE OF ELEMENT OF COMMERCE BEING LITIGATED WITH RESPECT TO THE SMALLEST COMPETITOR ACQUIRED**

   Fact that defendant was not given opportunity to argue that two companies it acquired were not "in commerce," within Clayton Act proscription against acquisition of stock of corporation in commerce where effect may be substantially to lessen competition or may tend to create a monopoly, was immaterial for purposes of determining whether order based on violation of that section was proper, where evidence that the two companies were engaged in interstate commerce was overwhelming, but, in absence of element of commerce being litigated with respect to a third, the smallest competitor acquired, enforcement of order must be denied.

5. **IN ABSENCE OF SHOWING THAT DEFENDANT WAS ONLY SUITABLE PURCHASER, DEFENDANT FAILED TO MAKE A LEGALLY SUFFICIENT RECORD ESTABLISHING THE FAILING-COMPANY DEFENSE**

   Defendant corporation charged with violating prohibition of Clayton Act against acquisition where effect may be substantially to lessen competition or may tend to create a monopoly failed to make a legally sufficient record to establish the failing-company defense with [884] respect to acquisition of one competitor, in absence of showing that defendant was the only available purchaser.

6. MERE PROOF THAT MOST LOGICAL OF PURCHASERS OF ACQUIRED COMPANY DECLINED TO BUY IT IS NOT A DEFENSE THAT ACQUIRED COMPANY WAS A FAILING COMPANY

Where acquiring corporation is charged with violating Clayton Act prohibition against acquisition where effect may be substantially to lessen competition or may tend to create a monopoly and relies on defense that the company acquired was a failing company, mere proof that some or all of most logical purchasers of that company have declined to buy it is not enough to prove that the challenged purchaser was the only prospective purchaser, a requirement for the defense.

(The syllabus, with substituted captions, is taken from 472 F.2d 882.)

On petition to review and set aside, court held that order compelling divestiture on finding violation of Clayton Act did not violate due process on theory that original complaint gave no notice upon reliance upon that Act. Order enforced except for part of order requiring divestiture of Oregon company.

J.Paul Coie (argued), *Douglas Beighle* (argued), of *Perkins, Coie, Stone, Olsen & Williams*, Seattle, Wash., *J. Wallace Adair*, of *Howrey, Simon, Baker & Murchison*, Washington, D.C., for petitioner.

Gerald Harwood, Atty. (argued), *Frederick H. Mayer, Montgomery Hyun*, Attys., *Harold J. Rhynedance, Jr.*, Asst. Gen. Counsel, *Ronald M. Dietrich*, Gen. Counsel, Federal Trade Comm., Washington, D.C., *William L. Dwyer*, Seattle, Wash., for respondent.

Before MOORE,* BROWNING and GOODWIN, *Circuit Judges.*

ALFRED T. GOODWIN, *Circuit Judge:*

Golden Grain Macaroni Company petitions for review of an order of the Federal Trade Commission directing Golden Grain to divest itself of all its interests in three other macaroni producers and requiring Golden Grain to refrain from futher acquisitions in the macaroni industry for a period of ten years.

Golden Grain is the largest seller of dry-paste food products in the Pacific Northwest. In 1957, Golden Grain entered the regional market in the Seattle area by the acquisition of Mission

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* The Honorable Leonard P. Moore, Senior United States Circuit Judge, United States Court of Appeals for the Second Circuit.

Macaroni. This acquisition is not challenged in this litigation, but it has historical significance.

Included in the assets acquired in 1957 from Mission Macaroni was 49 per cent of the stock of Porter-Scarpelli Macaroni Company, of Portland, Oregon. Control of Porter-Scarpelli has remained at all relevant times in the Scarpelli family.

In 1963, Golden Grain acquired control of Major Italian Foods, a Seattle macaroni manufacturer that by 1968 accounted for about 14 per cent of the sales in the Pacific Northwest market. Later, Golden Grain acquired all the stock of Oregon Macaroni Manufacturing Company. Oregon Macaroni operated a small plant accounting for about one per cent of the sales in the region. The extent of Oregon Macaroni's inter-state business was not established, but appeared to be minimal.

Divestiture proceedings were instituted by a complaint charging monopolization, and attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2. After lengthy litigation, the Commission decided that, whether or not Golden Grain had monopolized or attempted to monopolize the macaroni market in the relevant region, in violation of Section 2 of the Sherman Act, Golden Grain's acquisition of substantial interests in three macaroni manufacturing companies violated the prohibition of Section 7 of the Clayton Act, 15 U.S.C. § 18, against acquisitions where the effect may be substantially to lessen competition or may tend to create a monopoly. The Commission's final order compels divestiture of all of Golden **[885]** Grain's interest in Major Italian Foods, Porter-Scarpelli, and Oregon Macaroni.

Golden Grain attacks this order on both due-process and substantive grounds. Golden Grain asserts that the original complaint "sounded" in Sherman Act monopoly and attempted monopoly, and gave no notice of reliance upon Section 7 of the Clayton Act. The substantive theory is that the acquisition of Major Italian Foods is exempted from antitrust liability because Major Italian was a "failing company."

The final paragraph of the FTC complaint charged as follows:

> The acts and practices of the respondents as herein alleged have had and do have the effect of hindering, lessening, restricting, restraining, destroying, and eliminating competition in the manufacture, distribution and sale of macaroni and related paste products; have had and do have a tendency to unduly hinder competition or to create and maintain in respondents a monopoly; have constituted an attempt to monopolize; have foreclosed markets and access to markets to competitors or potential competitors * * * and constitute unfair methods of competition * * * within the intent and meaning of the Federal Trade Commission Act.

Elsewhere in the original complaint, both an over-all scheme of monopolization and various specific acts, including the acquisitions here in issue, were alleged and asserted to be unlawful. While the specific acts were said to be part of the over-all attempt to monopolize, the acts were also said to contravene Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. No mention of Section 7 of the Clayton Act appears in the complaint.

During the course of the hearings, both Golden Grain and complaint counsel for the FTC appeared to assume that the sole issue was monopolization. Thus, in the Proposed Findings before the hearing examiner, complaint counsel included several findings relative to monopolization, but none on the question whether Golden Grain's acts were illegal in and of themselves. Similarly, Golden Grain's Proposed Findings tended to exonerate the specific acts alleged within the context of an over-all monopolization charge.

The hearing examiner found that Golden Grain had not monopolized or attempted to monopolize the dry-paste market in the Pacific Northwest. He did, however, find that Golden Grain's acquisition of control of Major Italian Foods had violated the prohibition of Section 7 of the Clayton Act against acquisition the effect of which "may be substantially to lessen competition, or to tend to create a monopoly," and therefore had violated Section 5 of the Federal Trade Commission Act. The examiner did not make a similar finding with reference to the stock of Oregon Macaroni because Oregon Macaroni was so small that its acquisition made "little change" in the competitive structure of the market. Golden Grain's acquisition of 49% of the stock of Porter-Scarpelli was excused by the hearing examiner as within the "solely for investment" exception to Section 7 of the Clayton Act.

The Commission affirmed its examiner's order as to Major Italian Foods, but as to Porter-Scarpelli and Oregon Macaroni went further and declared both of these acquisitions also to be unlawful. The Commission based its decision on its conclusion that Section 7 of the Clayton Act proscribed all the challenged acquisitions, and it rejected the hearing examiner's reasons for excluding the two acquisitions from the scope of the order.

[1] Under the Administrative Procedure Act § 5(b), 5 U.S.C. § 554(b), persons entitled to notice of an administrative hearing must be informed of "the matters of fact and law asserted." However, the purpose of the Act is satisfied, and there is no due-process violation, if the party proceeded against "under-

stood the issue" and "was afforded full opportunity" to justify its conduct. *NLRB* v. *Mackay Radio & Telegraph Co.*, [**886**] 304 U.S. 333, 350, 58 S.Ct. 904, 82 L.Ed. 1381 (1938) ; *L. G. Balfour Co.* v. *FTC*, 442 F.2d 1, 19, 21 (7th Cir. 1971) ; *REA Trucking Co.* v. *NLRB*, 439 F.2d 1065 (9th Cir. 1971) ; *Tashof* v. *FTC*, 141 U.S.App.D.C. 274, 437 F.2d 707 (1970) ; *Swift & Co.* v. *United States*, 393 F.2d 247, 5 A.L.R. Fed. 709 (7th Cir. 1968) ; *J. B. Williams Co.* v. *FTC*, 381 F.2d 884 (6th Cir. 1967). On the other hand, if an issue was not litigated, and the party proceeded against was not given an opportunity to defend himself, an adverse finding on that issue by the agency does not violate due process. *L. G. Balfour Co.* v. *FTC*, 442, F.2d at 17; *Rodale Press, Inc.* v. *FTC*, 132 U.S.App.D.C. 317, 407 F.2d 1252 (1968) ; *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966) ; *Northeastern Indiana Building and Construction Trades Council* v. *NLRB*, 122 U.S.App.D.C. 220, 352 F.2d 696 (1965) ; *NLRB* v. *Johnson*, 332 F.2d 216 (6th Cir. 1963), *cert. denied*, 376 U.S. 951, 84 S.Ct. 968, 11 L.Ed.2d 971 (1964).

[2] In the present case the initial complaint, while hardly a model of clarity, put Golden Grain on notice that the specific practices as well as the alleged over-all scheme of monopolization were being challenged. Moreover, an examination of the proceedings subsequent to the complaint demonstrates that while there was some confusion as to the nature of the charge, all facts relevant to the alleged unlawful acts were fully litigated. Actual litigation is often referred to in support of a holding that a party was not prejudiced by initially inadequate pleadings. *NLRB* v. *Mackay Radio & Telegraph Co., supra; Bruhn's Freezer Meats* v. *United States Dept. of Agr.*, 438 F.2d 1332, 1342 (8th Cir. 1971) ; *REA Trucking Co.* v. *NLRB, supra; Tashof* v. *FTC, supra.*

[3] Before the examiner, complaint counsel attempted to prove that Golden Grain had monopolized or attempted to monopolize the macaroni business through a series of illegal acts, and Golden Grain attempted to rebut those charges by proving that each act was not illegal and did not have the effect of creating a monopoly. On Appeal before the Commission, the issue was whether Golden Grain's acquisitions substantially lessened competition or tended to create a monopoly. In this context, there is an obvious difference between the Sherman Act and Clayton Act standards. If Golden Grain had been deprived of all opportunity even to argue that it had not violated the more exacting standards of Section 7 of the Clayton Act, we would not hesitate to reverse. *See Bendix Corp.* v. *FTC*, 450 F.2d 534 (6th Cir. 1971).

But the facts at issue under the two standards can be essentially identical, and were identical in this case. Under both standards, the degree of market foreclosure is determined as of the time of suit. *United States* v. *E. I. du Pont de Nemours & Co.* (*General Motors*), 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957). Under both standards the pricipal factual questions concern the relevant product and geographic market affected by the merger or acquisition and the degree of resulting foreclosure of that market. In the present case this identity of factual issues is compelling, because this proceeding was not brought under either the Sherman Act or the Clayton Act as such, but under Section 5 of the Federal Trade Commission Act. Section 5 condemns "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce * * *." A violation of Section 5 may be found where the "basic policies" of the Sherman Act or the Clayton Act are violated; an actual violation of the underlying statutes need not be found. *FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 321, 86 S.Ct. 1501, 16 L.Ed.2d 587 (1966). Whatever the semantic difference between monopolization and tendency to create a monopoly, it is clear that the "basic policies" of these two prohibitions are the same.

Nor was Golden Grain deprived of an opportunity to present defenses to meet the full array of charges. Golden Grain raised and fully argued the "failing company" defense for its acquisition **[887]** of Major Italian Foods, a defense usually thought peculiar to Clayton Act § 7 violations. Although Golden Grain did not expressly argue that its 49% stock interest in Porter-Scarpelli fell within the "investment" exception to Clayton Act § 7, the precise facts that Golden Grain put forth as negating any monopolistic intent in its acquisition and retention of Porter-Scarpelli stock were relied on by the hearing examiner in his findings that the Porter-Scarpelli stock was held as an investment. Golden Grain has argued that its trial strategy was controlled by the pleadings, but we can find no substantive prejudice. The hearings went on for many months, and if an evidentiary stone was left unturned on the central issues it has not been brought to our attention.

[4] It is true that Golden Grain was never given a sufficient opportunity to argue that the companies it acquired were not "in commerce" within the meaning of Clayton Act § 7. As to two of the acquisitions, Major Italian Foods and Porter-Scarpelli, we hold this defect in the proceedings immaterial, for the evidence that these companies were engaged in interstate commerce was overwhelming. We cannot say the same, however, for Oregon

Macaroni, the smallest of the competitors acquired. As to Oregon Macaroni, we must deny enforcement of the Commission's order, because the element of commerce was never litigated.

Golden Grain next argues that the FTC had no jurisdiction to bring a Clayton Act § 7 action under Federal Trade Commission Act § 5, and that the FTC lost jurisdiction over the case when it dismissed the Sherman Act monopolization charges. This argument adds nothing to the due-process argument discussed above.

[5, 6] Golden Grain's final contention is that Major Italian Foods was a "failing company" within the meaning of *International Shoe Co.* v. *FTC*, 280 U.S. 291, 50 S.Ct. 89, 74 L.Ed. 431 (1930). This may be true, but despite its wide-ranging evidence on the point Golden Grain failed to make a legally sufficient record to establish the failing-company defense. In *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 138, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969), the Supreme Court held that the burden was on the party claiming the failing-company defense to prove that he was the "only available purchaser." This heavy burden has not been met. Golden Grain did prove that other companies looked at, but decided not to buy, Major Italian Foods, but Golden Grain did not prove that the owners of Major Italian had made any affirmative attempt to seek out other purchasers. Merely proving that some or all of the most logical purchasers have declined to buy is not enough to prove that the challenged purchaser was the only prospective purchaser. *United States* v. *Greater Buffalo Press, Inc.*, 402 U.S. 549, 91 S.Ct. 1692, 29 L.Ed.2d 170 (1971).

The Federal Trade Commission order is enforced except for that part of the order requiring divestiture of Oregon Macaroni, which is denied enforcement.

UNITED STATES v. BEATRICE FOODS COMPANY*

No. 4–70 Civ. 459—F.T.C. Docket 6653

(United States District Court, District of Minnesota, Fourth Division, December 26, 1972)

1. ILLEGAL ACQUISITION OF INTEREST IN DAIRY AND FAILURE OF TIMELY DIVESTITURE OF A THIRD DAIRY IN COMPLIANCE WITH F.T.C. ORDER WARRANTED $200 PER DAY PENALTIES ON EACH VIOLATION.

Two hundred dollars per day penalty was warranted for illegal ac-

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***Reported in 351 F. Supp. 969 (1972), 8th Cir., 493 F. 2d 1259 (1974), see p. 867 herein, *cert. denied*, 420 U.S. 961 (1975). For case before the Commission, see 68 F.T.C. 1003, *modified* 71 F.T.C. 797. See also p. 320 herein.**

quisition by dairy products distributor and processor of interest in another dairy, and $200 per day penalty was warranted for failure timely to divest stock of third dairy in compliance with F.T.C. order, with penalty in first case to be imposed from date of acquisition to date of filing of complaint, and penalty in second case to be imposed for period during which defendant was in violation of order.

2. **WHERE DIVESTITURE DID NOT SEEM TO WREAK IRREPARABLE HAVOC ON DEFENDANT, DISTRICT COURT WAS EMPOWERED TO ENTER DIVESTITURE ORDER TO UNDO VIOLATION OF F.T.C. ORDER**

District Court was empowered to enter divestiture order to undo violation of F.T.C. order committed by dairy products processor and distributor in illegally acquiring interest in second dairy, where divestiture did not seem to wreak irreparable havoc on defendant and its subsidiaries and equitable consideration called for such relief.

(Syllabus, with substituted captions, taken from 351 F.Supp. 969)

In penalty suit, Court held that $200 per day penalty was warranted for illegal acquisition of interest in another dairy company by a dairy products distributor and processor, with penalties to be imposed from the date of acquisition to date of filing of complaint. A second $200 per day penalty was found warranted for failure timely to divest stock of third dairy in compliance with FTC order, with penalty being imposed for the period in which defendant was in violation of the order. Order affirmed.

Robert G. Renner, U.S. Atty., by *Neal J. Shapiro*, Asst. U.S. Atty., together with *Joseph J. Gercke*, Federal Trade Commission, Washington, D.C., for plaintiff.

Winston, Strawn, Smith & Patterson, by *Ronald Butler*, Chicago, Ill., for defendant.

ORDER FOR CIVIL PENALTIES AND DIVESTITURE

NEVILLE, *District Judge.*

This case has been before the court twice before. See *United States* v. *Beatrice Foods Co.*, 52 F.R.D. 14 (D.Minn. 1971). A detailed statement of the facts can be found in a later order of this court reported in *United States* v. *Beatrice Foods Co.*, 334 F.Supp. 104 (D.Minn.1972). There defendant was found guilty of violating a cease and desist and divestiture order of the Federal Trade Commission. Thereafter the court held a hearing on the question of penalties to be imposed.

Robert G. Renner, United States Attorney, by Neal J. Shapiro, Esq., Assistant United States Attorney, together with Joseph J. Gercke, Esq., Federal Trade Commission, appeared for the plaintiff; Winston, Strawn, Smith & **[970]** Patterson, Chicago, Illinois, by Ronald Butler, Esq., appeared for the defendant.

Defendant has requested an evidentiary hearing on the issue of penalties to be imposed to the end that it might have an opportunity to present evidence of its alleged good faith in taking the actions it did and which this court held to be violative of the Trade Commission order. This court has read the exhaustive briefs filed by both parties, is familiar with and has read portions of various depositions and does not believe that an evidentiary hearing is necessary or required or would be of any help to the court. In its order of June 15, 1972 the court ruled that under the circumstances of this case any claimed misunderstanding or misinterpretation of the meaning of language contained in the Trade Commission Order (which in its final form is the exact counterpart of an order of the Court of Appeals for the Ninth Circuit) could not be shown or asserted as a defense to its violation. The court did rule however it could consider evidence of defendant's claimed good faith on the issue of penalties to be imposed to weigh such against the government's contention of a willful and deliberate violation of the Order. The court has given consideration thereto.

The statutes involved, 15 U.S.C. § 21(*l*) and § 45(*l*) are much the same and read as follows:

> 15 U.S.C. § 45 (*l*)
>
> Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense.
>
> 15 U.S.C. § 45 (*l*)
>
> Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

As to the Count I violation, illegal acquisition of an interest in Maple Island Dairy, the government pays $5,000 a day penalty from September 1, 1968 through the date of filing the complaint herein, October 23, 1970, a total of $3,910,000. As to Count II, failure timely to divest Valley Gold Dairy Co. stock, the government requests similar daily penalties from September 12, 1969 through January 3, 1970, a total of $565,000. The complaint alleges and there has been no denial thereof that defendant is "one of the largest manufacturers, processors and distributors of dairy products in the United States" and that its consolidated revenues for the fiscal year ending February 28, 1969 were in excess of One Billion, Three Million dollars. It is further alleged, though not completely substantiated, that by the acquisition of Maple Island Dairy it acquired an annual sales volume in excess of $1,000,000. The government argues that to impose but a nominal penalty would merely constitute a license fee for defendant's transgressions, contrary to Congressional intent that the penalties be sufficient to serve as a deterrent to further and other violations of the orders of the Federal Trade Commission. As to the failure to divest **[971]** charge, the court is willing to assume the applicability of the shorter period from November 15, 1969 to January 3, 1970, a total of some 49 days as the period during which defendant was in vioaltion of the Trade Commission Order. The court has some sympathy as a business proposition with defendant's difficulty in finding a ready market for a minority stock interest in a closed corporation, particularly where the principal stockholder of the corporation became deceased. The court also recognizes defendant did divest itself of its other properties as required and eventually of the Valley Gold stock, though some 49 days too late and beyond the last extension of time.

[1] The government's requests seem to the court to be excessive. The court is of the belief, particularly in view of the divestiture herein required, that a penalty of $156,400 or $200 per day for the violation as alleged in Count I of the complaint and $9,800, at the same daily rate, for the violation asserted in Count II of the complaint is appropriate, non-confiscatory and yet sufficient to command defendant's respect and attention and something substantially more than a mere license fee. The court cannot find defendant exculpated by its claimed good faith and believes the above penalties are warranted in the premises.

[2] The government further requests that this court enter a divestiture order to undo the results of the violation defendant committed by acquiring illegally an interest in Maple Island Dairy. The complaint herein was filed over two years ago and defendant meantime has continued to enjoy the acquired sales volume and such other benefits of the illegal acquisition as there might be.

The court believes it has the power and authority to enter such an order under its general equity powers. There are a number of cases, though not directly involving the same facts as in the case at bar, which augur for such a holding. See *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946); *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960); *Shafer* v. *United States*, 229 F.2d 124, 128 (4th Cir. 1956); *United States* v. *Schine*, 260 F.2d 552 (2d Cir. 1959); *United States* v. *H. M. Prince Textiles, Inc.*, 262 F.Supp. 383, 389 (S.D.N.Y.1966); *contra Herbold Laboratory, Inc.* v. *United States*, 413 F.2d 342 (9th Cir. 1969) (dicta). The statute above quoted and here applicable, though making no mention thereof, does not attempt to limit the exercise of the court's general equitable powers and if the court fails to grant equitable relief the illegal violation will continue unabated and the Federal Trade Commission's injunctive cease and desist order will be thwarted and become unenforceable, since the Federal Trade Commission in an instance such as here has no enforcement powers *per se* except through the courts. Congress could not have so intended.

An affidavit submitted by defendant states that after September 1, 1968 Maple Island Dairy terminated supplying dairy products to 26 locations in its so-called northern division. Defendant's subsidiary commenced supplying 19, but the other 7 outlets were closed. Of the original 19, 7 have switched to a competitor. Eight of the remaining 12 are independent distributors. Sales volume from the entire acquisition, which of course is not equivalent in any sense to profit, has dropped to under one-half million per year on the average. Under these circumstances, a divestiture would not seem to wreak irreparable havoc on defendant and its subsidiaries, and equitable considerations call for such relief.

On the basis of the above and on all of the files, records and proceedings herein,

It is ordered that the clerk of court shall enter judgment for civil penalties in favor of plaintiff and against defendant in the amount of $166,200, to be satisfied and paid within 60 days from date of this order by payment through the office of the clerk of this court to the Treasury of the United States.

[972] It is further ordered that within a period ending not later than September 1, 1973, defendant, its agents and subsidiaries shall divest themselves absolutely and outright in good faith of all rights, titles, interests, assets and facilities including the use thereof, directly or indirectly acquired by defendant or its agents and subsidiaries in the former so-called northern division or area of Maple Island Dairy as the result of, and arising out of, its arrangements, contracts, or agreements or those of defendant's agents and subsidiaries, with Maple Island Dairy or others. The divestiture shall be made with and subject to the approval of this court. A comprehensive plan therefor and containing a description of the means for the doing of such shall be submitted to the court with copy to the Federal Trade Commission within 60 days from date of this order. Any plan for divestiture shall be designated to protect the interests of financially affected third parties, consumers and the public. The court retains jurisdiction on noticed motion to modify this divestiture order in any such way as may be required or warranted in the premises.

Let judgment be entered accordingly.

STAR OFFICE SUPPLY CO., ET AL. v. F.T.C.*

No. 35,066. F.T.C. Docket 8749

(United States Court of Appeals, Second Circuit, September 28, 1971**)

On petition for review of F.T.C. cease-and-desist order, Court affirmed Commission's order barring an office supply firm from selling its merchandise through use of misrepresentations.

Jacob P. Lefkowitz, New York, N.Y., and *Abraham Glasser*, Nantucket Island, Mass., for petitioners.

Richard G. Kleindienst, Atty. Gen., Dept. of Justice, Wash., D.C., and F.T.C., Wash., D.C., for respondent.

JUDGMENT

Star Office Supply Company and Henry Pinkwater having filed their petition to review an order issued by the Federal Trade Commission on April 16, 1970, in Docket No. 8749; and the matter having been heard by this Court on briefs and oral argument on September 14, 1971; and the Court having announced its decision that the Commission's order should be affirmed and enforced, it is now therefore

Ordered, Adjudged, and Decreed that the order be, and it hereby is, affirmed and enforced.

PERIODICAL PUBLISHERS' SERVICE BUREAU, INC., ET AL. v. F.T.C., ET AL.†

Civ. A. No. 2532–71. F.T.C. Docket 8832

(United States District Court for the District of Columbia, February 16, 1972‡)

On cross-motion for summary judgment, court held that plaintiffs failed to establish a case for the issuance of a preliminary injunction.

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 73,867, at 91,631 (1972 Trade Cases). *Cert. denied*, 406 U.S. 918 (1972). For case before the Commission, see 77 F.T.C. 383.

**This case was inadvertently omitted from *1971 Supplement of Statutes and Court Decisions*.

†Not otherwise reported. On Dec. 19, 1972, Court of Appeals, District of Columbia issued a judgment in favor of the Commission.

‡This case was inadvertently omitted from *1972 Supplement of Statutes and Court Decisions*.

Accordingly, plaintiffs' motion for preliminary injunction was denied and defendants' motion for summary judgment was granted.

Before GASCH, *District Judge.*

MEMORANDUM-ORDER

This matter came on for consideration on cross motions for summary judgment. Earlier, after hearing in open Court, the Court granted plaintiffs' application for a temporary restraining order to preserve the status quo until consideration could be given to the government's motion for summary judgment and opportunity afforded plaintiffs to file a similar motion. International Magazine Service of the Mid-Atlantic, Inc., has been permitted to intervene.

Plaintiffs seek to enjoin the Federal Trade Commission from proceeding against them in complaint 8832 contending that the complaint was brought in violation of recognized procedures under the Commission's own Rule 1.3(b). In substance, Rule 1.3(b) requires the Federal Trade Commission to give notice when it rescinds an advisory opinion and prevents the Commission from proceeding against a party relying upon the advisory opinion without first affording such party the right voluntarily to comply. Plaintiffs contend that by its Advisory Opinion of May 22, 1967, the Commission approved the "Selling Code for Paid-During-Service Periodical Subscription Agencies" (hereafter referred to as the Code) and therefore could not proceed against them without first complying with Rule 1.3(b). While it is conceded by the defendants that this procedure was not followed, they contend that it is inapposite because the Advisory Opinion addressed itself only to the antitrust aspects of the Code and never approved the practices outlined in the complaint. The government also maintains that the charges contained in the complaint are not inconsistent with the provisions of the Code.

The Court notes at the outset that of the fourteen allegations in the complaint, eight involve practices specifically prohibited by the Code and two which are not covered by the Code. Plaintiffs, therefore, cannot rely on the alleged approval of the Code by the Commission to preclude the agency from proceeding against them on these grounds. Accordingly, the remainder of this opinion will deal with the four allegations concerning practices approved by the Code.[1]

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[1] These allegations, contained in paragraphs 4(a), 5(a), 6(a), 6(e), and 7, were the only allegations challenged by plaintiffs before the Commission. See, plaintiffs' Interlocutory Appeal From Order Denying Motion To Dismiss Complaint, p. 4, August 2, 1971. Charges contained in paragraphs 4(a) and 5(a) involve the same type of activity.

The statutory scheme for proceedings conducted pursuant to 15 U.S.C. § 45 is that appeals from adverse orders of the Commission be taken directly to the United States Court of Appeals. Only in rare instances does this Court have jurisdiction to review Commission decisions. See, *Elmo Division of Drive-X Co.* v. *Dixon*, 348 F.2d 342 (D.C. Cir. 1965). Plaintiffs contend that such an exception is presented by the case at bar since the administrative complaint was issued in violation of the Commission's own rules. *Elmo Division of Drive-X*, *supra*, at 346.

The complete record before this Court reveals about as much evidence to indicate FTC approval of the Code's substantive provisions as it does to demonstrate that the Commission was merely passing on the antitrust aspects of the Code. In an analogous situation the Court of Appeals for this Circuit has stated: [2]

> The question for us, therefore, as it was for the District Court, is not whether plausible grounds can be advanced for each of the contending constructions, but whether the one espoused by the Secretary is beyond the bounds of reasonableness. If it is not, his view prevails, even though appellee's arguments are not without substance.

Plaintiffs do not dispute the aptness of this doctrine but respond by saying "[o]f course, the answer to this contention is that there is no reasonable basis for the Commission's present contentions." [3] This Court cannot agree. The Commission's interpretation of its own order while not conclusive, clearly has a rational basis. Certainly the FTC cannot abdicate its responsibility and authority to perform the duties entrusted to it by law. While voluntary cooperation is desirable, nevertheless, if the Commission finds a basis for concluding that the law has been violated by persons subject to its jurisdiction, it has the duty to proceed with its enforcement complaint. In short, plaintiffs have failed to establish a case for the issuance of a preliminary injunction.

Accordingly, the temporary restraining order heretofore granted by the Court will not be renewed and plaintiffs' application for preliminary injunction is denied. Defendants' motion for summary judgment is granted.

Order accordingly.

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[2] *Udall* v. *Oelschlaeger*, 389 F. 2d 974, 976 (D.C. Cir.), *cert. denied*, 392 U.S. 909 (1968).

[3] Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss or in the alternative for Summary Judgment and in Support of Plaintiffs' Cross-Motion for Summary Judgment, p. 9.

COCA-COLA CO., COCA-COLA BOTTLING CO. (THOMAS), INC., COCA-COLA BOTTLING WORKS (THOMAS), INC., COCA-COLA BOTTLING WORKS 3RD, INC., ELBERTON COCA-COLA BOTTLING CO., RODDY MANUFACTURING CO., WESTMINSTER COCA-COLA BOTTLING CO., INC., COCA-COLA BOTTLING CO. OF KEENE, INC., ANN ARBOR COCA-COLA BOTTLING CO., SCIOTO COCA-COLA BOTTLING CO., AND TEXAS COCA-COLA BOTTLING CO. v. FTC.*

Civ. A. No. 16,484. F.T.C. Docket 8855.

(United States District Court, Northern District of Georgia,
Atlanta Division, May 16, 1972**)

In an action for injunctive and declaratory relief, Court held it had no jurisdiction to review an administrative decision of the Commission in denying plaintiffs' motion to dismiss the complaint for failure of the F.T.C. to join indispensable parties. There was no international implication or urgency, no substantial showing that the respondents' constitutional rights had been violated, no violation of an express statutory prohibition, or any delay on the part of the F.T.C.

Miller, Martin, Hitching, Tipton, Lenihan & Waterhouse, Chattanooga, Tenn., *White & Case*, New York, N.Y., *King & Spalding*, *Kilpatrick, Cody, Rogers, McClatchey & Regenstein*, and *Sutherland, Asbill & Brennen*, Atlanta, Ga., for plaintiffs.

John W. Stokes, U.S. Atty., and *Julian M. Longley, Jr.*, Asst. U.S. Atty., Atlanta, Ga., and *Ronald M. Dietrich*, Gen. Counsel, F.T.C., Wash., D.C., for defendant.

Before Freeman, *District Judge*.

ORDER

Freeman, D.J.: In this action for injunctive and declaratory relief, plaintiffs attack an interlocutory order of the Federal Trade Commission (hereinafter referred to as FTC) entered in an adjudicative proceeding pending before the FTC. Plaintiffs are a soft drink manufacturer, The Coca-Cola Company, and ten bottling companies who package and distribute its products. Defendant is a regulatory agency of the United States—FTC. Plaintiffs assert that this court has jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1337

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 73,998, at 92,156 (1972 Trade Cases). For F.T.C. interlocutory ruling, see 80 F.T.C. 1023.

**This case was inadvertently omitted from *1972 Supplement of Statutes and Court Decisions*.

(antitrust), 28 U.S.C. § 1361 (mandamus) and 28 U.S.C. § 1651 (All Writs Act).

Plaintiffs have moved for a preliminary injunction. Defendant has moved to dismiss the action. On May 3, 1972, this court heard argument on the above motions.

STATEMENT OF THE CASE

Plaintiff, Coca-Cola, is a Delaware corporation with its principal office and place of business in Atlanta, Georgia. Coca-Cola is engaged primarily in the business of manufacturing syrups and concentrates used by over nine hundred (900) contract bottlers in the preparation of soft drink products under its trademarks, including the trademark Coca-Cola. The bottlers, licensed by Coca-Cola to sell in certain geographical areas, mix the concentrate purchased from Coca-Cola, package it in bottles and resell the product. In addition to manufacturing and selling soft drink products, Coca-Cola also operates bottling plants in twenty-six (26) cities and sells soft drink products to retailers in those areas.

Plaintiffs, Coca-Cola Bottling Co. (Thomas), Inc.; Coca-Cola Bottling Works (Thomas), Inc.; and Coca-Cola Bottling Works 3rd, Inc. (hereinafter referred to as Thomas Companies), are Delaware corporations with their principal offices and places of business in Chattanooga, Tennessee. The Thomas Companies are parent bottlers who have operated for many years under contract with Coca-Cola whereby they purchase concentrate from Coca-Cola for resale to numerous bottlers which have obtained licenses from the Thomas Companies to bottle and resell Coca-Cola products within certain geographical territories.

The remaining plaintiffs (hereinafter referred to as FTC Intervenor Bottlers) are corporations organized, existing and having their principal offices and places of business as follows: Elberton Coca-Cola Bottling Company, Elberton, Georgia; Roddy Manufacturing Company, Knoxville, Tennessee; Westminster Coca-Cola Bottling Company, Inc., Westminster, Maryland; Coca-Cola Bottling Company of Keene, Inc., Keene, New Hampshire; Ann Arbor Coca-Cola Bottling Company, Ann Arbor, Michigan; The Scioto Coca-Cola Bottling Company, Circleville, Ohio; Texas Coca-Cola Bottling Company, Abilene, Texas. The FTC Intervenor Bottlers are engaged in the processing and sale of Coca-Cola products in designated territories pursuant to bottler contracts.

Defendant, FTC, is an administrative agency of the United States charged with, among other things, the duty of investigating, issuing and prosecuting in its adjudicative proceedings alleged violations of the antitrust laws.

On July 15, 1971, the FTC issued an administrative complaint (Docket No. 8855) charging The Coca-Cola Company (hereinafter referred to as (Coca-Cola), Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc. and Coca-Cola Bottling Works 3rd, Inc. with a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).[1] Specifically, the Administrative complaint[2] charges that, in the course of their business, Coca-Cola and the Thomas Companies have entered into licenses with their bottler customers whereby the bottlers agree not to resell Coca-Cola products outside a designated geographical area, and that such license provisions constitute an unfair method of competition.

Coca-Cola and the Thomas Companies filed an answer admitting the material facts in the complaint, including the existence of the territorial restrictions; but they denied the alleged violation of law. The FTC Intervenor Bottlers applied for and were granted permission to intervene in the proceeding.

Plaintiffs filed motions to dismiss the administrative complaint in Docket 8855 for failure to join indispensable parties. In their motions, plaintiffs contended that all bottlers licensed to bottle and distribute Coca-Cola products are indispensable parties to the administrative adjudication and therefore must be joined. On March 23, 1972, the FTC denied plaintiffs' motions to dismiss.[3]

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[1] Section 5(a) provides in part:

"(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

* * * * * * *

"(6) The Commission is hereby empowered and directed to prevail persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

[2] The FTC also issued administrative complaints involving seven (7) other soft drink manufacturers, alleging similar theories.

[3] Plaintiffs initially presented their motions to the hearing examiner who denied them on January 7, 1972. Plaintiffs sought review of the hearing examiner's order by filing an application for permission to file an interlocutory appeal under the FTC's Rules of Practice (16 C.F.R. § 3.23) or, in the alternative, to treat the motions as certified to the Commission by the hearing examiner pursuant to FTC's Rules of Practice (16 C.F.R. § 3.22). Since the Commission found that the hearing examiner did not have authority to add parties, it dealt with plaintiffs' motions under the latter Rule, stating that:

The Commission has made a distinction however, between those instances in which the motion to dismiss challenges the Commission's legal power to issue the complaint and those in which it seeks to probe the Commission's discretion or judgment on whether or not a proceeding would be in the public interest. It is only in the latter instance in which the examiner is considered to be without authority to rule. See, *The Drive-X Company, Inc.*, Docket No. 8615, Order Denying Application for Leave To File Interlocutory Appeal, or in the Alternative for an Order Requiring Certification of Question, June 10, 1964. While it is clear that the present situation falls within the former, *i.e.*, the category of cases challenging the Commission's legal authority to issue the complaint, and hence within the examiner's authority to decide, we have nevertheless determined that that question is so

Plaintiffs instituted the present action seeking: (1) a declaratory judgment decreeing that the bottlers of plaintiff Coca-Cola and plaintiff Thomas Companies are indispensable to the FTC proceeding challenging the contractual provisions and, the FTC having willfully failed to join them as parties, the complaint therein should be dismissed; and (2) an injunction enjoining the FTC from conducting any further proceedings in Docket 8855 as long as the bottlers are not joined as parties to said proceeding, and, failing that, requiring defendant to dismiss the complaint therein.

Plaintiffs base the requests for relief on the allegations that unless the FTC is enjoined it will proceed with the adjudication without all the bottlers being parties and should the FTC prevail therein with respect to its challenge to the exclusive territorial provisions of the bottlers' contracts:

(a) Plaintiffs Coca-Cola and the Thomas Companies would be subject to two inconsistent decrees, to wit: the decree of the United States District Court of Delaware [4] and the order of the Federal Trade Commission;

(b) The judicially declared property rights of the bottlers who are not parties, including the rights of said bottlers vis-a-vis other such bottlers, would be altered;

(c) All bottlers must have the opportunity to be heard further in other proceedings in defense of their property rights. As a result thereof, without the presence of the bottlers, Docket 8855 cannot result in effective relief of the kind sought by defendant Commission;

(d) Plaintiffs and the public would also be subject to multiple litigation and would be deprived of the right to a settlement of the dispute by wholes;

(e) The ultimate resolution of the matter will be inordinately delayed;

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intertwined with the question of amending the complaint by the addition of parties that both should have been certified to the Commission. *Order Ruling on Motions To Dismiss for Failure To Join Indispensable Parties, The Coca-Cola Company, et al.*, Docket No. 8855 (March 23, 1972), at 4.

[4] Without passing on the merits of this contention the court makes the following comments. In *The Coca-Cola Bottling Co. v. The Coca-Cola Co.*, 269 F. 796 (D. Del. 1920) the court considered the legality of a 1894 contract between Coca-Cola and a predecessor to the Thomas Companies. Under that contract, Coca-Cola, which previously had sold syrup only through soda fountains, licensed the distribution of soft drink in bottles and granted exclusive right to establish plants throughout a large part of the United States. In 1919, Coca-Cola and the bottling company had a disagreement concerning a price rise in the cost of syrup. Coca-Cola attempted to unilaterally terminate the contract. The bottling company sued for specific performance. Coca-Cola defended, *inter alia,* on the grounds that the terms of the contract violated federal antitrust laws. The court held that the contract was not terminable at the will of Coca-Cola. The court also held that the various restrictions in the contract were ancillary to the main purpose of the contract which was to develop a system of distributing the soft drink in bottles. Thus, the "territorial provision", whereby Coca-Cola agreed to "select [the bottling company] as its sole and exclusive customer and licensee for the purpose of bottling Coca-Cola in the territory heretofore acquired * * *" (269 F. at 802), was found to be reasonable. However, there is no mention in the case of any provision whereby the bottlers agree not to sell Coca-Cola products outside a certain territory which is the provision under attack in the present FTC proceeding Docket No. 8855. Thus, it would appear that unless such a provision can be inferred from the above quote, the legality of the "territorial provision" under attack in the FTC proceedings was not ruled upon by the Delaware Court.

(f) The proceeding would have to be dismissed or repeated with the bottlers as parties;

(g) Bottlers might be forced out of business.

Plaintiffs contend that a continuation of the proceedings in Docket No. 8855 without the presence of the bottlers as parties will deprive plaintiffs of their rights to due process of law and to basic fairness under the Fifth Amendment to the Constitution of the United States and the Administrative Procedure Act.

Since defendant's motion to dismiss raises the issue of this court's jurisdiction to entertain the present action, the court will deal with it first.

JURISDICTION

Although plaintiffs contend that the present action is a suit for a declaratory judgment and injunctive relief to protect plaintiffs' fundamental rights and to prevent the exercise of engaging in a potentially futile trial, the court believes that it is more appropriately characterized as a collateral suit to review agency action which is procedural in nature. Thus, the court will treat this as an action seeking judicial review of an administrative decision.

Both plaintiffs and defendant concede that the FTC's order denying plaintiff's motion to dismiss is reviewable. Therefore, the questions for this court to determine are: first, when is the FTC's action reviewable; and second, by whom is it reviewable? The first question presents the issues of ripeness and exhaustion, while the second question presents the issue of the proper court—District Court or Court of Appeals. In determining the answers to these questions the court will look first to the statutory law and then to the case law.

STATUTORY LAW

Congress has delegated the administration of the Federal Trade Commission Act (15 U.S.C. § 41 *et seq*) (hereinafter referred to as the Act) to the FTC. That delegation gives the FTC jurisdiction to institute and conduct adjudicative proceedings whenever it has reason to believe that an unfair method of competition is being used and a proceeding would be in the public interest.[5] If, as a result of such adjudicative proceeding, the FTC finds that there has been an unfair method of competition practiced, it has the power to issue cease-and-desist orders.[6] Section 5(c) of the Act confers jurisdiction to review cease-

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[5] 15 U.S.C. § 45 *et seq.* Docket 8855 is such a proceeding.

[6] Plaintiffs do not contest the FTC's authority to conduct adjudicative proceeding dealing with alleged unfair methods of competition. Neither do plaintiffs contest the FTC's authority to issue cease-and-desist orders to prevent such practices.

and-desist orders upon the courts of appeals.[7] That jurisdiction is made exclusive by Section 5(d).[8] The Act is silent as to any other type of judicial review. Since no cease-and-desist order has been entered, this court must look elsewhere.

Plaintiffs assert that the Administrative Procedure Act (5 U.S.C. § 551 *et seq*) makes such agency action reviewable at this time. The review provision of Section 10 of that Act provides in part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. 5 U.S.C. § 704.

Before determining when the above section makes the FTC's denial of plaintiffs' motions to dismiss reviewable, it is necessary to characterize the denial of a motion to dismiss in an agency adjudication.

Since the agencies frequently refer to the Federal Rules of Civil Procedure to make procedural determinations in their proceedings, the court will use the federal judicial proceedings by way of analogy. In a proceeding before a federal district court the denial of a motion to dismiss is not a final order and therefore is not appealable. 2A MOORE'S FEDERAL PRACTICE, Section 12.14 at 2338. Thus, a denial of a motion to dismiss is interlocutory in character. Under the Federal Rules of Appellate Procedure, Rule 5(a), appeal of an interlocutory order may be had under certain circumstances. However, Federal Rules of Appellate Procedure, Rule 20, excludes the application of Rule 5 interlocutory appeals from review or enforcement of agency orders. Thus, it would appear that Congress did not provide for any review of interlocutory agency orders in the Federal Rules.

Turning now to the review provisions of Section 10 of the Administrative Procedure Act, the first sentence addresses itself to agency action which is reviewable by statute or final in character. The court has determined that the Federal Trade Commission Act does not provide for review of the denial of a motion to dismiss and the court is not aware of any other statutory provision making such action reviewable. The court has characterized the FTC's action as interlocutory rather than final. Thus, the first sentence of Section 10 does not confer the power on this court to review the FTC's action. The second sentence of Section 10 provides for review of "preliminary, procedural, or intermediate agency action" on the review of final agency action. Since interlocutory is synonymous with intermediate, the Administrative Procedure Act provides for review of the FTC's denial of plaintiffs' motion to dismiss only upon review of cease-and-desist order entered by the FTC as a result of the adjudicative proceeding in Docket 8855. However, such review is in the exclusive jurisdiction of the Court of Appeals. Thus, there is no statutory basis for this court's jurisdiction over the present action. Therefore, if this court has jurisdiction, then it must be conferred by case law.

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[7] 15 U.S.C. § 45(c).
[8] 15 U.S.C. § 45(d).

CASE LAW

In view of the statutory prescription of judicial review of agency action directly in a court of appeals, district courts ordinarily lack jurisdiction to review agency action. Thus, where Congress has provided an adequate procedure for judicial review of administrative action, that procedure must be followed. Only in extraordinary cases will parties be allowed to deviate from this statutory course and seek injunctive relief from the district court, short-circuiting the administrative procedures. The court agrees with and adopts the reasons for the exhaustion doctrine as stated by Mr. Chief Justice Burger, while a circuit judge, in *Wolf Corp.* v. *Securities and Exchange Commission*, 317 F.2d 139 (D.C. Cir. 1963):

> Judicial power to impose prior restraint is not called an extraordinary remedy without reason. Even as between private parties the ordinary remedy is legal action after injury. Prior restraint is granted only upon a strong showing and is subject to definite and well established limitations. Prior restraint against governmental action, regular on its face and under color of authority, is even more cautiously exerted. Still higher hurdles stand in the way of prior restraint against the processes of a regulatory body exercising quasi-judicial powers which can be judicially reviewed as a matter of right before they become final. In this third category the jurisdiction of the regulatory or administrative body is exercised within the framework of a statutory scheme in which it acts as an arm of Congress; moreover it has established patterns of procedure and acts in a context where courts have long acknowledged a considerable deference to the specialized experience and competence of such a body. To exert judicial power to stop processes of this third category, which can always be judicially reviewed when the story is fully told and recorded is an extraordinary step in the usual as well as the legally artful sense of that word. One who seeks our employment of such powers must make the strongest kind of showing; his jurisdictional "t's" must be crossed and the factual "i's" dotted.
>
> The reasons for this restrained attitude on our part are plain if we look at the whole panorama. When Congress vested broad powers in the Commission it was not unaware of possible risks of misuse or even abuse of those powers by administrators. But except in very unusual and limited circumstances Congress did not contemplate a grant of jurisdiction to the courts to prevent abuse or misuse of power by prior restraint of the exercise of the powers. Instead judicial review after full hearing was accorded. While this does not preclude judicial restraint in advance of the administrative process in all circumstances, such relief is to be very sparingly applied and is limited to cases where on its face the contemplated hearing or other administrative process, if consummated, would be set aside on review on procedural grounds. at 142–43.

There are however cases which recognize very narrow and extraordinary exceptions to the general rule requiring exhaustion of administrative remedies. Plaintiffs contend that the present action falls within the limited exceptions carved out of the exhaustion doctrine by the cases. Although most of the exceptions have been established in labor cases, the principles established are equally as applicable to actions before the FTC.

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) established that a district court did not have jurisdiction to enjoin the hearing of a case before, or to review any interlocutory order of, the National Labor Relations Board because Congress had vested the exclusive power of review in the Circuit Courts of Appeal and for the additional reason that " * * * no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers*, *supra*, at 50. The *Myers* ruling has consistently been approved and the principle has become well established that a district court does not possess the power to police either the procedural or the substantive purity of a proceeding in progress before an agency. *Bokat* v. *Tidewater Equipment Co.*, 363 F.2d 667 (5th Cir. 1966).

The *Myers* principle is, however, not without exceptions and case law has allowed district court interference in agency proceedings in a few narrowly circumscribed instances, all of which have been thought to be based upon "exceptional circumstances". *Boire* v. *Miami Herald Publishment Company*, 343 F.2d 17 (5th Cir. 1965).

The first exception is where the suit tenders a "public question particularly high in the scale of our national interest because of their international complexion." *McCulloch* v. *Sociedad National de Marineros de Honduras*, 372 U.S. 10, 17 (1963). There the court permitted review of an NLRB election order because of the international overtones involved in the Board's application of the National Labor Relations Act to foreign maritime crews. In the present case, there is no international implication or urgency as there was in *Sociedad National*. Thus, the present action does not fall within this exception.

A second exception to the rule of exhaustion was fashioned by the Second Circuit in *Fay* v. *Douds*, 172 F. 2d 720 (2d Cir. 1949). This exception allows a district court to assert jurisdiction where there has been a substantial showing that agency action has violated the constitutional rights of the complaining party. This exception has only limited application in the Fifth Circuit. See *Boire* v. *Miami Herald Publishing Company*, 343 F.2d 17, 21 at n. 7 (5th Cir. 1965). Plaintiffs may be attempting to invoke this exception by alleging that by failing to join all the Coca-Cola bottlers as indispensable parties the FTC is denying them due process and basic fairness. The court finds this proposition has no merit. Since a party to a judicial action before a federal district court could not be said to be denied due process by a court's denial of a motion to dismiss for failure to join indispensable parties, the same must hold true for a party to an administrative action. See *Frito-Lay* v. *Federal Trade Commission*, 380 F.2d 8 (5th Cir. 1967).

A third exception was developed by the court in *Leedom* v. *Kyne*, 358 U.S. 184 (1958). There the court permitted review of the NLRB's certification of a bargaining unit which included both professional and nonprofessional employees even though the professional employees had not consented to inclusion in the otherwise nonprofessional unit. This action was in direct defiance of an express provision of the National Labor Relations Act. The District Court, whose judgment was affirmed by the Second Circuit, held that the Board had acted in excess of its powers and set aside the Board's determination even though it was not a "final order". On appeal the Board contended that the District Court lacked jurisdiction to entertain the suit. In this extreme factual context the Supreme Court held that the District Court had original jurisdiction:

> This is not one to "review", in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather, it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. * * * Plainly, this was an attempted exercise of powers that had been specifically withheld. It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given. 358 U.S. at 188, 89.

Leedom could easily have opened the doors to the Federal District Courts for numerous attacks on agency action. However the exception created by *Leedom* has remained very narrow. The narrowness of this exception was pointed out by the Fifth Circuit in *United States* v. *Feaster*, 410 F.2d 1354 (5th Cir. 1969):

> * * * *Leedom* v. *Kyne* represents only a narrow and rarely successfully invoked exception to the doctrine that exhaustion of administrative procedures is a condition precedent to federal court jurisdiction. Under this exception access to the courts is accorded only if the Mediation Board's determination is infused with error which is of a *summa* or *magna* quality as contraposed to decisions which are simply *cum* error. Only the egregious error melds the Board's decision into justiciability. Lesser malignancies thwart the jurisdiction of the courts. (cases cited) at 1368.

In the present action there is no statutory prohibition or provision of the Federal Trade Commission Act which the FTC is alleged to have violated. Even if on review by the Court of Appeals it was found that the FTC should have joined all the bottlers as indispensable parties, the FTC's failure to do so is not such an abuse by it that it is obvious on its face that it has acted incorrectly. Even if it was, the court does not believe that this is the kind of agency action protected against by the *Leedom* exception. Accordingly the court finds that the present action does not fall within this exception.

The fourth exception is recognized by the Fourth Circuit. In *Deering-Milliken Inc.* v. *Johnston*, 295 F.2d 856 (4th Cir. 1961), an action was brought pursuant to Section 10(e) of the Administrative Procedure Act [5 U.S.C. § 1009(e)] to compel agency action wrongfully withheld. The Court concluded that Section 6(a) of the Administrative Procedure Act [5 U.S.C. § 1005(a)] gave the complaining party a "specific statutory right" to have his hearing concluded with reasonable dispatch and that, as judicial review to prevent delay was adequate only through district court intervention, a district court was vested with the power to act. Delay on the part of the agency was considered implicitly to constitute exhaustion of administrative remedies. This exception has no application to the present case since there has been no delay on the part of the FTC.

The court has also considered the other cases relied on by plaintiffs such as: *McKart* v. *United States*, 395 U.S. 185 (1969); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557 (1919); *Jewel Companies, Inc.* v. *Federal Trade Commission*, 432 F.2d 1155 (7th Cir. 1970); *Davis* v. *Secretary of Health, Education and Welfare*, 386 F.2d 429 (4th Circuit 1967); *Wolf Corp.* v. *Securities Exchange Commission*, 317 F.2d 139 (D.C. Cir. 1963); *The Coca-Cola Company* v. *Federal Trade Commission*, 342 F. Supp. 760 (N.D. Ga. 1972), Civil Action No. 15436; *Lehigh Portland Cement Co.* v. *Federal Trade Commission*, 291 F. Supp. 628 (E. D. Va. 1968); *Union Bag-Camp Paper Corp.* v. *Federal Trade Commission*, 233 F. Supp. 660 (S.D. N.Y. 1964); *Yanish* v. *Wixon*, 81 F. Supp. 499 (N.D. Cal. 1948). None of these cases creates any new exception or broadens any of the above exceptions.

Thus, this court has been unable to find any case which has broadened the exhaustion doctrine to the point where the denial of a motion to dismiss for failure to join indispensable parties by an administrative agency can amount to the kind of agency action which will create jurisdiction in a Federal District Court to grant review or relief of any kind.

This court has been unable to find jurisdiction in either the statutory law or the case law to entertain the present action. Thus, the answers to the questions before the court as to when review of the FTC action is available and by whom the FTC's action is reviewable, are at the time any cease-and-desist order is reviewed and that review must be by the Court of Appeals.

Accordingly, defendant's motion to dismiss is hereby granted.

It Is So Ordered.

F.T.C. v. COLDWATER SEAFOOD CORP.*

No. M-18-304

(United States District Court, Southern District of New York, August 8, 1972)

In a subpoena enforcement action, Court held invalid defendant's claim that certain financial information requested in a subpoena *duces tecum* was confidential. The Court also rejected defendant's suggestion that the F.T.C. should have followed the protective arrangements as set forth in *FTC* v. *Crowther*, 430 F.2d 510 (D.C. Cir 1970), 1970 Trade Cases ¶73,238.

Before Frankel, *District Judge.*

Memorandum

Frankel, D. J.: The respondent resists production of its profit and loss statements, balance sheets, and attendant information called for by Item 4 of the subpoena upon a claim of "confidentiality." The crux of this position lies in respondent's asserted character as a closely-held corporation. In brief exploration of this assertion, counsel for respondent was unable to say whether the information in question is available to the membership of the cooperative which wholly owns the respondent corporation.

Even apart from this possible defect in the position, the claim of confidentiality must fail. Of the total of 28 identical subpoenas *duces tecum* issued by the hearing examiner to various companies, 26 recipients have come forth with the requested information. No claim is made that the information is not relevant and material in the Commission's pending proceeding. No good reason whatever is suggested for its being withheld.

The Commission has fashioned a protective order for the benefit of this and other respondents. There is a suggestion by respondent in this court that the Commission ought preferably to have followed the protective arrangements of *FTC* v. *Crowther*, 430 F.2d 510 (D.C. Cir. 1970). The suggestion was never pressed with any clarity in the instant proceeding before the Commission and it comes with fatal tardiness here. There is also a contention that the protective order in this case has not been effective. This contention rests on somewhat ambiguous hearsay. Nevertheless, it is a matter of concern to the Commission and to this court. The Commission, through the United States Attorney, has represented here that the hearing examiner will proceed immediately to explore the claim of breach and to take remedial action if the claim is substantiated. The court assumes, therefore, that the examiner—and, if necessary, the Commission—will make an explicit finding, one way or the other, as to whether the protective arrangements have been violated. If there has been a violation, a remedial action should lie in the Commission's discretion, at least in the first instance. All have agreed before me that the respondent would be entitled to have review of such remedial action, if it deems itself aggrieved or insufficiently protected thereby.

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 74,115, at 92,654 (1972 Trade Cases).

This case was inadvertently omitted from *1972 Supplement of Statutes and Court Decisions.*

Finally, the Commission is entitled to explore, through its examiner, the flat assertion by the respondent that it does not have, and has never kept, various records of a kind that would seem prima facie to be necessary or likely parts of such a corporation's papers.

In sum, the claim of confidentiality with respect to Item 4 is rejected. Respondent will appear before the hearing examiner to explore the non-existence of documents referred to just above. Unless the issue as to suitable measures for breach of the protective conditions is properly eligible for review, the respondent should proceed to comply with the subpoena in the respects herein discussed.

Settle an order on notice.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., v. PATSY T. MINK, ET AL.*

No. 71-909

(Supreme Court of the United States, January 22, 1973)

1. FREEDOM OF INFORMATION ACT PROVISION EXCLUDING SPECIFIC MATTERS REQUIRED BY EXECUTIVE ORDER TO BE KEPT SECRET IN INTEREST OF NATIONAL DEFENSE OR FOREIGN POLICY PRECLUDED COMPELLED DISCLOSURE OF DOCUMENTS.

   [827] Where documents pertaining to proposed underground atomic explosion were classified "top secret" or "secret," pursuant to executive order, provision of Freedom of Information Act which excludes from the operation of the Act matters specifically required by executive order to be kept secret in interest of the national defense or foreign policy precluded compelled disclosure of the documents.

2. THE PRESIDENT MAY DELEGATE HIS AUTHORITY TO CLASSIFY DOCUMENTS FOR PURPOSES OF EXEMPTION FROM THE FREEDOM OF INFORMATION ACT.

   For purposes of exemption from the operation of the Freedom of Information Act of matters that are specifically required by executive order to be kept secret in the interest of national defense or foreign policy, the President may delegate his authority to classify documents.

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*Reported in 410 U.S. 73, 93 S.Ct. 827 (1973). Although this case does not directly involve the Federal Trade Commission, it has been included in this publication because it contains the most definitive discussion to date of Section 552(b)(1) and, in particular, Section 552(b)(5) of the Freedom of Information Act of 1966.

3. **Classification of Material Under Executive Order Is Sufficient To Protect Documents From Disclosure Under the Freedom of Information Act Exemption.**

The Freedom of Information Act exempts matters specifically required by executive order to be kept secret and classification of material under executive order is sufficient to protect documents from disclosure.

4. **The Freedom of Information Act Is Not Intended To Subject the Soundness of Executive Security Classification to Judicial Review.**

The Freedom of Information Act is not intended to subject the soundness of executive security classification to judicial review at the insistence of any objecting citizen.

5. **Freedom of Information Act Exemption Provision Does Not Authorize or Permit *In Camera* Inspection of Contested Document so That Court May Separate the Secret From the Nonsecret and Order Disclosure of the Nonsecret.**

Provision of the Freedom of Information Act which exempts from its mandate matters which are specifically required by executive order to be kept secret in interest of the national defense or foreign policy does not authorize or permit *in camera* inspection of a contested document bearing a single classification so that the court may separate the secret from the supposedly nonsecret and order disclosure of the nonsecret.

6. **Freedom of Information Act Entitles Public to All Inter-Agency or Intra-Agency Memoranda or Letters Discoverable in Litigation.**

[828] The Freedom of Information Act entitles the public to all inter-agency or intra-agency memoranda or letters that a private party could discover in litigation with the federal agency.

7. **Exemption Provision of Freedom of Information Act Relating to Memoranda and Letters Not Available by Law to Parties in Litigation With the Agency Makes Privileged From Inspection Confidential Intra-Agency Advisory Opinions.**

Provision of the Freedom of Information Act which exempts from its mandate inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency makes confidential intra-agency advisory opinions privileged from inspection.

8. **Courts Are Not Given the Option To Impose Alternative Sanctions—Short of Compelled Disclosure—in Actions Under Freedom of Information Act.**

In actions under the Freedom of Information Act, courts are not given the option to impose alternative sanctions—short of compelled disclosure—such as striking a particular defense or dismissing the government's action.

9. **The Privilege of Compelled Disclosure Attached to Intra-Governmental Memoranda Clearly Has Finite Limits.**

The privilege of compelled disclosure that attaches to intra-governmental memoranda clearly has finite limits, even in civil litigation; in each case, the question is whether production of the contested document would be injurious to the consultative functions of government that the privilege of nondisclosure protects.

10. **Memoranda Consisting of Compiled Factual Material Is Available for Discovery in Absence of Claim That Disclosure Would Jeopardize State Secrets.**

In absence of claim that disclosure would jeopardize State secrets, memoranda consisting of only compiled factual material or purely factual material contained in deliberative memoranda and separable from its context would generally be available for discovery by private parties in litigation with the government.

11. FREEDOM OF INFORMATION ACT DOES NOT PERMIT WITHHOLDING OF FACTUAL MATERIAL OTHERWISE AVAILABLE ON DISCOVERY BECAUSE IT WAS PLACED IN MEMORANDUM WITH MATTERS OF LAW, POLICY OR OPINION.

Although the Freedom of Information Act does not require nondisclosure of manifestly private and confidential policy recommendations simply because the document containing them also happens to contain factual data, it does not permit the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of law, policy or opinion.

12. EXEMPTION PROVISION CONTEMPLATES THAT THE PUBLIC'S ACCESS TO INTERNAL MEMORANDA WILL BE GOVERNED BY THE SAME FLEXIBLE, COMMON SENSE APPROACH THAT HAS LONG GOVERNED DISCOVERY OF DOCUMENTS INVOLVED IN LITIGATION.

Provision of Freedom of Information Act exempting inter-agency or intra-agency memorandums or letters which would not be available by law to a party contemplates that the public's access to internal memoranda will be governed by the same flexible, common sense approach that has long governed private parties' discovery of such documents involved in litigation with government agencies.

13. ALTHOUGH IN SOME SITUATIONS *IN CAMERA* INSPECTION WILL BE NECESSARY AND APPROPRIATE, IT NEED NOT BE AUTOMATIC.

Although in some situations in which compelled disclosure of governmental agency memoranda is sought, *in camera* inspection will be necessary and appropriate, it need not be automatic; an agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the district court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency.

14. IF AGENCY RESISTS DISCLOSURE, BURDEN OF PROOF IS ON THE AGENCY, AND IF AGENCY FAILS TO MEET ITS BURDEN WITHOUT *IN CAMERA* INSPECTION, COURT MAY ORDER *IN CAMERA* INSPECTION OF MATERIAL IN QUESTION.

Burden is on the agency resisting disclosure of intra-agency or inter-agency memoranda on ground it is beyond range of material available to a private party in litigation with the government and if it fails to meet its burden without *in camera* inspection, the district court may order *in camera* inspection of government memoranda in order to determine whether it might be disclosed.

15. A REPRESENTATIVE DOCUMENT OF THOSE SOUGHT MAY BE SELECTED FOR *IN CAMERA* INSPECTION GIVING THE AGENCY AN OPPORTUNITY TO DEMONSTRATE BY SURROUNDING CIRCUMSTANCES, THAT PARTICULAR DOCUMENTS ARE WITHIN THE EXEMPTION.

Government agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory, contain no separable, factual information which might be subject to disclosure and are within exemption of Freedom of Information Act for intra-[**829**]agency memoranda used in the decision-making process of the Executive Branch and a representative document of those sought may be selected for *in camera* inspection.

16. **AGENCY MAY ATTEMPT TO SHOW THAT EXCISED PORTIONS CONSTITUTE BARE BONES OF MATTER PROTECTED BY EXEMPTION PORTION OF FREEDOM OF INFORMATION ACT.**

    Agency may itself disclose the factual portions of the contested documents and attempt to show by circumstances that the excised portions constitute the bare bones of matter protected by the Freedom of Disclosure Act as being used in the decision-making processes.

17. ***IN CAMERA* INSPECTION OF ALL DOCUMENTS IS NOT A NECESSARY TOOL IN EVERY CASE IN WHICH GOVERNMENT CLAIMS EXEMPTION TO FREEDOM OF INFORMATION ACT.**

    In camera inspection of all documents is not a necessary or inevitable tool in every case in which the government claims that disclosure is exempted by the Freedom of Information Act provision excluding inter-agency or intra-agency memoranda which is not available by law to a party in litigation with the agency.

(Syllabus, with substituted captions, taken from 93 S.Ct. 827 (1973))

[830] Mr. Justice WHITE delivered the opinion of the Court.

The Freedom of Information Act of 1966, 5 U.S.C. § 552, provides that government agencies shall make available to the public a broad spectrum of information but exempts from its mandate certain specified categories of information, including matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," § 552(b) (1), or are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." § 522(b) (5). It is the construction and scope of these exemptions that are at issue here.

I

[75] Respondents' lawsuit began with an article that appeared in a Washington, D.C., newspaper in late July 1971. The article indicated that the President had received conflicting recommendations on the advisability of the underground nuclear test scheduled for that coming fall and, in particular, noted that the "latest recommendations" were the product of "a departmental under-secretary committee named to investigate the controversy." Two days later, Congresswoman Patsy Mink, a respondent, sent a telegram to the President urgently requesting the "immediate release of the recommendations and reports by inter-departmental committee. * * *" When the request was denied, an action under the Freedom of Information Act was commenced by Congresswoman Mink and 32 of her colleagues in the House.[1]

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[1] A separate action was brought to enjoin the test itself, *Committee for Nuclear Responsibility, Inc.* v. *Seaborg* (D.D.C., Civ. Action No. 1346–71). After adverse decisions below, plaintiffs in that case applied for an injunction in this Court. On November 6, 1971, we denied the application, *Committee for Nuclear Responsibility, Inc.* v. *Schlesinger,* 404 U.S. 917, 92 S.Ct. 242, 30 L.Ed.2d 191 and the test was conducted that same day.

It should be noted that in the District Court respondents stated that they "have exhausted their administrative remedies [and] * * * have complied with all applicable regulations." Petitioners did not contest those assertions.

Petitioners immediately moved for summary judgment on the grounds that the materials sought were specifically exempted from disclosure under subsections (b)(1) and (b)(5) of the Act.[2] In support of the motion, petitioners filed an affidavit of John N. Irwin, II, the Undersecretary **[76]** of State. Briefly, the affidavit states that Mr. Irwin was appointed by President Nixon as Chairman of an "Undersecretaries Committee," which was a part of the National Security Council system organized by the President "so that he could use it as an instrument for obtaining advice on important questions relating to our national security." The Committee was directed by the President in 1969 "to review the annual underground nuclear test program and to encompass within this review requests for authorization of specific scheduled tests." Results of the Committee's reviews were to be transmitted to the President "in time to allow him to give them full consideration before the scheduled events." In ¶ 5 of the affidavit, Mr. Irwin stated that pursuant to "the foregoing directions from the President," the Undersecretaries Committee had prepared and transmitted to the President a report on the proposed underground nuclear test known as "Cannikin," scheduled to take place at Amchitka Island, Alaska. The report was said to have consisted of a covering memorandum from Mr. Irwin, the report of the Undersecretaries Committee, five documents attached to that report and three additional letters separately sent **[831]** to Mr. Irwin.[3] Of the **[77]** total of 10 documents, one, an Environmental Impact Statement prepared by AEC, was publicly available and was not in dispute. Each of the other nine was claimed in the Irwin affidavit to have been

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[2] Petitioners also moved for dismissal of the suit insofar as respondents sought disclosure of the documents in their official capacities as Members of Congress. The District Court granted this motion, but the Court of Appeals did not reach the issue. Accordingly, the issue is not before this Court.

[3] According to the Irwin affidavit, the report contained the following documents:

A. A covering memorandum from Mr. Irwin to the President, dated July 17, 1971. This memorandum is classified Top Secret pursuant to Executive Order 10501.

B. The Report of the Undersecretaries Committee. This report was also classified Top Secret. Attached to the report were additional documents:

1. A letter, classified Secret, from the Chairman of the Atomic Energy Commission (AEC) to Mr. Irwin.

2. A report, classified Top Secret, from the Defense Program Review Committee, of which Dr. Henry Kissinger was the Chairman.

3. The environmental impact statement on the proposed Cannikin test, prepared by the AEC in 1971, pursuant to the National Environmental Policy Act, 42 U.S.C. § 4332(C). This document had always been "publicly available" and a copy was attached to the Irwin affidavit.

4. A transcript of an oral briefing given by the AEC to the Committee. This document was classified Secret.

5. A memorandum from the Council on Environmental Quality to Mr. Irwin. This memorandum was separately unclassified.

C. In addition to the covering memorandum and the Committee's report (with attached documents), were three letters that had been transmitted to Mr. Irwin:

1. A letter from Mr. William Ruckelshaus, for the Environmental Protection Agency. This letter was classified Top Secret, but has now been declassified.

2. A letter from Mr. Russell Train, for the Council on Environmental Quality. Although the Irwin affidavit states that this letter was classified Top Secret, petitioners concede that it was so classified "only because it was to be attached to the Undersecretary's Report." Brief, at 6, n. 5.

3. A letter of Dr. Edward D. David, Jr., for the Office of Science and Technology. This letter is classified Top Secret.

> prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints and have been used for no other purpose.

In addition, at least eight (by now reduced to six) of the nine remaining documents were said to involve highly sensitive matter vital to the national defense and foreign policy and were described as having been classified Top Secret and Secret pursuant to Executive Order 10501.[4]

[78] On the strength of this showing by petitioners, the District Court granted summary judgment in their favor on the grounds that each of the nine documents sought was exempted from compelled disclosure by §§ (b)(1) and (b)(5) of the Act. The Court of Appeals reversed, concluding that subsection (b)(1) of the Act permits the withholding of only the secret portions of those documents bearing a separate classification under Executive Order 10501: "If the nonsecret components [of such documents] are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed." 464 F.2d 742, 746. The court instructed the District Judge to examine the classified documents "looking toward their possible separation for purposes of disclosure or nondisclosure."

In addition, the Court of Appeals concluded that all nine contested documents fell within subsection (b)(5) of the Act, but construed that exemption as shielding only the "decisional processes" reflected in internal government memoranda, not "factual information" unless that **[832]** information is "inextricably intertwined with policymaking processes." The court then ordered the District Judge to examine the documents *in camera* (including, presumably, any "nonsecret components" of the six classified documents) to determine if "factual data" could be separated out and disclosed "without impinging on the policymaking decisional processes intended to be protected by this exemption." We granted certiorari, 405 U.S. 974, 92 S.Ct. 1196, 31 L.Ed.2d 247 and now reverse the judgment of the Court of Appeals.

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[4] These eight documents were also described as having been classified as "Restricted Data * * * pursuant to the Atomic Energy Act of 1954, as amended. (42 U.S.C. §§ 2014(y), 2161 and 2162.)" Petitioners have not asserted that these provisions, standing alone, would justify withholding the documents in this case. But see 5 U.S.C. § 552(b)(3), relating to matters "specifically exempted from disclosure by statute."

II

[79] The Freedom of Information Act, 5 U.S.C. § 552,[5] is a revision of § 3, the public disclosure section, of the Administrative Procedure Act, 5 U.S.C. § 1002. Section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute. See S.Rep.No.813, 89th Cong., 1st Sess., 5 (1965) (hereinafter, S.Rep.No.813); H.R.Rep.No. 1497, 89th Cong., 2d Sess., 5-6 (1966) U.S.Code Cong. & Admin.News 1966, p. 2418 (hereinafter, H.Rep.No.1497). The section was plagued with vague phrases, such as that exempting from disclosure "any function of the United States requiring secrecy in the public interest." Moreover, even "matters of official record" were only to be made available to "persons properly and directly concerned" with the information. And the section provided no remedy for wrongful withholding of information. The provisions of the Freedom of Information Act stand in sharp relief against those of § 3. The Act eliminates the "properly and directly concerned" test of access, stating repeatedly that official information shall be made available "to the public," "for public inspection." Subsection (b) of the Act creates nine exemptions from compelled disclosures. These exemptions are explicitly made exclusive, 5 U.S.C. § 552(c), and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed. Aggrieved citizens are given a speedy remedy in district courts, where "the court shall determine the matter *de novo* and the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(3). Noncompliance with court orders may be punished by contempt. *Ibid.*

[80] Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. Subsection (b) is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses. As the Senate Committee explained, it was not "an easy task to balance the opposing interests, but it is not an impossible one either. * * * Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S.Rep.No.813, at 3.[6]

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[5] The Act was passed in 1966, 80 Stat. 250, and codified in its present form in 1967. 81 Stat. 54.

[833] It is in the context of the Act's attempt to provide a "workable formula" that "balances, and protects all interests," that the conflicting claims over the documents in this case must be considered.

A

[81] [1] Subsection (b)(1) of the Act exempts from forced disclosure "matters * * * specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." According to the Irwin affidavit, the six documents for which Exemption 1 is now claimed were all duly classified Top Secret or Secret, pursuant to Executive Order 10501, 3 CFR 280 (Jan. 1, 1970). That order was promulgated under the authority of the President in 1953, 18 Fed. Reg. 7049, and, since that time, has served as the basis for the classification by the Executive Branch of information "which requires protection in the interests of national defense."[7] We do not believe that Exemption 1 permits compelled disclosure of documents, such as the six here, that were classified pursuant to this Executive Order. Nor does the Exemption permit *in camera* inspection of such documents to sift out so-called "non-secret components." Obviously, this test was not the only alternative available. But Congress chose to follow the Executive's determination in these matters and that choice must be honored.

[2] The language of Exemption 1 was chosen with care. According to the Senate Committee, "[t]he change of standard from 'in the pub-

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[6] The Report states (*ibid.*):

"It is the purpose of the present bill * * * to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language * * *.

"At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.

"It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantialy subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."

See also H. Rep. No. 1497, at 6.

[7] Executive Order 10501 has been superseded, as of June 1, 1972, by Executive Order 11652, 37 Fed. Reg. 5209, which similarly provides for the classification of material "in the interest of national defense or foreign relations."

Portions of two documents for which Exemption 1 is claimed were ordered disclosed in connection with the action brought to enjoin the test (see n. 1, *supra*). Petitioners seek no relief with respect to any matters already disclosed.

lic interest' is made both to delimit more narrowly the exception and to give it a more precise definition. The phrase 'public interest' in Section 3(a) of the Administrative Procedure Act has been sub**[82]**-ject to conflicting interpretations, often colored by personal prejudices and predilections. It admits of no clear delineations." S. Rep. No. 813, at 8. The House Committee similarly pointed out that Exemption 1 "both limits the present vague phrase, 'in the public interest,' and gives the area of necessary secrecy a more precise definition." H. Rep. No. 1497, at 9, U.S. Code Cong. & Admin. News 1966, p. 2426. Manifestly, Exemption 1 was intended to dispel uncertainty with respect to public access to material affecting "national defense or foreign policy." Rather than some vague standard, the test was to be simply whether the President has determined by Executive Order that particular documents are to be kept secret. The language of the Act itself is sufficiently clear in this respect, but the legislative history disposes of any possible argument that Congress intended the Freedom of Information Act to subject executive security classifications to judicial review at the insistence of anyone who might seek to question them. Thus the House Report stated with respect to subsection (b)(1) that "citizens both in and out of Government can agree to restrictions on categories of information which the President has determined must be kept secret to protect the national defense or to advance foreign policy, such as matters classified pursuant to Executive Order 10501." H. Rep. No. 1497, pp. 9–10, U.S. Code Cong. & Admin. News 1966, p. 2427.[8] Similarly, **[834]** Representative **[80]** Moss, Chairman of the House Subcommittee that considered the bill, stated that the exemption "was intended to specifically recognize that Executive order [No. 10501]" and was drafted "in conformity with that Executive order." Hearings before a Subcommittee of the House Committee on Government Operations, "Federal Public Records Law," 89th Cong., 1st Sess. (March and April 1965), pp. 52, 105 (hereinafter, 1965 House Hearings). And a member of the committee, Representative Gallagher, stated that the legislation and the Committee Report make it "crystal clear that the bill in no way affects categories of information which the President * * * has determined must be classified to protect the national defense or to advance foreign policy. These areas of information most generally are classified under Executive Order No. 10501." 112 Cong. Rec. 13659.

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[8] It is true, the House Report indicates that the *President* must determine that the exempted matter be kept secret. Clearly, however, Executive Order 10501 is based on presidential authority and specifically delegates that authority to "the departments, agencies, and other units of the executive branch *as hereinafter specified.*" 3 CFR, at 281 (1970). One may disagree with the scope of the delegation or with how the delegated authority is exercised in particular cases, but the authority itself nevertheless remains the President's and it is his judgment that the first exemption was designed to respect.

[3] These same sources make untenable the argument that classification of material under Executive Order 10501 is somehow insufficient for Exemption 1 purposes, or that the exemption contemplates the issuance of orders, under some other authority, for each document the Executive may want protected from disclosure under the Act. Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering. *Cf. United States* v. *Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953). But Exemption 1 does neither. It states with the utmost directness that the Act exempts matters "specifically required by Executive order to be kept secret." Congress was well aware of the Order and obviously accepted determinations pursuant to that Order as qualifying for exempt status under § (b)(1). In this context it is patently unrealistic to **[84]** argue that the "Order has nothing to do with the first exemption." [9]

[4, 5] What has been said thus far makes wholly untenable any claim that the Act intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen. It also negates the proposition that Exemption 1 authorizes or permits *in camera* inspection of a contested document bearing a single classification so that the court may separate the secret from the supposedly nonsecret and order disclosure of the latter. The Court of Appeals was thus in error. The Irwin affidavit stated that each of the six documents for which Exemption 1 is now claimed "are and have been classified" Top Secret and Secret "pursuant to Executive Order No. 10501" and as involving "highly sensitive matter that is vital to our national defense and foreign policy." The fact of those classifications and the documents' characterizations have never been disputed by respondents. Accordingly, upon such a showing and in such circumstances, petitioners had met their burden of demonstrating that the docu**[835]**ments were entitled to protection under Exemption 1 and the duty of the District Court under § 552(a)(3) was therefore at an end.[10]

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[9] Respondents' Brief, at 18. Respondents note that the preamble of the new Executive Order 11652 (see n. 7, supra), specifies that material classified pursuant to its provisions "is expressly exempted from public disclosure by Section 552(b)(1) of Title 5, United States Code." Executive Order 10501 has no comparable recital, but only the sheerest ritualism would distinguish the effects of the two orders on any such basis. Indeed, respondents' apparent acceptance of the new order as a justifiable ground for resisting disclosure under Exemption 1 points to the absurdity of maintaining that Executive Order 10501 is irrelevant to the Act.

[10] This conclusion is not undermined by the new Executive Order 11652, which calls for the separation of documents into classified and unclassified portions, where practicable. 37 Fed. Reg., at 5212. On the contrary, that new order provides that the separating be done by the Executive, not the Judiciary, and, like its predecessor, permits declassification of material only in accordance with its procedures. More importantly, the very existence of

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[85] [6–10] Disclosure of the three documents conceded to be "unclassified" is resisted solely on the basis of Exemption 5 of the Act.[11] That Exemption was also invoked, alternatively, to support withholding the six documents for which Exemption 1 was claimed. It is beyond question that the Irwin affidavit, standing alone, is sufficient to establish that all of the documents involved in this litigation are "inter-agency or intra-agency" memoranda or "letters" that were used in the decisionmaking processes of the Executive Branch. By its terms, however, Exemption 5 creates an exemption for such documents only insofar as they "would not be available by law to a party * * * in litigation with the agency." This language clearly contemplates that the public is entitled to all such **[86]** memoranda or letters that a private party could discover in litigation with the agency. Drawing such a line between what may be withheld and what must be disclosed is not without difficulties. In many important respects, the rules governing discovery in such litigation have remained uncertain from the very beginnings of the Republic.[12] Moreover, at best the discovery rules can only be applied under Exemption 5 by way of rough analogies. For example, we do not know whether the Government is to be treated as though it were a prosecutor, a civil plaintiff, or a defendant.[13] Nor does the Act, by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant. Still, the legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule **[836]** that "confidential intra-agency advisory opin-

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the new order demonstrates that the Executive exercises a continuing responsibility for determining the need for secrecy in matters that affect national defense. Exemption 1 recognizes that responsibility by leaving to the Executive, under such orders as shall be developed, the decision of what may be disclosed and what must be kept secret.

[11] 5 U.S.C. § 552:

"(a) Each agency shall make available to the public information as follows:

* * * * * * *

"(b) This section does not apply to matters that are—

* * * * * * *

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

The three documents are: the CEQ memorandum to Mr. Irwin, the Train letter, and the Ruckelshaus letter, which has now been declassified.

[12] See generally, 4 Moore, Federal Practice ¶ 26.61 (1972) and authorities collected (*id.*, at ¶ 26.61 [1] n. 2); 8 Wigmore, Evidence §§ 2378, 2379 (McNaughton rev. 1961) (hereinafter Wigmore).

There were early disputes over the issue of Executive privilege. See Chief Justice Marshall's decisions in the trial of *United States* v. *Burr* (No. 14,692, 14,694), 25 Fed. Cas. pp. 30 and 187, 191–192 (CCD Va. 1807), discussed in 8 Wigmore, § 2371, at 739–741 (3d ed. 1940) and 4 Moore ¶ 26.61 [6.–4]. See also Wigmore § 2378, at 805 and n. 21.

[13] Different rules have been held to apply in each situation. See, *e.g.*, *United States* v. *Andolschek*, 142 F. 2d 503, 506 (CA2 1944) (L. Hand, J.) (United States as prosecutor); *Bank Line, Ltd.* v. *United States*, 76 F. Supp. 801 (SDNY 1948) (United States as defendant). Moreover, in actions under the Freedom of Information Act, courts are not given the option to impose alternative sanctions—short of compelled disclosure—such as striking a particular defense or dismissing the Government's action.

ions * * * are privileged from inspection." *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 946, 141 Ct. **[87]** Cl. 38 (1958) (Mr. Justice Reed). As Mr. Justice Reed there stated:

> There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action.

The importance of this underlying policy was echoed again and again during legislative analysis and discussions of Exemption 5:

> It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation. S.Rep.No.813, at 9.

See also H.Rep.No.1497, at 10. But the privilege that has been held to attach to intragovernment memoranda clearly has finite limits, even in civil litigation. In each case, the question was whether production of the contested document would be "injurious to the consultative functions of government that the privilege of nondisclosure protects." *Kaiser* v. *Aluminum & Chemical Corp., supra*, at 946. Thus, in the absence of a claim that disclosure would jeopardize state secrets, see *United States* v. *Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), memoranda consisting only of compiled factual material **[88]** or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government.[14] Moreover, in applying the privilege, courts often were required to examine the disputed documents *in camera*, in order to determine which should be turned over or withheld.[15] We must **[89]** assume, therefore, **[837]** that

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[14] See, *e.g.*, *Machin* v. *Zuckert*, 114 U.S. App. D.C. 335, 316 F. 2d 336, *cert. denied*, 375 U.S. 896, 84 S. Ct. 192, 11 L. Ed. 2d 124 (1963) (Air Force Aircraft Accident Investigation Report); *Boeing Airplane Co.* v. *Coggeshall*, 108 U.S. App. D.C. 106, 280 F. 2d 654, 660–661 (1960) (Renegotiation Board documents); *Olson Rug Co.* v. *NLRB*, 291 F. 2d 655, 662 (CA7 1961) (no claim that NLRB documents are "exclusively policy recommendations"); *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 327 (DDC 1966), *aff'd* 128 U.S. App. D.C. 10, 384 F. 2d 979 (CADC) *cert. denied*, 389 U.S. 952, 88 S. Ct. 334, 19 L. Ed. 2d 361 (1967) (discovery denied because documents "wholly of opinions, recommendations and deliberations"); *McFadden* v. *Arco Corp.*, 278 F. Supp. 57, 59–60 (MD Ala. 1967), and cases cited therein.

In *United States* v. *Cotton Valley Operators Comm.*, 9 F.R.D. 719, 720 (WD La. 1949), *aff'd by equally divided court*, 339 U.S. 940, 70 S. Ct. 793, 94 L. Ed. 1356 (1950), the United States offered to file "an abstract of factual information" contained in the contested documents (FBI reports).

[15] See, *e.g.*, *Machin* v. *Zuckert*, 114 U.S. App. D.C. 335, 316 F. 2d 336, 341, *cert. denied*, 375 U.S. 896, 84 S. Ct. 172, 11 L. Ed. 2d 124 (1963) (private tort action; discovery of Air Force Aircraft Accident Investigation Report); *Boeing Airplane Co.* v. *Coggeshall*, 108 U.S. App. D.C. 106, 280 F. 2d 654, 662 (1960) (excess profits tax redetermination); *Olson Rug*

Congress legislated against the backdrop of this case law, particularly since it expressly intended "to delimit the exception **[5]** as narrowly as consistent with efficient Government operation." S.Rep. No. 813, at 9. See H.Rep.No.1497, at 10. Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other.[16]

[11, 12] Nothing in the legislative history of Exemption 5 is contrary to such a construction. When the bill that ultimately became the Freedom of Information Act, **[90]** S. 1160, was introduced in the 89th Congress, it contained an exemption that excluded:

> intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy.[17]

This formulation was designed to permit "[a]ll *factual* material in Government records * * * to be made available to the public." S.Rep.

Co. v. *NLRB*, 291 F. 2d 655, 660, 662 (CA7 1961) (discovery for use in defense to contempt proceedings); *O'Keefe* v. *Boeing Co.*, 38 F.R.D. 329, 336 (SDNY 1965) (private tort action; Air Force Investigation Reports); *Rosee* v. *Board of Trade*, 36 F.R.D. 684, 687–688 (ND Ill. 1965); *United States* v. *Cotton Valley Operators Comm.*, 9 F.R.D. 719 (WD La. 1949), *aff'd by equally divided court*, 339 U.S. 940, 70 S. Ct. 793, 94 L. Ed. 1356 (1950) (civil antitrust suit). *Cf. United States* v. *Proctor & Gamble Co.*, 25 F.R.D. 485, 492 (NJ 1960) (criminal antitrust prosecution). See Wigmore § 2379, at 812.

In *Kaiser Aluminum & Chemical Corp.*, *supra*, where *in camera* inspection of the documents was refused because of plaintiff's failure to make a definite showing of necessity, 157 F. Supp., at 947, the "objective facts" contained in the disputed document were "otherwise available." *Id.*, at 946.

[16] See, *e.g.*, *Soucie* v. *David*, 145 U.S. App. D.C. 144, 448 F. 2d 1067 (1971); *Grumman Aircraft Eng. Corp.* v. *Renegotiation Bd.*, 138 U.S. App. D.C. 147, 425 F. 2d 578, 582 (1970); *Bristol-Myers Co.* v. *FTC*, 138 U.S. App. D.C. 22, 424 F. 2d 935 (1970); *International Paper Co.* v. *FPC*, 438 F.2d 1349, 1358–1359 (CA2), *cert. denied*, 404 U.S. 827, 92 S.Ct. 61, 30 L.Ed.2d 56 (1971); *General Services Admin.* v. *Benson*, 415 F.2d 878 (CA9 1969) aff'g, 289 F. Supp. 590 (WD Wash. 1969); *Long Island R. Co.* v. *United States*, 318 F. Supp. 490, 499 n. 9 (EDNY 1970); *Consumers Union* v. *Veterans Admin.*, 301 F. Supp. 796 (SDNY 1969), *appeal dismissed as moot*, 436 F.2d 1363 (CA2 1971); *Olson* v. *Camp.*, 328 F. Supp. 728, 731 (ED Mich. 1970); *Reliable Transfer Co.* v. *United States*, 53 F.R.D. 24 (EDNY 1971).

The proposed Federal Rules of Evidence appear to recognize this construction of Exemption 5. Proposed Rule 509(a)(2)(A) defines "official information" to include "intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions." Rule 509(c) further provides that "[i]n the case of privilege claimed for official information the court may require examination *in camera* of the information itself."

[17] Hearings before the Subcommittee of Administrative Practice and Procedure of the Senate Committee on the Judiciary, on S. 1160, S. 1376, S. 1758, and S. 1879, 89th Cong., 1st Sess., at 7 (May 1965) (hereinafter 1965 Senate Hearings). This exemption had itself been broadened during its course through the Senate in the 88th Congress. The exemption originally applied only to internal memoranda "relating to the consideration and disposition of adjudicating and rulemaking matters." Section 3(c) of S. 1666, 88th Cong., 2d Sess. (1964), introduced in 110 Cong. Rec. 17086. That early formulation came under attack for not sufficiently protecting material dealing with general policy matters, not directly related to adjudication or rulemaking. See Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, on S. 1666 and S. 1663, 88th Cong., 1st Sess., at 202–203, 247 (Oct. 1963).

No. 1219, 88th Cong., 2d Sess. 7 (1964). (Emphasis in original.) The formulation was severely criticized, however, on the ground that it would permit compelled disclosure of an otherwise private document simply because the document did not deal "solely" with legal or policy matters. Documents dealing with mixed questions of fact, law and policy would inevitably, under the proposed exemption, become available to the public.[18] As a result of **[838]** this criticism, **[91]** Exemption 5 was changed to substantially its present form. But plainly the change cannot be read as suggesting that *all* factual material was to be rendered exempt from compelled disclosure. Congress sensibly discarded a wooden exemption that could have meant disclosure of manifestly private and confidential policy recommendations simply because the document containing them also happened to contain factual data. That decision should not be taken, however, to embrace an equally wooden exemption permitting the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of law, policy or opinion. It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, common sense approach that has long governed private parties' discovery of such documents involved in litigation with government agencies. And, as noted, that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents.

Petitioners further argue that although *in camera* inspection and disclosure of "low-level, routine, factual reports"[19] may be contemplated by Exemption 5, that type of document is not involved in this case. Rather, **[92]** it is argued, the documents here were submitted directly to the President by top-level government officials, involve matters of major significance, and contain, by their very nature, a blending of factual presentations and policy recommendations that are necessarily "inextricably intertwined with policymaking processes."

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[18] See 1965 Senate Hearings, at 36, 94–95, 112–113, 205, 236–237, 244, 366–367, 382–383, 402–403, 406–407, 417, 437, 445–446, 450, 490. See 1965 House Hearings, at 27–28, 49, 208, 220, 223–224, 229–230, 245–246, 255–257. Examples of these many statements are: Federal Aviation Administration (1965 Senate Hearings, at 446):

"Few records would be entirely devoid of factual date, thus leaving papers on law and policy relatively unprotected. Staff working papers and reports prepared for use within the agency of the executive branch would not be protected by the proposed exemptions." Department of Commerce (1965 Senate Hearings, at 406):

"Under this provision, internal memorandums dealing with *mixed questions of fact, law and policy* could well become public information." (Emphasis in original.)

[19] Tr. of Oral Arg., at 23.

464 F.2d, at 746. For these reasons, the petitioners object both to disclosure of any portions of the documents and to *in camera* inspection by the District Court.

To some extent this argument was answered by the Court of Appeals, for its remand expressly directed the District Judge to disclose only such factual material that is "intertwined with policymaking processes" and that may safely be disclosed "without impinging on the policymaking decisional processes intended to be protected by this exemption." We have no reason to believe that, if petitioners' characterization of the documents is accurate, the District Judge would go beyond the limits of the remand and in any way compromise the confidentiality of deliberative information that is entitled to protection under Exemption 5.

[13–17] We believe, however, that the remand now ordered by the Court of Appeals is unnecessarily rigid. The Freedom of Information Act may be invoked by any member of "the public"—without a showing of need—to compel disclosure of confidential government documents. The unmistakable implication of the decision below is that any member of the public invoking the Act may require that otherwise confidential documents be brought forward and placed before the District Court for *in camera* inspection—no matter how little, if any, purely factual material may actually be contained therein. Exemption 5 mandates no such result. As was said in **[839]** *Kaiser Aluminum & Chemical Corp., supra*, at 947: "It seems * * * obvious **[93]** that the very purpose of the privilege, the encouragement of open expression of opinion as to governmental policy, is somewhat impaired by a requirement to submit the evidence even [*in camera*]." Plainly, in some situations, *in camera* inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency. The burden is, of course, on the agency resisting disclosure, 5 U.S.C. § 552(a)(3), and if it fails to meet its burden without *in camera* inspection, the District Court may order such inspection. But the agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual information. A representative document of those sought may be selected for *in camera* inspection. And, of course, the agency may itself disclose the factual portions of the contested documents and attempt to show, again by circumstances, that the excised portions constitute the bare bones of protected matter. In short, *in camera* inspection of all documents is not a necessary or inevitable tool in every case. Others are available. Cf. United States v. Reynolds, *supra*. In the present case, the petitioners proceeded on the theory that all of the nine documents were exempt from disclosure in their entirety under Exemption 5 by virtue of their use in the decisionmaking process. On remand, petitioners are entitled to attempt to demonstrate the propriety of withholding any documents, or portions **[94]** thereof, by means short of submitting them for *in camera* inspection.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Judgment reversed and case remanded.

Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

Mr. Justice STEWART, concurring.

This case presents no constitutional claims, and no issues regarding the nature or scope of "executive privilege." It involves no effort to invoke judicial power to require any documents to be reclassified under the mandate of the new Executive Order 11652. The case before us involves only the meaning of two exemptive provisions of the so-called Freedom of Information Act, 5 U.S.C. § 552.

My Brother DOUGLAS says that the Court makes a "shambles" of the announced purpose of that Act. But it is Congress, not the Court, that in § 552(b) (1) has ordained unquestioning deference to the Executive's use of the "secret" stamp. As the opinion of the Court demonstrates, the language of the exemption, confirmed by its legislative history, plainly withholds from disclosure "matters . . . specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy." In short, once a federal court has determined that the Executive has imposed that requirement, it may go no further under the Act.

One would suppose that a nuclear test that engendered fierce controversy within the Executive Branch of our Government would be precisely the kind of event that should be opened to the fullest possible disclosure consistent with legitimate interests of national defense. Without such disclosure, factual information available to the concerned Executive agencies cannot be considered **[95]** by the people or evaluated by the Congress. And with the people and their representatives reduced to a state of ignorance, the democratic process is paralyzed.

[840] But the Court's opinion demonstrates that Congress has conspicuously failed to attack the problem that my Brother DOUGLAS discusses. Instead, it has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document "secret," however cynical, myopic, or even corrupt that decision might have been.

The dissenting opinion of my Brother BRENNAN makes an admirably valiant effort to deflect the impact of this rigid exemption. His dissent focuses on the statutory requirement that "the court shall determine the matter *de novo* * * *." But the only "matter" to be determined *de novo* under § 552(b)(1) is whether in fact the President has required by Executive Order that the documents in question are to be kept secret. Under the Act as written, that is the end of a court's inquiry.*

As the Court points out, "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering." But in enacting § 552(b)(1) Congress chose, instead, to decree blind acceptance of Executive fiat.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, concurring in part and dissenting in part.

The Court holds today that the Freedom of Information Act, 5 U.S.C. § 552 (1970), authorizes the District **[96]** Court to make an *in camera* inspection of documents claimed to be exempt from public disclosure under Exemption 5 of the Act. In addition, the Court concludes that, as an exception to this rule, the Government may, in at least some instances, attempt to avoid *in camera* inspection through use of detailed affidavits or oral testimony. I concur in those aspects of the Court's opinion. In my view, however, those procedures should also govern matters for which Exemption 1 is claimed, and I therefore dissent from the Court's holding to the contrary. I find nothing whatever on the face of the statute or in its legislative history which distinguishes the two Exemptions in this respect, and the Court suggests none. Rather, I agree with my Brother DOUGLAS that the mandate of § 552(a)(3)—"the court shall determine the matter *de novo* and the burden is on the agency to sustain its action"—is the procedure that Congress prescribed for both Exemptions.

The Court holds that Exemption 1 immunizes from judicial scrutiny any document classified pursuant to Executive Order 10501, 3 CFR § 292 (Jan. 1, 1971).[1] In reaching this result, however, the Court

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*Similarly rigid is § 552(b)(3), which forbids disclosure of materials that are "specifically exempted from disclosure by statute." Here, too, the only "matter" to be determined in a district court's *de novo* inquiry is the factual existence of such a statute, regardless of how unwise, self-protective or inadvertent the enactment might be.

[1] Executive Order 10501 was revoked on March 8, 1972, and replaced with Executive Order 11652, 37 Fed. Reg. 5209, which became effective June 1, 1972. See pp. 7–9, *infra*.

adopts a construction of Exemption 1 which is flatly inconsistent with the legislative history and, indeed, the unambiguous language of the Act itself.[2] In plain words, Exemption 1 exempts from disclosure only material "*specifically required* by Executive order to be kept secret *in the interest of the national defense or foreign policy.*" (Emphasis **[97]** added.) Executive Order 10501, however, which was promulgated 13 years before the passage of the Act, does not require that any specific docu-**[841]**ments be classified. Rather, the Executive Order simply delegates the right to classify to agency heads, who are empowered to classify information as Confidential, Secret, or Top Secret. Thus, the classification decision is left to the sole discretion of these agency heads. Moreover, in exercising this discretion, agency heads are not required to examine each document separately to determine the need for secrecy but, instead, may adopt *blanket* classifications, without regard to the content of any particular document. Thus, as §§ 3(b) and 3(c) of the Order make clear, matters for which there is no need for secrecy "in the interest of the national defense or foreign policy" may be indiscriminately classified in conjunction with those matters for which there is a genuine need for secrecy:

> 3(b) *Physically Connected Documents.* The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification.
>
> 3(c) *Multiple Classification.* A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications.

Even the petitioners concede,[3] no doubt in response to the "specifically required" standard of § 552(b)(1) **[98]** and the "specifically stated" requirement of § 552(c),[4] that documents classified pursuant to

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[2] "The policy of the Act requires that the * * * exemptions [be construed narrowly]." *Soucie* v. *David*, 145 U.S. App. D.C. 144, 157, 448 F.2d 1067, 1080 (1971). "A broad construction of the exemptions would be contrary to the express language of the Act." *Wellford* v. *Hardin*, 444 F.2d 21, 25 (CA4 1971).

[3] Petitioners' Brief for Certiorari, at 9, n. 4.

[4] Section 552(c) provides:

"This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."

The accompanying Senate Report emphasizes that § 552(c) places a heavy burden on the Government to justify nondisclosure:

"The purpose of [§ 552(c)] is to make it clear beyond a doubt that all materials of the Government are to be made available to the public by publication or otherwise unless *explicitly* allowed to be kept secret by one of the exemptions in [§ 552(b)]." S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965) (emphasis added).

A commentator cogently argues that the "pull of the word 'specifically' [in § 552(c)] is

§ 3(b) of Executive Order 10501 cannot qualify under Exemption 1. Indeed, petitioners apparently accept the conclusion of the Court of Appeals that as to § 3(b):

> This court sees no basis for withholding on security grounds a document that, although separately unclassified, is regarded secret merely because it has been incorporated into a secret file. To the extent that our position in this respect is inconsistent with the above-quoted paragraph of Section 3 of Executive Order 10501, we deem it required by the terms and purpose of the [Freedom of Information Act], enacted subsequently to the Executive Order. 464 F.2d, at 745.

[99] Nevertheless, petitioners maintain that information classified pursuant to § 3(c) of the Order is exempt from disclosure under Exemption 1. The Court of Appeals rejected that contention, and in **[842]** my view, correctly. The Court of Appeals stated:

> The same reasoning applies to this provision as to the one dealing with physically-connected documents. Secrecy by association is not favored. If the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed. 464 F.2d, at 746.

Petitioners' argument, adopted by the Court, is that this construction of the Act imputes to Congress an intent to authorize judges independently to review the Executive's decision to classify documents in the interest of the national defense or foreign policy. That argument simply misconceives the holding of the Court of Appeals. Information classified pursuant to § 3(c), it must be emphasized, may receive the stamp of secrecy not because such secrecy is necessary to promote "the national defense or foreign policy," but simply because it constitutes a part of such other information which genuinely merits secrecy. Thus, to rectify this situation, the Court of Appeals ordered only that the District Court *in camera* determine "[i]f the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning * * * ." The determination whether any components are in fact "non-secret" is left exclusively to the agency head representing the Executive Branch. The District Court is not authorized to declassify or to release information which the Executive, in its sound discretion, determines must be classified to "be kept secret in the interest of the national defense or **[100]** foreign policy." [5] The District Court's authority stops with the inquiry whether there are

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toward emphasis on [the] statutory language" of the nine stated exemptions. The "specifically stated" clause in § 552(c), he notes, "is often relevant in determining the proper interpretation of particular exemptions." K. C. Davis, Administrative Law § 3A.15, at 142 (1970 Supp.). See also Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761 (1967).

For a detailed study of the Freedom of Information Act and its background, see Note, Comments on Proposed Amendments to § 3 of the Administrative Procedure Act: The Freedom of Information Bill, 40 Notre Dame Law. 417 (1965).

[5] See Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1224–1225 (1972).

components of the documents which would not have been independently classified as secret. If the District Court finds, on *in camera* inspection, that there are such components, and that they can be read separately without distortion of meaning, the District Court may order their release. The District Court's authority to make that determination is unambiguously stated in § 552(a)(3): "the [district] court shall determine the matter *de novo* and the burden is on the agency to sustain its action." The Court's contrary holding is in flat defiance of that congressional mandate.[6]

Indeed, only the Court of Appeals' construction is consistent with the congressional plan in enacting the Freedom of Information Act. We have the word of both Houses of Congress that the *de novo* proceeding requirement was enacted expressly "in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965) (hereinafter cited as S.Rep. No. 813); H.R.Rep.No.1497, 89th Cong., 2d Sess. 9 (1966) U.S.Code Cong. & Admin.News 1966, p. 2418 (hereinafter cited as H.Rep.No.1497). What was granted, and purposely so, was a broad grant **[101]** to the District Court of "authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld." H.Rep. **[843]** No.1497, at 9, U.S. Code Cong. & Admin. News 1966, p. 2426. And to underscore its meaning Congress rejected the traditional rule of deference to administrative determinations by "[p]lacing the burden of proof upon the agency" to justify the withholding. S.Rep.No.813, at 8; H.Rep.No.1497, at 9. The Court's rejection of the Court of Appeals' construction is inexplicable in the face of this overwhelming evidence of the congressional design.

The Court's reliance on isolated references to Executive Order 10501 in the congressional proceedings is erroneous and misleading. The Court points to a single passing reference to the Order in the House Report, which even a superficial reading reveals to be merely suggestive of the kinds of information that the Executive Branch might classify. Nothing whatever in the Report even remotely implies that the Order was to be recognized as immunizing from public disclosure the entire file of documents merely because one or even a single paragraph of one has been stamped secret. The Court also calls to its support some comments out of context of Congressmen Moss and Gallagher on the House floor. But on their face, these comments do no more than confirm that Exemption 1 was written with awareness of the existence of Executive Order 10501. Certainly, whatever the significance that may be attached to debating points in construing a statute,[7] these comments hardly support the Court's conclusion that a classification pursuant to Executive Order 10501, without more, immunizes an entire document from disclosure under Exemption 1.

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[6] "[G]iven the requirement that a file or document is generally classified at the highest level of classification of any information enclosed, it will often be the case that a classified file will contain information that could be released separately. Because it is not 'specifically required by Executive order to be kept secret,' such information is not privileged under the Information Act. To insure that an overall classification is not being used to protect unprivileged papers, a reviewing court should inspect the documents sought by a litigant." Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1223 (1972).

[102] Executive Order 10501 was promulgated more than a decade before the Freedom of Information Act was debated in Congress. Yet no reference to the Order can be found in either the language of the Act or the Senate Report. Under these circumstances, it would seem odd, to say the least, to attribute to Congress an intent to incorporate "without reference" Executive Order 10501 into Exemption 1. Indeed, petitioners' concession that "physically connected documents," classified under § 3(b) of the Order, are not immune from judicial inspection serves only to reinforce the conclusion that the mere fact of classification under § 3(c) cannot immunize the identical documents from judicial scrutiny.

The Court's rejection of the Court of Appeals' construction of Exemption 1 is particularly insupportable in light of the cogent confirmation of its soundness supplied by the Executive itself. In direct response to the Act, Order 10501 has been revoked and replaced by Order 11652 which expressly requires classification of documents in the manner the Court of Appeals required the District Court to attempt *in camera*. The Order, which was issued on March 8, 1972, and became effective on June 1, 1972, 37 Fed.Reg. 5209 (Mar. 10, 1972), explicitly attributes its form to the Executive's desire to accommodate its procedures to the objectives of the Freedom of Information Act:

> The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executive branch.

Moreover, in his statement accompanying the promulgation of the new Order, the President stated: "The Executive order I have signed today is based upon * * * **[103]** a reexamination of the rationale underlying the Freedom of Information Act." 8 Presidential Documents 542 (Mar. 13, 1972).

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[7] See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) (Jackson, J., concurring) (Frankfurter, J., dissenting).

The new Order recites that "*some* official information and material * * * bears directly on the effectiveness of our national defense and the conduct of **[844]** our foreign relations" and that "[*t*]*his* official information or material, referred to as classified information or material, * * * is expressly exempted from public disclosure by Section 552(b)(1) of [the Freedom of Information Act]." (Emphasis added.) Thus, the Executive clearly recognized that Exemption 1 applies only to matter *specifically* classified "in the interest of the national defense or foreign policy." And in an effort to comply with the Act's mandate that genuinely secret matters be carefully separated from the nonsecret components, § 4(A) of the new Order provides:

> *Documents in General* * * *. Each classified document shall * * * to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use.

The President emphasized this requirement in his statement:

> A major course of unnecessary classification under the old Executive order was the practical impossibility of discerning which *portions* of a classified document actually required classification. Incorporation of any material from a classified paper into another document usually resulted in the classification of the new document, and *innocuous portions of neither paper could be released*. 8 Presidential Documents 544 (Mar. 13, 1972) (emphasis added).

It is of course true, as the Court observes, that the Order "provides that the separating be done by the Ex**[104]**ecutive, not the Judiciary * * *." *Ante*, 835, n. 10. But that fact lends no support to a construction of Exemption 1 precluding judicial inspection to enforce the congressional purpose to effect release of nonsecret components separable from the secret remainder. Rather, the requirement of judicial inspection made explicit in § 552(a)(3) is the keystone of the congressional plan, expressly deemed "essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion." S.Rep.No.813, at 8; H.Rep.No.1497, at 9. It could not be more clear, therefore, that Congress sought to make certain that the ordinary principle of judicial deference to agency discretion was discarded under this Act. The Executive was not to be allowed "to file an affidavit stating [the] conclusion [that documents are exempt] and by so doing foreclose any other determination of the fact." *Cowles Communications, Inc.* v. *Department of Justice*, 325 F. Supp. 726, 727 (ND Cal. 1971). Accord, *Frankel* v. *SEC*, 336 F. Supp. 675, 677, n. 4 (SDNY 1971), *rev'd on other grounds*, 460 F.2d 813 (CA2 1972);

Philadelphia Newspapers, Inc. v. *HUD*, 343 F. Supp. 1176, 1180 (ED Pa. 1972).[8]

[105] [845] The Court's interpretation of Exemption 1 as a complete bar to judicial inspection of matters claimed by the Executive to fall within it wholly frustrates the objective of the Freedom of Information Act. That interpretation makes a nullity of the Act's requirement of *de novo* judicial review. The judicial role becomes "meaningless judicial sanctioning of agency discretion," S.Rep.No. 813, at 8; H.Rep.No.1497, at 9, the very result Congress sought to prevent by incorporating the *de novo* requirement.

Mr. Justice DOUGLAS, dissenting.

The starting point of a decision usually indicates the result. My starting point is what I believe to be the philosophy of Congress expressed in the Freedom of Information Act, 5 U.S.C. § 552.

Henry Steele Commager, our noted historian, recently wrote:

> The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to. Now almost everything that the Pentagon and the CIA do is shrouded in secrecy. Not only are the American people not permitted to know what they are up to but even the Congress and, one suspects, the President [witness the "unauthorized" bombing of the North last fall and winter] are kept in darkness. The New York Review of Books, Oct. 5, 1972, p. 7.

[106] Two days after we granted certiorari in the case on March 6, 1972, the President revoked the old Executive Order 10501 and substituted a new one, Executive Order 11652, dated March 8, 1972, and effective June 1, 1972. The new Order states in its first paragraph that "The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executives branch."

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[8] In support of their claim that Executive Order 10501 automatically and without judicial review activates the exemption of § 552(b)(1), petitioners rely upon *Epstein* v. *Resor,* 421 F.2d 930 (9 Cir., 1970). Rather, *Epstein* confirms the Court of Appeals interpretation of the Act. The *Epstein* court refused a request to review *in camera* documents classified pursuant to Executive Order 10501, but only because the Government, at the plaintiff's request, had begun a current review of the documents on "a paper-by-paper basis." Moreover, in response to the argument that petitioners advance here—namely, that the mere classification of a document precludes judicial review—*Epstein* states:

"[I]n view of the legislative purpose to make it easier for private citizens to secure Government information, it seems most unlikely that [the Act] was intended to foreclose an (a)(3) judicial review of the circumstances of the exemption. Rather it would seem that [subsection] (b) was intended to specify the basis for withholding under (a)(3) and that judicial review *de novo* with the burden of proof on the agency should be had as to whether the conditions of exemption in truth exist." 421 F.2d, at 932–933.

While "classified information of material" as used in the Order is exempted from public disclosure, § 4 of the Order states that each classified document shall "to the extent practicable be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use." § 4(A). And it goes on to say "Material containing references to classified materials, which references do not reveal classified information regarding the affairs of *Ibid.*

The Freedom of Information Act does not clash with the Executive Order. Indeed the new Executive Order precisely meshes with the Act and with the construction given it by the Court of Appeals. Section 552(a)(3) of the Act gives the District Court "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." Section 552(a)(3) goes on to prescribe the procedure to be employed by the District Court. It says "the court shall determine the matter *de novo* and the burden is on the agency to sustain its action."

The Act and the Executive Order read together mean at the very minimum that the District Court has power **[107]** to direct the agency in question to go through the suppressed document and make the portion-by-portion classification to facilitate the excerpting as required by the Executive Order. Section 552(a)(3) means also that the District Court may in its discretion collaborate with the agency to make certain that the congressional policy of disclosure is effectuated.

[846] The Court of Appeals, in an exceedingly responsible opinion, directed the District Court to proceed as follows:

> (1) where material is separately *unclassified* but nonetheless under the umbrella of a "secret" file, the District Court should make sure that it is disclosed under the Act. This seems clear from § 552(b)(1) which states "This section does not apply to matters that are; (1) specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy." Unless the *unclassified* appendage to a "secret" file falls under some other exception in § 552(b) it seems clear that it must be disclosed. The only other exception under which refuge is now sought is (b)(5) which reads that the section does not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

This exemption was described in the House Report as covering "any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency." H.R. Rep. No. 1497, 89th Cong., 2d Sess., p. 10, U.S. Code Cong. & Admin. News 1966, p. 2428. It is clear from the legislative history that while opinions and staff advice are exempt, factual matters are not. H. Rep., *supra*, at 10; S. Rep. No. 813, 89th Cong., 1st Sess., p. 9. And the courts have uniformly agreed on that construction of the Act. See *Soucie* v. *David*, 448 F.2d 1067; *Grumman Aircraft Eng. Corp.* v. *Renegotiating Bd.*, **[108]** 425 F.2d 578; *Long Island R. Co.* v. *United States*, 318 F. Supp. 490; *Consumers Union* v. *Veterans Adm.* 301 F. Supp. 796.

Facts and opinions may, as the Court of Appeals noted, be "inextricably intertwined with policy making processes" in some cases. In such an event, secrecy prevails. Yet where facts and opinions can be separated, the Act allows the full light of publicity to be placed on the facts.

Section 552(c) seems to seal the case against the government when it says "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." Disclosure, rather than secrecy, is the rule, save for the specific exceptions in subsection (b).

The Government seeks to escape from the Act by making the Government stamp of "Top Secret" or "Secret" a barrier to the performance of the District Court's functions under § 552(a)(3) of the Act. The majority makes the stamp sacrosanct, thereby immunizing stamped documents from judicial scrutiny, whether or not factual information contained in the document is in fact colorably related to interests of the national defense or foreign policy. Yet anyone who has ever been in the Executive Branch knows how convenient the "Top Secret" or "Secret" stamp is, how easy it is to use, and how it covers perhaps for decades the footprints of a nervous bureaucrat or a wary executive.

I repeat what I said in *Gravel* v. *United States*, 408 U.S. 606, 641–642, 92 S. Ct. 2614, 2633, 2634, 33 L.Ed.2d 583 (dissenting opinion):

> * * * as has been revealed by such exposes as the Pentagon Papers, the My Lai massacres, the Gulf of Tonkin "incident," and the Bay of Pigs invasion, the Government usually suppresses damaging news but highlights favorable news. In this filtering process the secrecy stamp is the officials' tool of suppression and it has been used to withhold infor**[109]**mation which in "99½%" of the cases would present no danger to national security. To refuse to publish "classified" reports would at times relegate a publisher to distributing only the press releases of Government or remaining silent; if it printed only the press releases or "leaks" it would become an **[847]** arm of officialdom, not its critic. Rather, in my view, when a publisher obtains a classified document he should be free to print it without fear of retribution, unless it contains material directly bearing on future, sensitive planning of the Government.

The Government looks aghast at a federal judge even looking at the secret files and deals with disdain the prospect of responsible judicial action in the area. It suggests that judges have no business declassifying "secrets," that judges are not familiar with the stuff with which these "Top Secret" or "Secret" documents deal.

This is to misconceive and distort the judicial function under § 552 (a) (3) of the Act. The Court of Appeals never dreamed that the trial judge would reclassify documents. His first task would be to determine whether nonsecret material was a mere appendage to a "secret" or "top secret" file. His second task would be to determine whether under normal discovery procedures contained in Rule 26 of the Rules of Civil Procedure, factual material in these "secret" or "top secret" material is detached from the "secret" and would therefore be available to litigants confronting the agency in ordinary lawsuits.

Unless the District Court can do those things, the much advertised Freedom of Information Act is on its way to becoming a shambles.[1] Unless federal courts can be **[110]** trusted, the Executive will hold complete sway and by *ipse dixit* make even the time of day "top secret." Certainly, the decision today will upset the "workable formula," at the heart of the legislative scheme, "which encompasses, balances, and protects all interests, yet places emphasis on the fullest possible disclosure." S.Rep.No.813, *supra*, at 3. The Executive Branch now has *carte blanche* to insulate information from public scrutiny whether or not that information bears any discernible relation to the interests sought to be protected by subsection (b) (1) of the Act. We should remember the words of Madison:

> A popular government without popular information or the means of acquiring it, is but a prologue **[111]** to a farce or a tragedy or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power knowledge gives.[2]

I would affirm the judgment below.

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[1] My Brother STEWART, with all deference, helps make a shambles of the Act by reading § 552(b)(1) as swallowing all the other eight exceptions. While § 552(b)(1) exempts matters "specifically required by the Executive order to be kept secret in the interest of the national defense or foreign policy," § 4 of the Executive Order, as I have noted, contemplates that not all portions of a document classified as "secret" are necessarily "secret," for the order contemplates "excerpting" of some material. Refereeing what may properly be excerpted is part of the judicial task. This is made obvious by § 552(b)(5) which keeps secret "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The bureaucrat who uses the "secret" stamp obviously does not have the final say as to what "memorandums or letters" would be available by law under the Fifth exception, for § 552(a)(3) gives the District Court authority, where agency records are alleged to be "improperly withheld" to "determine the matter *de novo*," the "burden" being on the agency "to sustain its action." Hence § 552(b)(5), behind which the executive agency seeks refuge here, establishes a policy which is served by the fact-opinion distinction long established in federal discovery. The question is whether a private party would routinely be entitled to disclosure through discovery of some or all of the material sought to be excerpted. When the Court answers that no such inquiry can be made under § 552(b)(1), it makes a shambles of the disclosure mechanism which Congress tried to create. To make obvious the interplay of the nine exceptions listed in § 552(b), as well as § 552(c), I have attached them as an Appendix to this dissent.

[2] Letter to W. T. Barry, Aug. 4, 1822, IX The Writings of James Madison (Hunt ed. 1910) 103.

APPENDIX

[848] Sec. 552(b) and (c) of the Freedom of Information Act reads as follows:

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

[112] (9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

UNITED STATES v. J. B. WILLIAMS COMPANY, INC., ET AL.*

No. 70 Civ. 1589 F.T.C. Docket 8547

(United States District Court, Southern District of New York, January 22, 1973)

1. CONTROL OF FALSE OR MISLEADING ADVERTISING OF DRUGS TO SHIELD CONSUMER IS ONE OBJECT OF STATUTES PROVIDING FOR IMPOSITION OF PENALTY FOR VIOLATION OF F.T.C. CEASE AND DESIST ORDER.

> **[521]** One of objects of statutes providing for imposition of penalty for violation of FTC cease and desist order proscribing false advertisement, by mail or in commerce, for purpose of inducing purchase of drugs and providing for Commission's certification of facts to Attorney General is to control false or misleading advertising of drugs so as to shield typical consumer against deception and misinformation resulting from dissemination of such advertising and to give him opportunity to make an intelligent choice about drug products.

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*Reported in 354 F. Supp. 521 (1973). For Opinion of the Second Circuit Court of Appeals, see p. 938 herein. For case before Commission, see 68 F.T.C. 481; *modified* 72 F.T.C. 865.

2. CURTAILMENT OF UNFAIR COMPETITION IS A BASIC POLICY OF F.T.C. ACT.

Basic policy of Federal Trade Commission Act is to curtail unfair competition.

3. CIVIL PENALTY RECOVERY LANGUAGE IN STATUTE DOES NOT ESTABLISH THAT STATUTORY PROVISION IS NONCRIMINAL IN ACTION BUT THAT PROVISION WAS NOT INTENDED TO BE PUNITIVE.

That statute itself specifically provides that fines imposed under it are a civil penalty to be recovered in a civil action does not conclusively establish that statutory provision is noncriminal in action, but furnishes strong evidence that provision was not intended to be punitive.

4. STATUTORY PROVISION FOR CIVIL PENALTY DOES NOT COME INTO PLAY ONLY ON A FINDING OF SCIENTER.

Statutory provision for civil penalties for violations of FTC cease and desist order does not come into play only on a finding of scienter.

5. STATUTORY MAXIMUM PENALTY OF $5,000 FOR EACH VIOLATION IS NOT EXCESSIVE.

Statutory maximum penalty of $5,000 for each violation of FTC cease and desist order is not excessive.

6. ALTHOUGH ABSENCE OF EFFECTS AS A RESULT OF A SANCTION ESTABLISHES STATUTE IS NON-CRIMINAL IN NATURE, INVERSE OF SUCH PROPOSITION IS NOT TRUE.

Though, generally, absence of affirmative disability and of deterrent effects as a result of a sanction establishes that statute is noncriminal in nature, inverse of such proposition is not true.

7. SIXTH AMENDMENT RIGHT TO JURY TRIAL DID NOT APPLY TO SUIT BY U.S. TO RECOVER CIVIL PENALTIES FOR ALLEGED VIOLATIONS OF F.T.C. CEASE AND DESIST ORDER.

Sixth Amendment right to jury trial did not apply to suit by United States to recover civil penalties for alleged violations of FTC cease and desist order, notwithstanding contention that action was inherently criminal in nature in that $1,000,000 in penalties was sought and though sanction statutorily prescribed **[522]** might involve affirmative disability or restraint and might serve incidental function of deterrence and retribution.

8. JURY TRIAL IS NOT CONSTITUTIONALLY REQUIRED IN CIVIL CONTEMPT PROCEEDINGS.

Though serious criminal contempts must be tried to a jury, jury trial is not constitutionally required in civil contempt proceedings.

9. NATURE OF CIVIL CONTEMPT PROCEEDINGS MAY BE COMPENSATORY OF COERCIVE.

Civil contempt proceedings may be compensatory or coercive in nature.

10. ATTRIBUTE OF LIABILITY TO A CIVIL CONTEMPT PENALTY NOT REQUIRING THAT VIOLATION OF COURT ORDER BE WILLFUL EQUALLY APPLICABLE TO PENALTY SUITS FOR VIOLATION OF FTC CEASE AND DESIST ORDERS.

Liability to a civil contempt penalty does not require that violation of a court order be willful, and such attribute is equally applicable to action for civil penalties for violation of FTC cease and desist order.

11. ATTRIBUTE OF CIVIL CONTEMPT PROCEEDING NOT OPENING TO RECONSIDERATION THE FACTUAL OR LEGAL BASIS OF THE UNDERLYING COURT ORDER EQUALLY APPLICABLE TO PENALTY SUITS FOR VIOLATION OF FTC CEASE AND DESIST ORDERS.

Civil contempt proceeding does not open to reconsideration the factual or legal basis of the underlying court order, and such attribute is equally applicable to actions for civil penalties for violation of FTC cease and desist order.

12. VINDICATION OF AUTHORITY OF U.S. COURTS IS PURPOSE OF STATUTE PROVIDING THAT U.S. COURTS HAVE AUTHORITY TO PUNISH DISOBEDIENCE OR RESISTANCE TO THEIR LAWFUL ORDERS.

Purpose of statute providing that United States courts have authority to punish disobedience or resistance to their lawful orders is to vindicate authority of United States courts.

13. PRODUCT ASSERTEDLY TO BE USED FOR PREVENTION OF IRON DEFICIENCY ANEMIA WAS A "DRUG" WITHIN THE STATUTORY DEFINITION OF "DRUG," AND AS SUCH WAS PROPER SUBJECT OF FTC CEASE AND DESIST ORDER.

Product assertedly to be used for prevention of iron deficiency anemia was a "drug" within statute providing that, for purposes of Federal Trade Commission Act provisions proscribing dissemination by mail or in commerce of false advertisements likely to produce purchase of drugs, "drug" means articles intended for use in prevention of disease in man; thus, such product was proper subject of FTC cease and desist order.

14. WHERE IRON WAS ONLY NUTRITIVE PROPERTY ADVERTISED IN ONE PRODUCT AND WAS THE MOST SIGNIFICANT NUTRITIVE PROPERTY ADVERTISED IN ANOTHER, THE PRODUCTS POSSESSED A "SUBSTANTIALLY SIMILAR PROPERTY" WITHIN THE ORDER AND PROHIBITION OF FTC ORDER APPLIES.

Where iron was only nutritive property of product advertised as "DAILY IRON SUPPLEMENT FOR WOMEN" and was most significant nutritive property of product advertised as "HIGH POTENCY IRON AND VITAMIN TONIC" and where FTC cease and desist order was designed to prohibit representations by defendants with respect to benefits to be derived from iron contained in such tonic, supplement and tonic possessed "substantially similar property" within such order, which applied to advertisements of tonic and to advertisements of any other preparation possessing substantially similar properties.

15. QUESTION OF LAW FOR COURT TO DETERMINE WAS INTERPRETATION OF F.T.C. CEASE AND DESIST ORDER DESIGNED TO PROHIBIT REPRESENTATION WITH RESPECT TO BENEFIT DERIVED FROM SPECIFIC PRODUCT AND PRODUCTS POSSESSING SUBSTANTIALLY SIMILAR PROPERTIES.

Interpretation of FTC cease and desist order which was designed to prohibit representation by defendants with respect to benefit to be derived from specific product and products possessing substantially similar properties was question of law for court to determine.

16. DEFENDANTS COULD NOT RELITIGATE ISSUE IN ACTION BY U.S. TO RECOVER CIVIL PENALTIES AGAINST SUCH DEFENDANTS FOR ALLEGED VIOLATIONS OF ORDER WHERE ANOTHER CIRCUIT HAD DECIDED THAT MODIFIED ORDER WAS NOT VAGUE.

Where another circuit had, in upholding FTC cease and desist order with modifications on appeal, necessarily decided that modified order was not vague and fairly apprised defendants as to that which was expected of them, defendants could not relitigate such issue in action by United States to recover civil penalties against such defendants for alleged violations of order.

17. EVIDENCE BEFORE COURT WAS SUFFICIENT TO PERMIT COURT TO MAKE CORRECT INTERPRETATION OF ORDER.

[523] Evidence before court in action by United States to recover civil penalties for alleged violations of FTC cease and desist order, was sufficient to permit court to make correct interpretation of order.

18. NO VIOLATION OF DEFENDANTS' RIGHT TO DUE PROCESS WHEN GOVERNMENT IMPOSES PENALTIES FOR VIOLATIONS OF F.T.C. ORDER TO CEASE AND DESIST PRIOR TO NOTICE BY AGENCY THAT DEFENDANTS' CONDUCT DEEMED IN VIOLATION OF THE ORDER.

Government could impose penalties with respect to alleged violations of FTC cease and desist order even if violations preceded any notice to defendants by Commission that such conduct was deemed in violation of order; and such would not violate defendants' right to due process.

19. SEVENTH AMENDMENT RIGHT TO JURY TRIAL DOES NOT EXTEND TO ACTIONS FOR CIVIL CONTEMPT.

Seventh Amendment right to jury trial does not extend to actions for civil contempt.

20. IT WAS FOR COURT TO DETERMINE AS MATTER OF LAW WHETHER ORAL AND/OR VISUAL CONTENT OF CHALLENGED ADVERTISEMENT WAS WITHIN SCOPE OF PROVISIONS IN THE ORDER.

In action by United States to recover civil penalties for alleged violations of FTC cease and desist order, once Commission established that order was in effect and that a particular advertisement, which allegedly violated order, had been disseminated, it was for court to determine as matter of law whether oral and/or visual content of challenged advertisement was within scope of provisions of the order.

21. F.T.C. ACT IS DESIGNED TO PROTECT CONSUMING PUBLIC AND BUSINESS COMMUNITY FROM FALSE ADVERTISING.

Federal Trade Commission Act is designed to protect consuming public and business community from false advertising.

22. INTERPRETATION OF WRITTEN CONTRACT IS A MATTER OF LAW FOR THE COURT.

Interpretation of written contract is a matter of law for the court.

23. QUESTION AS TO REPRESENTATIONS MADE IN DEFENDANT'S ADVERTISEMENTS WAS FOR COURT TO DETERMINE.

Though views of FTC were relevant in determining meaning of FTC cease and desist order, question, in action for civil penalties for violations of orders, as to representations made in defendant's advertisements was for court to determine on basis of content of advertisements.

24. DISSEMINATION OF ADVERTISEMENTS CONTAINING CERTAIN REPRESENTATIONS AS TO "BLOOD-BUILDING POWER" OF PRODUCT VIOLATED PORTIONS OF F.T.C. ORDER.

Dissemination of advertisements all of which claimed that product carried "blood-building power to every part of your body" and that it "builds iron power in your blood fast" and some of which showed transformation of "tired blood" into "untired" blood as result of use of product violated portion of FTC order, which enjoined dissemination of any advertisement representing that purported "HIGH POTENCY IRON AND VITAMIN TONIC" or any similar preparation would be beneficial in treatment or relief or tiredness symptoms unless advertisement contained expressed disclosures, and violated other comparable portions of order.

25. Dissemination of Advertisements Containing Certain Representations to Effect That Product "Builds Iron Power Fast" Violated Portions of F.T.C. Order.

Dissemination of advertisements, all of which contained statements to effect that product "builds iron power fast" and some of which showed transformation of "iron-poor blood cells * * * pale, few in number, badly shaped," *i.e.* "tired blood," into "iron-rich red blood" with "more blood cells * * * better shaped * * * rich in iron," *i.e.* healthy, "untired" blood, as a result of use of certain product, violated portion of FTC order which enjoined dissemination of advertisement representing that tiredness, loss of strength, rundown feeling, nervousness or irritability were generally reliable indications of iron deficiency or iron deficiency anemia.

26. Dissemination of Advertisement Containing Certain Representations That Product Carried Its High Potency Iron Throughout Body Violated FTC Order.

Dissemination of advertisement, in which it was stated that product carried its high potency iron throughout body and which depicted person with iron-poor blood as having been transformed from "sad" to "glad" state as result of taking such product, and dissemination of similar advertisements violated portions of FTC order prohibiting dissemination of [524] any advertisement which created impression that tired feeling was caused by iron deficiency or which linked tired symptoms with iron deficiency anemia.

27. Dissemination of Advertisement Stating That Product Built Iron Power in Blood and Depicted "Sad" to "Glad" Transformation of Person Taking Such Product Violated Portions of F.T.C. Order.

Dissemination of advertisement, in which it was stated that product built iron power in blood and which depicted "sad" to "glad" transformation of person who took product after she discovered that she had iron-poor blood, and dissemination of similar advertisement violated portions of FTC order prohibiting dissemination of any advertisement which created impression that tired feeling was caused by iron deficiency or which linked tiredness symptoms with iron deficiency anemia.

28. Dissemination of Advertisements Depicting "Vital Look" Purported to Use of "Feminine Iron Tablet" Violated Portions of FTC Order.

Dissemination of advertisements, which showed closeup of "tired mother" and contained statement "You see, some women even risk becoming anemic and tired," and which depicted "vital look" of user of purported "FEMININE IRON TABLET," violated portions of FTC order prohibiting dissemination of any advertising which created impression that tired feeling was caused by iron deficiency or which linked tiredness symptoms with iron deficiency anemia, notwithstanding assertion that sole theme of advertisement was prevention.

29. STATUTORY REQUIREMENT FOR CERTIFICATION OF FACTS OF VIOLATION OF FTC ORDER TO CEASE AND DESIST DOES NOT REQUIRE CERTIFICATION OR RECOMMENDATION AS TO AMOUNT OF PENALTIES TO BE SOUGHT.

Statute which requires that FTC certify facts which give it reason to believe that any corporation is liable for a penalty for violation of Commission cease and desist order does not require certification or recommendation by FTC to Attorney General as to amount of penalties which should be sought.

30. ATTORNEY GENERAL'S DUTY TO BRING APPROPRIATE PROCEEDINGS BASED ON FACTS CERTIFIED TO HIM NOT ALTERED BY DRAFT OF COMPLAINT SEEKING $500,000 IN PENALTIES OR LACK OF SUGGESTION THAT PROCEEDINGS SEEKING $1,000,000 IN PENALTIES WOULD NOT BE APPROPRIATE.

That letter of certification of FTC was accompanied by a "draft of complaint" which only sought a total of $500,000 in penalties for alleged violations of Commission cease and desist order did not alter duty of Attorney General to bring appropriate proceedings based on facts certified to him and did not suggest that proceedings seeking $1,000,000 in penalties would not be appropriate.

31. FTC CERTIFICATION OF FACTS WARRANTING ONLY $500,000 IN FINES WOULD NOT CREATE A JURISDICTIONAL BAR TO AWARD OF GREATER PENALTIES.

Even if FTC certified to Attorney General that facts of case only warranted imposition of total fine of $500,000 for violation of Commission cease and desist order, such would not have created jurisdictional bar to award of greater penalties.

32. EVEN IF DEFENDANT CORPORATIONS WERE NOT DE FACTO SEPARATE, SUCH WOULD NOT PRECLUDE IMPOSITION OF PENALTIES AGAINST EACH CORPORATION FOR SAME VIOLATIONS.

Even if defendant corporations which were subject to FTC cease and desist order, were not de facto separate, such did not preclude imposition of penalties against each corporation with respect to same violations.

33. WHERE FTC ORDER HAD BEEN ENFORCED BY ANOTHER CIRCUIT, VALIDITY OF ORDER WAS NOT REVIEWABLE IN GOVERNMENT'S ACTION FOR CIVIL PENALTIES.

Where FTC cease and desist order had been enforced against defendants by another circuit, validity or order was not reviewable in government's action against such defendants for civil penalties for alleged violations of order.

34. STATUTORY PENALTY COULD BE INVOKED MORE THAN ONCE FOR DISSEMINATION OF EACH COMMERCIAL IN VIOLATION OF FTC ORDER.

Statutory penalty could be invoked more than once for dissemination of each commercial in violation of FTC order prohibiting dissemination of certain advertisement.

35. WHERE GOVERNMENT'S CLAIM WAS NOT THAT DEFENDANTS HAD FAILED OR NEGLECTED TO DO SOMETHING BUT THAT THEY DID SPECIFIC PROHIBITED ACTS, PROVISO THAT "EACH DAY OF CONTINUATION OF SUCH FAILURE OR NEGLECT SHALL BE DEEMED A SEPARATE OFFENSE" WAS NOT APPLICABLE.

Proviso that "each day of continuation of such failure or neglect shall be deeemd a separate offense" was not applicable, in action by Government for civil penalties for alleged violations of FTC cease and desist order where government's claim was not that defendants had failed or neglected to do something but rather that defendants did specific acts which were prohibited by order.

36. PURPOSE OF PROVISO REGARDING OFFENSES BEING DEEMED SEPARATE OFFENSES FOR EACH DAY OF CONTINUANCE IS TO ASSURE FINES OF MORE THAN $5,000.

[525] Purpose of statutory proviso that "each day of continuance of such failure or neglect shall be deemed a separate offense" is to assure that individuals or corporations who fail to do some act which they are specifically required to do by FTC may be fined more than $5,000.

37. FINANCIAL ABILITY TO PAY PENALTIES, DEGREE OF HARM CAUSED BY VIOLATIONS, AND WHETHER DEFENDANTS HAVE ACTED IN GOOD FAITH OR BAD ARE FACTORS TO BE CONSIDERED IN DETERMINING AMOUNT OF PENALTIES TO BE ASSESSED.

Factors to be considered in determining the amount of penalties to be assessed for violation of FTC cease and desist order are financial ability of denfendants to pay penalties demanded, degree of harm which defendants may have cause by their violations and whether defendants have acted in good or bad faith in violating order.

38. COURT WOULD ENTERTAIN APPLICATION TO PAY PENALTIES IN INSTALLMENTS WITH INTERESTS ON SHOWING OF NECESSITY WHERE DEFENDANT MIGHT HAVE DIFFICULTY PAYING ASSESSED FINES IN LUMP SUM.

Where it appeared that a defendant in action by Government for civil penalties for alleged violations of FTC cease and desist order might have difficulty in paying assessed fines in a lump sum, court would entertain any application by such defendant to pay penalties over period of years, in installments with interest, on a showing of necessity therefor.

39. ADVERTISING REACHING VAST AUDIENCE AT GREAT EXPENSE MAY BE ASSUMED TO CAUSE SIGNIFICANT MONETARY HARM TO PUBLIC AND SHOULD BE TAKEN INTO ACCOUNT IN DETERMINING PENALTY.

If advertising, which has been conducted in violation of FTC cease and desist order, has reached vast audience at great expense, it may be assumed that such advertising has caused significant monetary harm to public, and such should be taken into account in determining penalty to be invoked.

40. TOTAL LACK OF GOOD FAITH, WILLFUL VIOLATIONS, AND RECKLESS DISREGARD OF CEASE AND DESIST ORDER PROVISIONS PERTAINING TO DISSEMINATION OF CERTAIN ADVERTISING, WOULD IMPOSE MAXIMUM PENALTY OF $5,000 AGAINST DEFENDANT HAVING FINANCIAL ABILITY TO PAY FOR EACH VIOLATION AND A $4,000 PENALTY FOR EACH VIOLATION AGAINST DEFENDANT HAVING DIFFICULTY IN PAYING PENALTIES ASSESSED.

Where violations of cease and desist order related to dissemination of unlawful advertisements over network television and where there was total lack of good faith with respect to violations pertaining to dissemination of certain advertisements and, if not willful violations of order, at least reckless disregard of its provisions, maximum penalty of $5,000 would be imposed against defendant, which had financial ability to pay maximum penalties sought, for each violation involving such advertisements and penalty of

$4,000 for each such violation would be imposed against defendant which might have had difficulty in paying, in a lump sum, penalties assessed.

41. FAILURE OF RESPONDENTS TO OBTAIN FTC ADVICE ON ADVERTISEMENTS PRIOR TO DISSEMINATION AND CONTINUED DISSEMINATION AFTER SUBMISSION OF SAME AS PART OF COMPLIANCE REPORT WITHOUT AWAITING ADVICE BY FTC ESTABLISHES BAD FAITH AND AMOUNTS TO GROSS NEGLIGENCE BORDERING ON RECKLESSNESS. PENALITY OF $4,000 ASSESSED AGAINST DEFENDANT FINANCIALLY ABLE TO PAY IN LUMP SUM, AND $3,000 AGAINST DEFENDANT UNABLE TO PAY IN LUMP SUM WITH RESPECT TO EACH VIOLATION.

Where violations of FTC cease and desist order related to dissemination of unlawful advertisements over network television and where defendants did not submit certain advertisements to FTC prior to their dissemination in violation of order, despite fact that defendants' employees were aware that advertisements might violate order, penalty of $4,000 would be imposed against defendant, which had financial ability to pay maximum penalties sought, for each violation involving such advertisements and penalty of $3,000 for each such violation would be imposed against defendant which might have difficulty in paying, in a lump sum, the penalties assessed.

42. DISSEMINATION OF CERTAIN ADVERTISEMENTS AFTER ADVICE BY APPROPRIATE FTC DIVISION THAT SAID ADVERTISEMENTS WERE COVERED BY THE ORDER CONSTITUTES WILLFUL DISREGARD OF FTC ORDER; AND COURT IMPOSED MAXIMUM PENALTY OF $5,000 AGAINST DEFENDANT ABLE TO PAY IN LUMP SUM, AND $4,000 AGAINST DEFENDANT UNABLE TO PAY IN LUMP SUM WITH RESPECT TO EACH VIOLATION.

Where violations of FTC cease and desist order related to dissemination of unlawful advertisement over network television and where defendants, in violation of order, had disseminated certain advertisements over one month after they were advised that appropriate division of FTC considered product advertisement to be covered by order, maximum penalty of $5,000 would be imposed against defendant, which had financial ability to pay maximum penalties sought, for each violation involving such advertisements and penalty of $4,000 for each such violation would be imposed against defendant which might have difficulty **[526]** in paying, in a lump sum, the penalties assessed.

(Syllabus, with substituted captions, taken from 354 F. Supp. 521)

On motion for summary judgment, court held that Sixth Amendment right to jury trial did not apply to action involving $1,000,000 in civil penalties and, *inter alia*, that dissemination of advertisements depicting persons with iron-poor blood as having been transformed from "sad" to "glad" state as result of taking defendants' product and dissemination of similar advertisements violated portions of prior FTC cease and desist order.

Motion granted.

Whitney North Seymour, Jr., U.S. Atty., by *Patricia M. Hynes*, Asst. U.S. Atty., New York City, *Janet D. Saxon*, Bureau of Consumer Protection, F.T.C., Washington, D.C., for plaintiff.

Hughes, Hubbard & Reed, by *Powell Pierpoint*, New York City, *Covington & Burling*, by *James H. McGlothlin*, *John Vanderstar*, Washington, D.C., *Henry E. Schultz*, New York City, for defendants.

MOTLEY, *District Judge.*

OPINION ON MOTION FOR SUMMARY JUDGMENT

This action was instituted against defendants to recover civil penalties for alleged violation of a Federal Trade Commission (FTC) cease and desist order. Federal Trade Commission Act (F.T.C. Act), Section 5(*l*), 15 U.S.C. § 45(*l*).

The order, which was enforced by the Court of Appeals for the Sixth Circuit with modifications, *see J. B. Williams Company* v. *Federal Trade Commission*, 381 F. 2d 884 (6th Cir. 1967), reads in pertinent part as follows:

> IT IS ORDERED that respondents, The J. B. Williams Company, Inc., a corporation, and Parkson Advertising Agency, Inc., a corporation, * * * directly or through any corporate or other device, in connection with the offering for sale, or distribution of the preparation designated Geritol Liquid or the preparation designated Geritol Tablets, or any other preparation of substantially similar composition or possessing substantially similar properties, under whatever name or names sold, do forthwith cease and desist from:
>
> 1. Disseminating or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement
>
> * * * * * * *
>
> (b) which represents directly or by implication that the preparation is a generally effective remedy for tiredness, loss of strength, rundown feeling, nervousness or irritability;
>
> (c) which represents directly or by implication that the preparation is an effective remedy for tiredness, loss of strength, rundown feeling, nervousness or irritability in more than a small minority of persons experiencing such symptoms;
>
> (d) which represents directly or by implication that the use of such preparation will be beneficial in the treatment or relief of tiredness, loss of strength, run-down feeling, nervousness or irritability, unless such advertisement expressly limits the claim of effectiveness of the preparation to those persons whose symptoms are due to an existing deficiency of one or more of the vitamins contained in the preparation, or to an existing deficiency of iron or to iron deficiency anemia, and further, unless the advertisement also discloses clearly and conspicuously that: (1) in the great majority of persons who experience such symptoms, these symptoms are not caused by a deficiency of one or more of the vitamins contained in the preparation or by iron deficiency or iron deficiency anemia; and (2) for such persons the preparation will be of no benefit;
>
> (e) which represents directly or by implication that tiredness, loss of strength, run-down feeling, nervousness or irritability are generally reliable indications of iron deficiency or iron deficiency anemia;
>
> * * * * * * *

[527] In Matter of J. B. Williams Company, Inc., Federal Trade Commission Docket No. 8547, November 24, 1967. (Modified order to cease and desist.)

This order became final by operation of law on December 24, 1967, 15 U.S.C. § 45(i), and has remained in effect since that date. The validity of the order is not subject to question in this action. *See Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 54, 68 S.Ct. 822, 92 L.Ed. 1196 (1948); *Piuma* v. *United States*, 126 F.2d 601, 603 (9th Cir.), *cert. denied*, 317 U.S. 637, 63 S.Ct. 28, 87 L.Ed. 513 (1942); *United States* v. *H. M. Prince Textiles, Inc.*, 262 F.Supp. 383, 388 (S.D.N.Y. 1966); *United States* v. *Vitasafe Corporation*, 212 F.Supp. 397, 398 (S.D.N.Y. 1962); *cf. Parke, Austin & Lipscombe, Inc.* v. *Federal Trade Commission*, 142 F.2d 437, 442 (2d Cir.), *cert. denied*, 323 U.S. 753, 65 S.Ct. 86, 89 L.Ed. 603 (1944).

The alleged violations of the order consist of the dissemination by defendants of eleven different television advertisements on a total of 100 separate occasions. The United States seeks the maximum penalty of $5000 for each violation, as prescribed by Section 5(*l*), of the F.T.C. Act, 15 U.S.C. § 45(*l*), or a total of $500,000 in penalties against each defendant.

Before initiation of the instant suit by the United States, the facts which gave rise to it were properly certified by the FTC to the Attorney General of the United States, as required by Section 16 of the Act, 15 U.S.C. § 56[1]

The United States now moves for summary judgment. For the reasons set forth below, the motion is granted.

I. *Propriety of the Motion for Summary Judgment*

A. *Defendants Do Not Have the Right to Trial by Jury*

At the outset, the court must consider defendants' claim that summary judgment would be improper in this action because "the Sixth Amendment requires a jury trial in this case." Defendants' Memorandum 32. To support this argument defendants cite the Supreme Court decision in *Bloom* v. *Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), which held that serious criminal contempts must be tried to a jury. Defendants argue that the instant action, seeking penalties of $1,000,000, is "inherently criminal in nature" and "so similar to a criminal contempt proceeding, [that] defendants must be extended exactly the same right to a jury trial as they would have enjoyed had the Commission sought to impose the identical fines in a criminal contempt proceeding." Defendants' Memorandum 32, 34–35.

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[1] Defendants' contention regarding the scope of the certification is discussed *infra*, at pp. 544–546 [pp. 512–516 herein].

Plaintiff simply responds in its reply brief that "this action, as well as all prior civil penalty actions involving violations of Federal Trade Commission orders to cease and desist, is clearly civil in nature." Reply Memorandum 14. Plaintiff also points out that no court has ever held that a civil penalty action involving violations of a FTC order was criminal rather than civil in nature.

The court does not believe that defendants' contention can be dismissed so easily. However, the court reads two lines of Supreme Court cases as clearly establishing that the Sixth Amendment right to jury trial does not apply to suits brought by the United States pursuant to Section 5(*l*).

The first line of cases culminating in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), considers the question of whether a sanction imposed by a particular legislative enactment is penal or regulatory in character. The Court in *Kennedy* set forth the revelant criteria for answering this question in a specific case. Absent conclusive evidence of congressional intent as to the penal nature of a statute, the Court noted, in dictum, that "[various] **[528]** factors must be considered in relation to the statute on its face."

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry * * *. *Kennedy, supra,* 372 U.S. at 168–169, 83 S.Ct. at 567.

[1,2] On their face the stautory provisions under which this action has been brought, Sections 5(*l*), 12 and 16 of the F.T.C. Act, 15 U.S.C. §§ 45, 52 and 56, are regulatory in character. There is no doubt that, taken together, one of their objects is to control false or misleading advertising of drugs in order to shield the typical consumer against deception and misinformation resulting from dissemination of such advertising and to give him an opportunity to make an intelligent choice about drug products. *See, e.g., J. B. Williams, supra*, 381 F.2d at 890; *Federal Trade Commission* v. *Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963). In this way, too, the provisions promote the basic policy of the F.T.C. Act of curtailing unfair competition. *See, e.g., Federal Trade Commission* v. *Texaco*, 393 U.S. 223, 225–226, 89 S.Ct. 429, 21 L.Ed.2d 394 (1968). In the regulatory scheme, the civil penalty provision of Section 5(*l*) serves the distinct function of compelling compliance with FTC cease and desist orders which have been issued to protect the consuming public and the business community in the

manner just described. *See United States* v. *St. Regis Paper Company*, 355 F.2d 688, 692–695 (2d Cir. 1966).[2]

[3] Section 5(*l*) itself specifically provides that the fines imposed are a "civil penalty" to be recovered in a "civil action". While this characterization by Congress does not conclusively establish that the statutory provision is non-criminal in nature, *see United States* v. *Constantine*, 296 U.S. 287, 294, 56 S.Ct. 223, 80 L.Ed. 233 (1935), *cf. Kennedy, supra*, 372 U.S. at 163–184, 83 S.Ct. 554, it does furnish very strong evidence that Congress did not intend the provision to be punitive. Indeed, when Congress wished to make the dissemination of certain types of false advertising a criminal offense, it did exactly that. *See* 15 U.S.C. § 54(a). *See also* 15 U.S.C. § 50. A comparison of Section 12 with Section 14(a) of the F.T.C. Act strongly suggests that Congress viewed the sanction in Section 5(*l*) of the Act, as applied to the dissemination of false advertising, to be regulatory rather than penal in character. *See also St. Regis Paper, supra*, 355 F.2d at 692–699. (Held: Certification of facts by FTC to Attorney General pursuant to Section 16 of the Act is jurisdictional prerequisite to civil penalty suit under Section 5(*l*) of the Act.)

Furthermore, since here "the source of legislative concern can be thought to be the activity * * * from which the individual [or corporation] is barred," *i.e.* the dissemination of false advertising, the sanction imposed "is not punishment even though it may bear harshly upon one affected." *Flemming* v. *Nestor*, 363 U.S. 603, 614, 80 S.Ct. 1367, 1374, 4 L.Ed.2d 1435 (1960). *See id.* at 616 and 616 n. 9, 80 S.Ct. 1367, approved in dictum in *Kennedy, supra*, 372 U.S. at 169 n. 28, 83 S.Ct. 554. The sanction prescribed by Section 5(*l*) remains an integral part of the regulatory scheme and is not punishment in the criminal law sense, even though its imposition may have severe effects on violators of FTC cease and desist orders. *Cf. Fleming, supra*, 363 U.S. at 616 and 616 n. 9, 80 S.Ct. 1367.

[529] [4] Moreover, the civil penalty provision does not come into play only on a finding of scienter. *See United States* v. *H. M. Prince Textiles, Inc.*, 262 F. Supp. 383, 388 (S.D.N.Y.1966) and cases cited therein; *cf. Federal Trade Commission* v. *Algoma Lumber Company*, 291 U.S. 67, 81, 54 S.Ct. 315, 78 L.Ed. 655 (1934). Nor is dissemination of the challenged advertisements punishable as a crime either under the F.T.C. Act or any other act of Congress.

[5] Finally, Section 5(*l*) has not historically been regarded as a punishment, as evidenced by the fact that not a single decision which has been brought to the attention of the court has even hinted that

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[2] **The Court of Appeals noted that there was "little explanation or elaboration in [congressional] hearings or debates" about the section. 355 F.2d at 692.**

the provision is penal in character. *Cf. St. Regis Paper*, *supra*, 355 F.2d at 694 ("* * * the 'Federal Trade Commission Act is not a revenue-raising or penal measure.'") *See also Federal Trade Commission* v. *Ruberoid Company*, 343 U.S. 470, 72 S.Ct. 800, 96 L.Ed. 1081 (1952) ("Orders of the Federal Trade Commission are not intended to impose criminal punishment * * *, but to prevent illegal practices in the future." At 473, 72 S.Ct. at 803); *United States* v. *Vitasafe Corporation*, 234 F. Supp. 710 (S.D.N.Y.1964), *aff'd per curiam*, 352 F. 2d 62 (2d Cir. 1965). Nor can the court say that the penalty provided in Section 5(*l*) is in any sense excessive in relation to the clear prophylactic purpose of the statute.

[6] On the other hand, the court does think that the sanction prescribed by Section 5(*l*) may involve an affirmative disability or restraint [3] and may serve the incidental function of deterrence and retribution, once a cease and desist order takes effect. However, these factors are far outweighed by the significance of the other factors discussed above, particularly when all the factors are viewed in relation to the statute on its face. Moreover, although the absence of an affirmative disability and of deterrent effects as a result of a sanction generally establishes its non-criminal nature, *see Flemming*, *supra*, 363 U.S. at 617, 80 S.Ct. 1367, the inverse of this proposition is not true. *See Rex Trailer Company* v. *United States*, 350 U.S. 148, 76 S.Ct. 219, 100 L.Ed. 149 (1956) and arguments of counsel in that case at 100 L.Ed. 150–152. *Cf.* pages 529–530 *infra*.

[7] Therefore, applying the *Kennedy* criteria set forth above to the face of the statute, the court holds that the statutory provisions in question can only be interpreted as regulatory in nature and that the Sixth Amendment right to trial by jury is not applicable to defendants in this action.

[8] This conclusion is buttressed by a second line of Supreme Court cases which consider the distinction between proceedings for civil contempt and those for criminal contempt. While serious criminal contempts must be tried to a jury, *see Bloom* v. *Illinois*, *supra*, the Supreme Court has held that a jury trial is not constitutionally required in civil contempt proceedings. *See Shillitani* v. *United States*, 384 U.S. 364, 365, 371, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966).

Defendants argue that the instant action should be likened to a criminal contempt proceeding, both because of "the enormous size of the fines sought" and "because plaintiff is seeking to recover a *penalty*, not compensatory damages." Defendants' Memorandum 33. (Emphasis in original.) The argument is untenable. Indeed precedents in both the Supreme Court and the Court of Appeals for this circuit convince the court that the instant action is so analogous to a civil contempt proceeding that no jury trial can or should be required here.

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[3] The court is doubtful that Section 5(*l*) does involve an *affirmative* disability or restraint within the meaning of *Flemming, supra,* 363 U.S. at 617, 80 S.Ct. 1367.

[9] First, defendants' contention ignores the fact that civil contempt proceedings may be compensatory *or* coercive in nature. *See Shillitani, supra*, at 368–371, 86 S.Ct. 1531; *Backo* v. *Local 281, United Brotherhood of Carpenters* **[530]** *and Joiners of America*, 438 F.2d 176, 182 (2d Cir. 1970), *cert. denied*, 404 U.S. 858, 92 S.Ct. 110, 30 L.Ed.2d 99 (1971). The statutory provision underlying the present action, Section 5(*l*) of the F.T.C. Act, is coercive in the same way that the conditional imprisonment imposed in *Shillitani* was coercive. It serves the same coercive function as does the liability to a fine for violating an injunction.

In each case, the question to be asked is: what does the sanction seek to accomplish? *See Shillitani, supra*, 384 U.S. at 370, 86 S.Ct. 1531. Where the sanction seeks to compel the person subject to it to do what he is legally required to do, the sanction is neither punitive nor criminal, but simply remedial in purpose. The penalty prescribed by Section 5(*l*) in the context of this action is "intended to be remedial by coercing the defendant[s] to do what [they have] refused to do," *i.e.* to cease and desist from disseminating advertisements of a type which the Commission has found to be misleading. *See Penfield Company of California* v. *Securities and Exchange Commission*, 330 U.S. 585, 590, 67 S.Ct. 918, 91 L.Ed. 1117 (1947); *Gompers* v. *Bucks Store & Range Company*, 221 U.S. 418, 442, 31 S.Ct. 492, 55 L.Ed. 797 (1911). *Cf. L. G. Balfour Co.* v. *Federal Trade Commission*, 442 F.2d 1, 24 (7th Cir. 1971).

Second, defendants' contention that the size of the fines sought in this action turns the action into a criminal proceeding is erroneous. The Supreme Court has upheld the power of courts to imprison witnesses who refuse to testify before a grand jury under a *civil* contempt order, even though the imprisonment may continue for a lengthy period and may depend upon "fortuitous circumstances, such as the life of the grand jury and when a witness appears." *Shillitani, supra*, 384 U.S. at 371–372, 86 S.Ct. 1531 at 1536. Similarly, the imposition of a fine of $5000 for each separate violation of a FTC cease and desist order while it is in effect remains a civil penalty, so long as it was within the power of the violator to have abided by the order and thereby to have avoided the sanction. *See Shillitani, supra*, 368–370, 86 S.Ct. 1531. *See also* 8A J. Moore, Federal Practice ¶ 42.02 [2] (2d Ed. 1972).

[10, 11] In other respects as well, Section 5(*l*) resembles a civil contempt sanction. Liability to a civil contempt penalty does not require that violation of a court order be wilful. *See McComb* v. *Jack-*

sonville Paper Company, 336 U.S. 187, 191, 69 S.Ct. 497, 93 L.Ed. 599 (1947); *National Labor Relations Board* v. *Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 428 F.2d 994, 1001 (2d Cir. 1970). Nor does a civil contempt proceeding open to reconsideration the factual or legal basis of the underlying court order. *See Maggio* v. *Zeitz*, 333 U.S. 56, 69, 68 S.Ct. 401, 92 L.Ed. 476 (1948). These attributes of a civil contempt proceeding apply equally to actions under Section 5(*l*). *See* pages 527 and 529 *supra*.

[12] Finally, defendants' argument that the FTC could have petitioned the Court of Appeals for the Sixth Circuit to bring criminal contempt proceedings against defendants for precisely the same alleged violations and asking for the same fines as are involved here (Defendants' Memorandum 33–34) is of no avail to defendants. Indeed, it simply points up the fact that Congress intended Section 5(*l*) to provide a non-criminal means for the FTC to enforce valid cease and desist orders. The statutory provision bolsters the regulatory goals of the entire Federal Trade Commission Act. In contrast, a criminal contempt proceeding to enforce a Commission order would have to be brought under the United States Criminal Code, 18 U.S.C. § 401, which is designed to vindicate the authority of the courts of the United States, a purpose wholly separate from that of the regulatory statute. *See, e.g., Cheff* v. *Schnackenberg*, 384 U.S. 373, 377–378, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966); *United States* v. *Schine*, 266 **[531]** F.2d 552, 557 (2d Cir. 1958), *cert denied*, 358 U.S. 934, 79 S.Ct. 318, 3 L.Ed.2d 306 (1959); 8A J. Moore, Federal Practice ¶ 42.02 [2] (2d Ed.1972). Furthermore, the same conduct can amount to both civil and criminal contempt. *See United States* v. *United Mine Workers*, 330 U.S. 258, 298–299, 67 S.Ct. 677, 91 L.Ed. 884 (1947); *Gompers, supra*, 221 U.S. at 441–442, 31 S.Ct. 492; 5 J. Moore, Federal Practice ¶ 38.33 [1] (2d Ed. 1971). Therefore, the observation of defendants does not support its claim that this action has the character of a criminal proceeding.

B. *FemIron*

[13] FemIron is another iron preparation sold by defendant J. B. Williams Company. Counts ten and eleven of the complaint relate to the dissemination by defendants of FemIron advertisements. In their answer to the complaint, defendants deny that FemIron is a drug preparation within the meaning of Section 15 of the F.T.C. Act. Moreover, defendants contend that whether FemIron is covered by the FTC order presents a genuine issue of fact which cannot be determined on this motion for summary judgment. Both contentions are rejected.

Section 15(c) of the F.T.C. Act states that the term "drug" means, *inter alia*, "articles intended for use in the * * * prevention of disease in man * * *." 15 U.S.C. § 55(c) (2). In paragraphs 46 and 50 of their answer, defendants aver that "FemIron is a product for the prevention of * * * iron deficiency anemia." Consequently, it is clear that FemIron is a "drug" and that FemIron advertisements are a proper subject of the FTC order. *See* 15 U.S.C. § 52.

[14] The FTC order applies by its terms not only to advertisements of Geritol Liquid or Geritol Tablets, but also to advertisements of "any other preparation * * * possessing substantially similar properties, under whatever name or names sold." Defendants argue that FemIron does not possess properties substantially similar to those of Geritol. They support this argument with numerous affidavits of recognized experts in the fields of iron deficiency anemia and nutrition. Thus, defendants assert, there is a dispute as to this substantial issue of fact and the motion for summary judgment, at least as to counts ten and eleven, should not be granted. *See* Defendants' Memorandum 47–48.

The court rejects this argument for two reasons. First, it is undisputed that both Geritol and FemIron are iron preparations. They are also both indicated for use as a dietary supplement. The Geritol Tablet label states that it is "A HIGH POTENCY IRON AND VITAMIN TONIC" and that it may be used "As a dietary supplement: One (1) tablet daily." *See, e.g.*, Beutler Affidavit, Exhibit B, submitted by defendants. The FemIron label indicates that it is a "DAILY IRON SUPPLEMENT FOR WOMEN * * * DIRECTIONS: One tablet every day with any meal." *Id.* The labels in themselves establish that the preparations possess substantially similar properties within the meaning of the FTC order.

Second, the FTC order was designed to prohibit representations by defendants with respect to the benefit to be derived from the iron contained in Geritol. The phrase "possessing substantially similar properties" must be interpreted in this light. It is undisputed that FemIron contains only one nutritive ingredient, iron, and that it is less effective than Geritol, which contains more iron per tablet as well as seven vitamins. Therefore, FemIron's single chemical property is the very same property which distinguishes Geritol from other drug preparations and for which Geritol is advertised. In this sense, FemIron possesses properties substantially similar to those of Geritol. Indeed, FemIron's only nutritive property is identical to the most significant nutritive property of a Geritol tablet or a tablespoon of Geritol Liquid.

The thrust of all the expert affidavits submitted by defendants is that FemIron and Geritol differ in their properties, because FemIron contains *less* iron than does Geritol and is, therefore, *less effective* **[532]** when taken as directed as a remedy for iron deficiency anemia. These observations are undoubtedly correct. However, it is disingenuous for defendants to argue that FemIron is exempt from the order because it is a less effective preparation than Geritol. To the extent that the representations prohibited by the order with respect to Geritol are deceptive, they are also deceptive with respect to FemIron. The court concludes that the dissemination of FemIron advertising is covered by the FTC order.

C. *No Other Genuine Issues of Fact Remains to be Tried*

Defendants contend that this is not a proper case for summary judgment because there are material issues of fact in dispute, including:

1) The proper interpretation of the FTC order;

2) Whether defendants had been given notice and a reasonable opportunity to discontinue the challenged advertisements; and

3) The meaning of each of the advertisements challenged in the complaint. Memorandum 24. *See id.* at 24–32, 36–46, 49–64. The court will consider each of these contentions in succession.

1. Meaning of the Order

[15, 16] Interpretation of the FTC order is undoubtedly a question of law for the court to determine. In upholding the order with modifications on appeal, the Sixth Circuit necessarily decided that the modified order here in issue was not vague and fairly apprised defendants of what was expected of them. *See J. B. Williams, supra*, 381 F.2d at 891. Defendants cannot relitigate that issue in this action. *See Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37, 54, 68 S.Ct. 822, 92 L.Ed. 1196 (1948).

[17] On the other hand, correct interpretation of the order requires the court to consider not only its plain language, but relevant proceedings before the FTC and the Sixth Circuit's decision as well. The court finds that the undisputed documentary evidence now before the court is more than sufficient to enable it to fully perform this task.[4]

2. Notice to Defendants of Alleged Violations

[18] The court disagrees with defendants' assertion that "it is settled that the Government may not impose penalties under 15 U.S.C. § 45(*l*) with respect to alleged violations of orders where these violations preceded Commission notice that the conduct was deemed in vio-

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[4] Furthermore, the issues presented by defendants as to the meaning of the order, Memorandum 36–45, are apparently not in dispute. *See* Government Reply Memorandum 3–4.

lation of the order." Defendants' Memorandum 58–59. Such notice is neither required by the statutory scheme nor by the Commission's rules and procedures. The only procedural step required by the F.T.C. Act before institution of a Section 5(*l*) suit is the certification of facts relating to the alleged violation to the Attorney General. *See* Section 16, 15 U.S.C. § 56. A blanket rule requiring prior notice by the Commission of alleged violations of its orders has absolutely no statutory basis whatever. *See generally* Government Reply Memorandum 27–39.

If defendants intend by this assertion to claim a violation of their right to due process in this case, the claim is rejected. The record shows that the FTC informed defendants that the advertisements contained in their first compliance report were in violation of the order. The Commission took the unusual step of permitting defendants to file a second compliance report. The Commission informed defendants in June, 1969, on the basis of this report, that they were still not in compliance with the order. When, after this notice and after 17 months since the order became final, defendants proceeded to disseminate the advertisements challenged here without prior approval by the Commission, defendants **[533]** acted at their own peril.[5] *Cf. Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965). If defendants' argument were accepted, it would reduce Section 5(*l*) to meaninglessness.

3. Representations in the Advertisements

[19, 20] Defendants also oppose the motion for summary judgment on the ground that there are genuine issues of material fact as to what representations are made in the challenged advertisements and whether these representations are prohibited by the FTC order. Defendants argue that these factual questions must be submitted to a jury[6] and cite three court decisions in support of their argument.[7]

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[5] Indeed, defendants did have notice that the Commission considered six of the challenged advertisements in violation of the order. *See* Part III D, *infra* (discussion of counts 1–4, 8 and 9.)

[6] The court doubts whether defendants can demand a jury trial as a matter of right pursuant to Fed.R.Civ.P. Rule 38(b). The action is in the nature of a civil contempt proceeding. *See* pp. 529–530 *supra*. The Seventh Amendment right to jury trial does not extend to actions for civil contempt. *See* 5 J. Moore, Federal Practice ¶ 38.33[2]–[3] (2d Ed. 1971); *cf. Shillitani, supra*. Nor has Congress provided for trial by jury as of right in Section 5(*l*) actions.

In any case, the court need not reach this question, since the court holds *infra* that no dispute of material fact remains to be resolved.

[7] Defendants cite *United States* v. *Fire Safety Devices*, Civ. No. 13254 (D.Md. 1962) (no written opinion); *United States* v. *Hindman*, 179 F.Supp. 926 (D.N.J.1960); and *United States* v. *Americana Corporation*, Civ.No.10858 (D.Md.1960) (no written opinion).

Fire Safety and *Americana* do not support defendants' contention because they involved the factual question of what *oral* representations were made by employees of the companies being sued. *See* Defendants' Memorandum 29n.1; Vanderstar Affidavit, Exhibits D and E;

Plaintiff responds to this argument by citing seven cases where "courts in similar situations have held that no issue of fact is presented when the question before them is whether an advertisement falls within the prohibition of a cease and desist order and have disposed of these cases by summary judgment." [8]

Only one of the cases cited by the parties actually considered the precise issue **[534]** presented here. *See* notes 7 and 8 *supra*. That case is *United States* v. *Vulcanized Rubber & Plastics Company*, 178 F. Supp. 723 (E.D.Pa.1959), *aff'd* 288 F. 2d 257 (3d Cir. 1961), *cert. denied*, 368 U.S. 821, 82 S.Ct. 38, 7 L. Ed. 2d 26 (1961).

In *Vulcanized Rubber*, the defendant was ordered by the FTC to cease and desist from representing, directly or by implication, by any advertisement or labeling that combs which it manufactured were "rubber" or "hard rubber" or were "made of 'rubber'" or "made of 'hard rubber,'" unless such combs were in fact made of vulcanized hard rubber. After the order became final, the defendant labeled its combs "rubber-resin." The United States brought suit under Section 5(*l*) of the F.T.C. Act and moved for summary judgment. The defendant's argument that the marking "rubber-resin" was not a "misrepresentation * * * to the purchasers thereof that the same are, in fact, made of 'rubber' or 'hard rubber'" was rejected by the District Court and the court granted summary judgment. 178 F. Supp. at 726.

The Third Circuit panel affirmed this decision stating that "since there was no issue of fact presented, the district court properly disposed of the case on summary judgment" 288 F. 2d at 258 n. 2. The court then ruled that "the labeling of the combs as being made of

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Hynes Affidavit, Exhibits D and E. Here, in contrast, the actual advertisements sued upon are before the court and their dissemination is undisputed.

The *Hindman* decision is not authoritative, for it was subsequently criticized by the Court of Appeals for the Third Circuit in *United States* v. *Vulcanized Rubber & Plastics Company*, 288 F.2d 257, 258n.2 (3d Cir. 1961), *cert. denied*, 368 U.S. 821, 82 S.Ct. 38, 7 L.Ed.2d 26 (1961). *See* note 10 *infra*.

[8] Reply Memorandum 5. *See United States* v. *Vulcanized Rubber & Plastics Company*, *supra*; *Piuma* v. *United States*, 126 F.2d 601 (9th Cir.), *cert. denied*, 317 U.S. 637, 63 S.Ct. 28, 87 L.Ed. 513 (1942); *United States* v. *Smith Fencer Corporation*, 312 F.Supp. 666 (E.D. Mich.1970); *United States* v. *Sav-Cote Chemical Laboratories, Inc.* CCH 1971 Trade Cases ¶ 73,439 (D.N.J.1969); *United States* v. *Bogolub*, Civil No. 67–C–1138 (N.D.Ill.1967) (no written opinion); *United States* v. *Winters*, No. 66–195 Civ.T. (M.D.Fla. 1966) (no written opinion); *United States* v. *Modell*, Civ. No. 127–366 (S.D.N.Y.1960).

In all of these cases, with the exception perhaps of *Vulcanized Rubber*, it was obvious that the representations made in the advertisements were in direct conflict with the FTC order at issue. For example, in *Piuma*, the FTC order prohibited the appellant from representing among other things that a particular product "is a gland tonic" or "constitutes a remedy for glands." The challenged advertisements contained the following language: "Money-Back Gland Tablet Calls for Trial . . . its purpose is to help stimulate all the glands to healthy activity." 126 F.2d at 602–603. As for the *Bogolub* and *Winters* cases, in which there were no written opinions, the court has based its conclusion on the papers filed in those actions. *See* Hynes Affidavit, Exhibits A and B. The significance of *Modell* is impossible to ascertain from the information provided by the parties. *See* Defendants' Memorandum 29n.2; Government Reply Memorandum 6; Hynes Affidavit, Exhibit C.

rubber-resin falls within the proscription of the Order."[9] 288 F. 2d at 259.

This court holds that there is no genuine issue as to any material fact and that the advertisements here challenged violate the provisions of the FTC order.

There is no dispute as to what words were used or what was shown in the challenged advertisements. The FTC order prohibited any direct representation as well as any implication that a product covered by the order "is a generally effective remedy for tiredness, loss of strength, run-down feeling, nervousness or irritability." Paragraph 1(b). The court has read the television scripts and has viewed the films which were televised. From the oral and visual content of the advertisements, the court has determined that the implicit representations made in the advertisements fall within the scope of the prohibitions in the FTC order. *See* Part II of this opinion.

Defendants attempt to support their contention that a factual dispute exists as to the representations made in the advertisements with the affidavits of so-called expert witnesses. These affiants state that the advertisements do not impress *them* as violative of the order and that *viewers* would not be so impressed. *See* Defendants' Memorandum 54–55 and the affidavits cited therein. However, the question for this court is not whether the challenged advertisements tend to mislead or deceive the viewing public.[10] The sole issue before the court is whether the advertisements fall within the prohibitions of the valid FTC order which became effective on December 24, 1967. The Sixth Circuit has already determined that, if they do, they violate Section 12 of the F.T.C. Act because they are false within the meaning of Section 15 of that Act.

[21] The court's conclusion has a sound basis in policy. The F.T.C. Act is designed to protect the consuming public and the business community from false advertising. To effectuate this goal, the statute invests the FTC with broad authority to investigate advertising practices, *see* Section 6, 15 U.S.C. § 46, and to prohibit such advertising

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[9] Defendants here contend that the basis of the Third Circuit holding in *Vulcanized Rubber* was that the change in labeling from "rubber" to "rubber-resin" was not a material change. Therefore, defendants argue, no issue of fact was presented as to the representation made by the challenged labels and summary judgment was appropriate in that case. Defendants apparently attempt to distinguish the instant case by asserting that the representations contained in the challenged advertisements are materially different from those prohibited by the outstanding FTC order, since none of them contains a direct reference to tiredness or the other symtoms mentioned in the order.

The advertisements challenged in counts 10 and 11 do make direct reference to tiredness but defendants contend that they comply with the order for other reasons. *See* p. 544 *infra.*

[10] In *Vulcanized Rubber, supra,* the Court of Appeals for the Third Circuit stated: "* * * the holding [in *Hindman, supra*] was erroneous, since the sole issue before the court was whether or not the labeling practice was within the proscription of the order and not whether the labeling practice was deceptive." 288 F. 2d at 258 n. 2.

as the Commission determines is false by the issuance of appropriate cease and desist orders, 15 U.S.C. §§ 45(b), 52(b) and 55. A primary sanction for compelling compliance with such orders, once they become final, is Section 5(*l*) of the Act.

Thus, the statutory framework contemplates that, upon a well-grounded finding of deceptiveness in a company's advertising practices, the Commission will have the power to prevent the continuation or recurrence of such practices by the company. The orders in themselves place the company on notice of what types of advertising violate the statute. It would vitiate the very purpose of the statute to require the Commission, after a valid cease and desist order has gone into effect, to establish in respect to each subsequent advertisement disseminated by the company that it is false or deceptive.

[22] Once the Commission establishes that a cease and desist order is in effect and that a particular advertisement has been disseminated which allegedly violates that order, it is for the court to determine as a matter of law whether the oral and/or visual content of the challenged advertisement falls within the scope of the prohibitions in the order.[11]

II. *Merits of the Action*

In reaching the merits of this action, the court must consider each challenged advertisement in relation to the specific injunctions in the FTC order. First, the court will consider paragraphs 1(b), 1(c) and 1(d) of the order.

The three paragraphs prohibit very similar types of representations concerning the effect of Geritol or FemIron on tiredness, loss of strength, run-down feeling, nervousness or irritability, which for brevity may be described as the "tiredness symptoms." The parties appear to agree that if an advertisement violates paragraph 1(d), it will violate paragraphs 1(b) and 1(c) as well. Likewise, it is suggested that any advertisement which is not prohibited by paragraph 1(d) will also comply with the two other paragraphs: *See* Defendants' Memorandum 11; Government Memorandum 27–33.

This approach is sensible. Paragraph 1(d) enjoins the dissemination of any advertisement "which represents directly or by implication that the use of [Geritol or any similar preparation, *e.g.* FemIron,] will be beneficial in the treatment or relief of [any of the tiredness symptoms,]" unless the advertisement contains certain express disclosures. This prohibition is comparable if not identical, to the injunction in paragraph 1(b) against representing that the preparation is "a generally effective remedy" for any of the tiredness symptoms and to the paragraph 1(c) injunction against representing that the preparation is "an effective remedy [for any of the tiredness symptoms] in more than a small minority of persons experiencing such symptoms."

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[11] The issue is analogous to the interpretation of a writing in a contract action. Interpretation of the written contract is considered to be a matter of law for the court. *See* 4 Williston on Contracts § 616, particularly at pp. 648–49 (3d Ed. 1961). *See, e.g., West, Weir & Bartel, Inc.* v. *Mary Carter Paint Company,* 25 N.Y.2d 535, 307 N.Y.S.2d 449, 452, 255 N.E.2d 709 (1969).

It is undisputed that the challenged advertisements do not contain the disclosures set out in paragraph 1(d). Therefore, any advertisement will violate that paragraph, if, but only if, it represents directly or by implication that the preparation advertised will be beneficial in the treatment or relief of any of the tiredness sysmptoms. This test can also be used to determine whether the same advertisement complies with or violates paragraphs 1(b) and 1(c) of the order.

The only other portion of the order which the United States claims has been violated by the challenged advertisements is paragraph 1(e). That paragraph prohibits defendants from disseminating any advertisement "which represents directly or by implication that tiredness, loss of strength, run-down feeling, nervousness or irritability are generally reliable indications of iron deficiency or iron deficiency anemia."

The basic thrust of paragraphs 1(b)-1(e) of the FTC order is to prohibit the dissemination of any advertisement which "creates the impression that [a] tired feeling is caused by something [i.e. iron deficiency] which Geritol can cure" or which links "common, nonspecific symptoms [i.e. any of the tiredness symptoms] with iron deficiency anemia." *J. B. Williams, supra,* 381 F.2d at 889, 890.

Before testing the challenged advertisements against these injunctions in the order, it is appropriate to note some comments of the Supreme Court in *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 393, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965), since they are relevant to several of the arguments made by defendants with respect to the commercials at issue here:

> If [defendants] in their * * * commercials attempt to come as close to the line of misrepresentation as the Commission's order permits, they may without specifically intending to do so cross into the area proscribed by this order. However, it does not seem "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337 [340, 72 S.Ct. 329, 331, 96 L.Ed. 367] [1952]. 380 U.S. at 393, 85 S.Ct. at 1047.

A. *Counts One through Four*

The first advertisement to be considered is entitled "Blood Cells" (#G-218-40, TV Script, Parkson Advertising Agency, Inc.) and was disseminated by defendants on June 16, 1969. This dissemination is the basis for count one of the complaint. The television script reads as follows:

1. MS ON TED MACK IN LIBRARY. STANDING NEXT TO LIGHT BOX. HE FLIPS SWITCH, LIGHTING UP LEFT HALF OF SHADOW BOX TO SHOW BAD BLOOD CELLS AND TITLE: "IRON-POOR BLOOD BEFORE GERITOL."	1. MACK: (O.C.): Hello, I'm Ted Mack. Your bloodstream has been called your lifeline. Look! You could have iron-poor blood cells like these * * * pale, few in number, badly shaped.
2. DISSOLVE TO FILM CLIP OF "POOR" & "RICH" CELLS. IN THIS SEQUENCE WE WILL USE OUR FILM OF THE BLOOD CELLS FRAMES 2 AND 3.	2. If that's so, take Geritol to build more blood cells * * * better shaped * * * rich in iron * * * like these.
3. CUT BACK TO SHOW MACK STANDING BY LIGHT BOX. HOLDS UP BOTTLE OF TABLETS.	3. There's no finer, more effective way to build iron-rich, red blood than with Geritol.
4. [537] CUT TO TWO BOTTLES. BACK TO MACK.	4. Geritol-iron enters your bloodstream fast carrying its blood-building power to every part of your body.
5. TITLE: "TWICE THE IRON IN A POUND OF CALF'S LIVER."	5. Just 2 Geritol tablets or two tablespoons of Geritol liquid contain *twice* the iron in a pound of calf's liver.
6. CUT TO BOTTLES SHOT. TITLE: BUILDS IRON POWER FAST.	6. Take Geritol. It builds iron power in your blood *fast*! Geritol really works!

[23, 24] The United States contends that the phrases "iron power" and "blood-building power," as used in this commercial, suggest that Geritol will have an effect upon tiredness, that it will increase a person's strength, and that it will overcome the feeling of being rundown.[12] Memorandum 29. Defendants reply that the advertisement makes no symptomatic claims at all, that it simply shows the actual effects of Geritol on iron-poor blood cells and states that Geritol will relieve iron deficiency, and that the word "power" refers solely to the strength of the preparation. Defendants' Memorandum 55.

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[12] The government asks the court "to give weight to the Commission's finding that the commercials containing the word 'power' violated the order, keeping in mind the Commission's experience in this area * * *." Memorandum 30. The court declines this invitation. While the Commission's views are relevant to determining the meaning of the order, the question of what representations are made in the advertisements is for the court to determine on the basis of their content. *See* pages 532, 534–535 *supra*.

The court holds that dissemination of the advertisement violated paragraph 1(d) of the order and, therefore, violated paragraphs 1(b) and 1(c) as well. The representations that Geritol carries "blood-building power to every part of your body" and that it "builds iron power in your blood *fast*" clearly imply that a person who takes Geritol will have more power after taking it than he had before. To say that Geritol builds power in your blood is the effective equivalent of saying that Geritol builds power in you. Just as the advertising term "tired blood" was used by defendants to signify the condition of a tired person, *see* Government Exhibit 1, at 106 (FTC Exhibit 9A appended to FTC opinion, Docket No. 8547, September 28, 1965), so "power in your blood" signifies your condition as a powerful or energetic person. Clearly, the claim in the advertisement that Geritol gives a person power or additional power is a representation by implication that Geritol will be beneficial in the treatment or relief of tiredness, loss of strength, and run-down feeling.

This implied representation is strengthened by the transformation in the advertisement of "iron-poor blood cells * * * pale, few in number, badly shaped," *i.e.* "tired-blood," into "iron-rich red blood" with "more blood cells * * * better shaped * * * rich in iron," *i.e.* healthy, "untired" blood, as a result of the use of Geritol. While the advertisement only speaks of the transformation of a person's blood cells, the advertisement strongly implies that the same transformation from paleness, weakness and deformity to red-bloodedness, strength and shapeliness will take place in the person himself.

[25] The court further holds that dissemination of the advertisement violated paragraph 1(e) of the order. It has already been shown that the advertisement represents by implication that **[538]** Geritol will relieve tiredness. The way in which the advertisement claims Geritol will do this is by furnishing iron to a person's body. In this way, the advertisement represents that a person who is tired needs iron; otherwise, Geritol could not be beneficial as claimed in the advertisement. A person who needs iron has an iron deficiency. Thus, it is seen that the advertisement represents by implication that tiredness results from an iron deficiency or, in medical terms, that the tiredness symptoms are generally reliable indications of iron deficiency. This is the type of representation which paragraph 1(e) specifically prohibits.

Counts two through four of the complaint relate to the dissemination by defendants of three different advertisements. The television scripts for these advertisements are reproduced in the Appendix to this opinion as Scripts 1, 2, and 3, respectively.

Each of these three advertisements contains statements by Ted Mack, the announcer, and a concluding title "Builds Iron Power Fast" or "Builds Iron Power in Your Blood," which are substantially identical to those contained in the "Blood Cells" script discussed above. For the reasons set forth in the court's analysis of that advertisement, the court holds that dissemination of these three advertisements also violated paragraphs 1(b), 1(c), 1(d) and 1(e) of the FTC order.[13]

B. *Counts Five through Seven*

[26] The three advertisements challenged in counts 5–7 are entitled "Vacation" and have substantially identical scripts. The "Vacation" television script sued upon in count five (Parkson Advertising Agency, Inc., #G–556–40) reads as follows:

1. A MAN AND A WIFE ARE FILLING A STATION WAGON WITH VACATION GEAR. WIFE LOOKS SAD BUT NOT TIRED.	1. HUSBAND: Honey, we're going on vacation. Why do you look so sad? WIFE: I found out I have iron-poor blood.
2. WIPE TO TED MACK IN LIBRARY.	2. MACK: (O.C.): If you have iron poor blood, don't be sad * * * be glad for GERITOL.
3. HOLDS UP BOTTLE OF GERITOL TABLETS.	3. Geritol-iron enters your bloodstream fast carrying its high potency iron throughout your whole body.
4. CUT TO ECU TABLET BOTTLE. TITLE: "TWICE THE IRON IN A POUND OF CALF'S LIVER" UNDERCUT: "PLUS 7 VITAMINS."	4. Just two Geritol tablets contain *twice* the iron in a pound of calf's liver * * * *plus* 7 vitamins for nutrition.
5. DISS TO MAN AND WIFE COMING INTO THE HOUSE AFTER THEIR TRIP. WOMAN IS SMILING. SUPER: "WEEKS LATER."	5. HUSBAND: It's good to see you smile again. WIFE: Thanks to the Geritol I've been taking.
6. [539] BACK TO TED MACK.	6. MACK: Check with your doctor, and if iron-poor blood is your problem * * *
7. CUT TO PRODUCT SHOT. SUPER: "BUILDS HIGH POTENCY IRON IN YOUR BLOOD." BULLET: "AMERICA'S NO. 1 TONIC."	7. * * * don't be sad * * * be glad for Geritol. Geritol builds high potency iron in your blood. Try it!

The scripts of the two other "Vacation" advertisements are reproduced in the Appendix, Scripts 4 and 5.

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[13] The advertisement challenged in count 4 does not refer to the transformation of pale, iron-poor blood into iron-rich, red blood. Nevertheless, the advertisement violates the order because of the "power" representation.

The court holds that dissemination of these advertisements by defendants violated the FTC order. More specifically, the court holds that the visual impression created by the transformation of the woman in the advertisements from a "sad" to a "glad" state, combined with the references to "high potency iron," represents by implication that the use of Geritol will be beneficial in the treatment or relief of one or more of the tiredness symptoms.

Defendants argue that the "contrast between 'sad' and 'glad' emotions was selected because these are basic human emotions and thus provide human interest." Memorandum 57. Furthermore, defendants assert that "the actresses who portrayed the women who took Geritol were selected specifically to project sadness, and defendants made every effort to assure that sadness, and not tiredness, was projected." *Id.* at 56.

However this may be, the difficulty of carrying out the "sad/glad" theme and, at the same time, complying with the FTC order is manifest in the affidavit of Donald Blauhut, who was in charge of producing the commercials:

> A great deal of time, money and worry went into assuring that the women's faces in the so-called sad/glad series of commercials * * * projected sadness but not tiredness. Blauhut Affidavit 1, submitted by defendants.

See also Eichler Affidavit 2–3, submitted by defendants: "* * * a great deal of time and money were devoted to obtaining expressions on the subjects which carried the message of sadness but did not carry the message of tiredness. I ran many versions of the commercials to make sure the expressions were not those depicting tiredness."

The court has viewed these commercials carefully and believes that the "sad/glad" contrast in the advertisements may be easily perceived as a contrast between feeling weak and run-down and feeling lively. The wife, who looks dreary and perhaps run-down in her "sad" state at the beginning of the advertisement, looks energetic when she gives a broad smile at the end of the advertisements. There is no question but that the change in her feelings is the result of Geritol:

> "Husband: It's good to see you smile again.
> Wife: Thanks to the Geritol I've been taking."

Defendants contend that the wife is sad at the beginning of the advertisements, not because she is tired or run-down, but because she has learned that she has iron-poor blood. However, this explanation of the advertisements cannot offset the visual impression just noted. Moreover, the visual impression is strengthened by what must be the common-sense response of many viewers to the advertisements—that the wife is not sad only because of the *knowledge* that she has iron-poor blood, but because of the *effects* that this condition has had and is having on her. In this way, the "sad/glad" contrast produces a "tired/energetic" motif when the wife smiles at the end of the commercials.

[540] Her smile may convey to viewers her happiness that she no longer has iron-poor blood, but it definitely conveys something else as well. It shows her in good spirits and makes her look stronger and healthier. The implication is that she was sad not simply because she had iron-poor blood, but because she was feeling run-down as a result of that fact. Now she is smiling not simply because she has iron-rich blood, but because she feels better as a consequence. Thanks to Geritol.

The phrases, "Geritol-iron enters your bloodstream fast carrying its high potency iron throughout your whole body" and "Geritol builds high potency iron in your blood" reinforce this implied representation. The phrases are very similar to the phrases, "Geritol-iron enters your bloodstream fast carrying its blood-building power to every part of your body," and Geritol "builds iron power in your blood *fast*," which were used in the "Blood Cells" advertisement discussed *supra*, at 537–538.[14] "Potency" among other things means "power."[15] While the court agrees with defendants that "high potency iron" does refer literally to the iron content in Geritol, this does not alter the fact that the phrases utilized in the advertisements convey the implicit message that Geritol brings power to the person who takes it.

The court concludes that the dissemination of the "Vacation" advertisements violated paragraphs 1(b), 1(c), 1(d) and 1(e) of the FTC order.

C. *Counts Eight and Nine*

[27] In counts eight and nine of the complaint, the United States claims that dissemination on various dates of two virtually identical advertisements, entitled "Two Women," violated the FTC order. The television script (Parkson Advertising Agency, Inc. #G–552–40) of the advertisement sued upon in count eight reads as follows:

1. OPEN ON FIRST WOMAN WHO QUESTIONS THE CAMERA.	1. SCOTTIE BLOCK: What are *you* so sad about?
2. CUT TO SECOND WOMAN WITH SAD EXPRESSION WHO ANSWERS THE CAMERA.	2. LOIS SMITH: I found out I have iron-poor blood.
3. PULL BACK TO TWO-SHOT. IN BACKGROUND WE SEE KITCHEN WITH COUNTER, CABINET, SINK AND WINDOW.	3. SCOTTIE BLOCK: So, then it's time * * *

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[14] *See also* Government Exhibit 3 (Second Compliance Report of defendants) at 28–33, 35–54. The advertisements contained therein included substantially the following: "Geritol-iron works in your bloodstream carrying strength through your body."

[15] Webster's Third New International Dictionary 1775 (1963): "potency * * * 1: the quality or state of being potent: a: FORCE, POWER, AUTHORITY * * *."

4. FIRST WOMAN PICKS UP AND UNCAPS BOTTLE OF GERITOL TABLETS.	4. * * * you found out about Geritol!
5. [541] CUT TO CLOSEUP OF GERITOL TABLET BOTTLE, IN FIRST WOMAN'S HAND, AS SHE POURS FROM IT TWO TABLETS INTO HAND OF SECOND WOMAN.	5. Geritol can change your iron-poor blood into iron-*rich* blood. Here. I'll start you off.
6. CUT TO CLOSEUP OF SECOND WOMAN.	6. LOIS SMITH: Geritol really works?
7. PULL BACK TO TWO-SHOT AS FIRST WOMAN NOW POURS WATER FROM TAP INTO GLASS.	7. SCOTTIE BLOCK: *Course* it really works.
8. CUT TO CLOSEUP OF HANDS OF SECOND WOMAN WITH TABLETS AND BOTTLE. SUPER: "TWICE THE IRON IN A POUND OF CALF'S LIVER."	8. Those two tablets contain twice the iron in a pound of calf's liver.
9. MOVE IN ON SECOND WOMAN AS SHE SWALLOWS THE TWO GERITOL TABLETS WITH WATER, WHICH FIRST WOMAN HANDS HER.	9. Like they say * * * Geritol-iron enters your bloodstream fast, carrying its blood-building power throughout your body.
10. SHIMMER DISS. TO SECOND WOMAN HAPPILY EXAMINING DRESSES ON RACK IN DEPT. STORE. SHE HAPPENS TO LOOK UP SMILING AS SHE NOTICES FIRST WOMAN APPROACH. SUPER: "WEEKS LATER".	10. LOIS SMITH: Hello! SCOTTIE BLOCK: Well! First time I've seen you smile in weeks!
11. CUT TO CLOSEUP OF SECOND WOMAN, STILL SMILING.	11. LOIS SMITH: Thanks for telling me about Geritol!
12. CUT TO GERITOL TABLET AND LIQUID BOTTLES AND PACKAGES. SUPER: "BUILDS IRON POWER IN YOUR BLOOD".	12. ANNCR (V.O.): Iron-poor blood? Be *glad* for Geritol! It builds iron power in your blood! Try it.

The script of the advertisement challenged in count nine is reproduced in the Appendix, Script 6.

The court holds that dissemination of these advertisements violated paragraphs 1(b), 1(c), 1(d) and 1(e) of the FTC order. For one thing, the use of the word "power" in these commercials constituted an implied representation prohibited by those four paragraphs. *See* pages 537–538 *supra*. Secondly, the "sad/glad" contrast creates the same visual impression as that produced by the "Vacation" advertisements, discussed *supra*, and, in conjunction with the references to "high potency" and "power," violates the injunctions of those paragraphs. See pages 538–540 *supra*.

D. *Counts Ten and Eleven*

[28] These counts relate to the dissemination by defendants of two different advertisements for FemIron. The script of the first of these, entitled "Fem Is for Women" (Parkson Advertising Agency, Inc., #FEM–31–30–REV.), reads as follows:

1. OPEN ON TCU OF THE LETTERS "FEM" IN FEMIRON LOCO.	1. ANNCR (V.O.): Fem is for women.
2. CUT TO WORD "IRON" IN FEMIRON LOCO.	2. Iron is for women.
3. SHOT WIDENS TO BECOME FULL PKG OF FEMIRON. WORD "NEW" OVER IT. (IF IT IS POSSIBLE, WE SHOULD INCLUDE BOTH THE LARGE 60'S AND THE STRETCH PACK OF 30'S.)	3. Femiron is the new all iron tablet for women, to help you * * *
4. DISS TO GIANT FEMIRON PKG. WITH MAN & WOMAN RIDING OUT OF IT ON A TANDUM BIKE.	4. * * * prevent a shortage of iron.
5. CAMERA MOVES IN FOR TIGHTER SHOT.	5. A medical journal reports that * * *
6. CAMERA PANS WITH BIKE. THEY PASS A MOTHER ON A BENCH, SMALL CHILDREN PLAYING.	6. * * * many healthy young women have little or no iron reserves.
7. CU OF TIRED MOTHER. FREEZE FRAME ON HER EXPRESSION.	7. You see, some women even risk becoming anemic and tired.
8. DISS TO CU OF WOMAN'S HAND HOLDING FEMIRON TABLET TWIXT FINGERS. SUPER: "NEW!" SUPER: "FEMIRON" LOCO.	8. One Femiron tablet a day gives you iron * * * all iron * * *
9. DISS TO CU OF PROFILE SHOT OF WOMAN. SHE TAKES TABLET WITH WATER.	9. * * * to maintain the supply you need * * *
10. DISS TO COUPLE LEANING BIKE AGAINST TREE. SHOT SHOULD FAVOR WOMAN.	10. * * * to prevent iron shortage.
11. FREEZE FRAME ON HER EXPRESSION. SHE IS LAUGHING. VITAL LOOK.	11. Get new FemIron * * *

12. DISS TO CU OF LARGE BOX OF 60'S AND STRETCH PACK OF 30'S. SUPER TITLE: "THE VERY VERY FEMININE IRON TABLET"	12. * * * the very, very feminine iron tablet.

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[543] The advertisement sued upon in count 11 is entitled "Ever Since Eve" and its script reads as follows:

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1. OPEN ON PAN SHOT DOWN TREE. YOUNG COUPLE AT BASE OF TREE ON A PICNIC.	1. ANNCR (V.O.): Ever since Eve * * *
2. YOUNG MAN PULLS GIRL TO HER FEET. PUTS ARM AROUND HER SHOULDER AND THEY WALK OFF.	2. * * * women have faced the problem of preventing a shortage of iron.
3. PAN WITH COUPLE. MOVE INTO CLOSE SHOT FAVORING GIRL.	3. A leading medical journal reports that many healthy young women have little or no iron reserves.
4. COUPLE PASSES A MOTHER WITH SMALL CHILDREN. LOSE COUPLE. PUSH INTO SEE TIRED MOTHER WITH CHILDREN CAUSING A FUSS AND IRRITATING MOTHER. FREEZE FRAME ON MOTHER'S EXPRESSION.	4. You see, some women even risk becoming anemic and tired.
5. SLOW DISSOLVE TO: ECU A PAN SHOT FEMIRON LETTERS ON BOX. THEN * * *	5. Take just one FEMIRON tablet every day.
6. DISS TO CU. WOMAN'S HAND REMOVES TABLETS FROM BOX.	6. FEMIRON gives you iron * * * all iron * * *
7. DISS TO NEGATIVE PROFILE SHOT WOMAN TAKING TABLET.	7. * * * to maintain the supply you need to prevent iron shortage * * *
8. DISS TO GIRL FROM OPENING. SHE LEANS AGAINST TREE. BOY CLOSE TO HER. PUSH IN TO CU OF HER LAUGHING, VITAL LOOK. FREEZE FRAME ON HER EXPRESSION.	8. Get FEMIRON * * * the very, very * * *
9. DISS TO CU OF BOX SUPER: "THE VERY, VERY FEMININE ALL IRON TABLET."	9. * * * feminine all iron tablet.

The court holds that dissemination of each of these advertisements violated paragraphs 1(b), 1(c), 1(d) and 1(e) of the FTC order. The court has already held that FemIron advertisements are subject to the order. *See* pages 531–532 *supra.* Having viewed these advertisements, the court finds that the closeup of the "tired mother" and the statement, "You see, some women even risk becoming anemic and tired," especially when juxtaposed against the "vital look" of the FemIron user, represent by implication that the use of FemIron will be beneficial in the treatment or relief of the tiredness symptoms. For this reason, paragraphs 1(b), 1(c) and 1(d) of the order were violated. Paragraph 1(e) of the order was violated as well for the reasons stated at page 537 *supra.*

Defendants argue that "the sole theme of the FemIron commercials was prevention." Memorandum 58. This argument is simply irrelevant, since the Government does not allege that either of the commercials violated the order because a prevention claim is made. *See* Government Reply Memorandum 3.

Defendants further contend that "the tired, older woman briefly portrayed in the commercial[s] was shown solely to emphasize the condition which might occur if preventive steps were not taken at a younger age." Memorandum 58. According to a Parkson employee, "the ad was not designed to appeal to older women who might already have become iron deficient." Handman Affidavit 1. *See also* Lurie Affidavit 1–2.

This contention is rejected by the court. The advertisements directly represent that women risk becoming anemic and tired from a shortage of iron. The clear implication is that tiredness is a generally reliable indication of iron deficiency or iron deficiency anemia. This implicaton, which violates paragraph 1 (e), is in no way muted by the prevention claim.

Furthermore, viewers are told that FemIron will supply iron to women who take it and will thereby prevent iron shortage. It is frivolous to argue that the only claim which is thus made is that FemIron will supply iron for the purpose of preventing iron deficiency. It is obvious that FemIron will also provide iron to any woman who takes it, even if she already has an iron shortage. In this way, the advertisements represent that FemIron will overcome an *already existing* iron deficiency. The advertisements strongly suggest that tired viewers, and especially tired elderly women, are probably tired because they have an existing iron deficiency. Consequently, the advertisements unmistakably represent by implication that the use of FemIron will not only prevent tiredness, but will be beneficial in the relief of tiredness as well. The message conveyed is that a tired woman who takes FemIron will soon have a "vital look." This latter representation transgresses the prohibitions of paragraphs 1(b), 1(c) and 1(d) of the FTC order.

III. *Penalties*

The final question for the court is whether the Government's demand for the imposition of the maximum penalty of $5000 for each of the 100 violations as to each defendant is justified under all of the facts and circumstances of this case.

Defendants raise three issues with respect to the imposition of penalties in this action. The facts relevant to the determination of these issues are undisputed and, consequently, the court can dispose of them on this motion for summary judgment. After considering these issues, the court will discuss the undisputed factual basis and the reasoning behind the award of penalties which the court has assessed.

A. *Jurisdiction of the Court*

[29] Defendants challenge the jurisdiction of the court to impose the total amount of penalties which the United States has demanded in its complaint. Defendants argue that no more than $500,000 in penalties may be imposed in this action. The United States has demanded judgment against each defendant in the sum of $500,000 plus interest and costs, totaling more than $1,000,000. The basis of defendants' argument is the Court of Appeals decision in *United States* v. *St. Regis Paper Company*, 355 F.2d 688 (2d Cir. 1966), which held that satisfaction of the requirements of Section 16 of the F.T.C. Act [16] is a jurisdic-**[545]**tional prerequisite to the commencement of a civil penalty suit by the Attorney General under Section 5(*l*) of the Act. *See* 355 F.2d at 699.

The FTC did certify the facts underlying defendants' liability in this action to the Attorney General, as required by Section 16, and defendants do not challenge the certification as such. *See* Pierpoint Affidavit, Exhibit A; Government Exhibit 5; Defendants' Memorandum 65. However, defendants claim that the certification by the FTC was limited by the "draft of [a] complaint alleging violations of the Commission's order and seeking $500,000 in penalties" which accompanied the certification notice. *See* Pierpoint Affidavit, Exhibit A, at p. 4 and Exhibit B. Defendants contend that, since the Commission "specified" that $500,000 in penalties should be sought in this action, the court lacks jurisdiction to impose penalties in a greater amount. Defendants' Memorandum 66.

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[16] F.T.C. Act, Section 16, 15 U.S.C. § 56: "Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 54 of this title or under subsection (1) of section 45 of this title, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection."

The argument is based on a misreading both of Section 16 and of the FTC certification notice. Section 16 only requires that the FTC "certify the *facts*" which give it "reason to believe that any * * * corporation is liable to a penalty" under Section 5(*l*) of the F.T.C. Act. (Emphasis supplied.) Section 16 has absolutely nothing to say about either a certification, or even a recommendation, by the FTC to the Attorney General as to the *amount* of penalties which should be sought in the Section 5(*l*) action. Since the statute does not require that any certification be made in regard to penalties, it can hardly be argued that such a certification, even were it present here, constituted a jurisdictional bar to awarding greater penalties which were demanded by the United States in its complaint. The *St. Regis* decision, *supra*, did not add any jurisdictional requirements to the statute; it merely insisted that the requirement that there be a certification of facts, as specifically prescribed in Section 16, be satisfied before the Attorney General can bring a Section 5(*l*) suit.

Moreover, Section 16 states that it is the "duty" of the Attorney General "to cause appropriate proceedings to be brought for the enforcement" of Section 5(*l*). It cannot be argued that the instant action is not an appropriate proceeding for the enforcement of Section 5(*l*), for it seeks no more than the maximum penalty authorized by that section. *St. Regis* does not militate against this conclusion. Indeed, in *St. Regis* the Second Circuit panel noted:

> In Section 16, * * * Congress prescribed the circumstances under which civil penalty actions for violations of Commission orders shall be commenced and the officer of the United States *who shall prosecute them* and *in Section 5(l) it prescribed the amount of the penalty* * * *. 355 F.2d at 694–695. (Emphasis supplied.)

The circumstances under which this action was brought conformed to Section 16 and, consequently, there can be no challenge to the decision of the Attorney General to prosecute the action for the full amount of the penalty prescribed by Section 5(*l*).

[30] Furthermore, the certification by the FTC in no way instructed the Attorney General to limit the relief sought to $500,000 *in toto*. The certification stated:

> Pursuant to the provisions of Section 16 of the Federal Trade Commission Act, the Commission hereby certifies *the facts* of violation of its order to cease and desist in its Docket 8547.
>
> The Commission in so certifying *the facts* states that it has reason to believe that the J. B. Williams Company, Inc., and Parkson Advertising Agency, Inc. *are liable for penalties under Section 5(l)* of the Federal Trade Commission Act and therefore *recommends that appropriate proceedings be instituted for recovery of civil penalties as prescribed in said section.*

Pierpoint Affidavit, Exhibit A, page 1 (Letter from the FTC to the Honorable **[546]** John N. Mitchell, Attorney General of the United States, dated November 28, 1969.) (Emphasis supplied.)

The fact that this letter of certification was accompanied by a "draft of complaint" which only sought a total of $500,000 in penalties did not alter the duty of the Attorney General to bring appropriate proceedings based on the facts which were certified to him nor did it suggest that proceedings seeking $1,000,000 in penalties would not be appropriate. The most that can be said about the inclusion of the "draft" with the letter was that it was intended to facilitate the Attorney General's task.

[31] Finally, even were the court to find that the FTC did certify to the Attorney General that the facts of this case only warranted imposition of a total fine of $500,000, this finding would still not create a *jurisdictional* bar to the award of greater penalties under the rationale of the *St. Regis* decision. Not one of the policy arguments which were enumerated by the Court of Appeals in *St. Regis* supports defendants' contention on this point.[17]

The court concludes that it has jurisdiction to award the total amount of penalties demanded by the United States in its complaint.

B. *The Status of Defendant Parkson*

[32] Defendants point out "that Parkson was at all relevant times an affiliate of Williams under common stockholder control (even the percentage shareholding of each stockholder was identical), with identical boards of directors." Memorandum 72. Defendants argue that, since "the corporations are not *de facto* separate," [18] the court can-

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[17] The Court of Appeals noted the following pitfalls of a "system of dual surveillance and enforcement of FTC orders" (355 F.2d at 695, 697, 698) which would result from allowing the Attorney General to sue under Section 5(*l*) without prior certification by the FTC:

(1) such a system "would necessarily involve the possibility of conflicting interpretations of [FTC] orders" (at 695);

(2) "such a system could result in stultifying the Commission's implementation of its policies" (at 695);

(3) the Attorney General's "office is simply not equipped or designed to intelligently police the Commission's orders" (at 697);

(4) "the value of the Commission's practices and rules designed to promote voluntary compliance and avoid the rigors of litigation would be greatly impaired" (at 697);

(5) the system "would unjustly hamper those subject to orders by creating uncertainty and doubt as to what course of action to follow" (at 697);

(6) it would create "the possibility that unnecessary time and money will be expended in litigation by those subject to Commission's orders and the public" (at 698); and

(7) it "would in all probability jeopardize the Commission's vitally important consent order procedure" (at 698).

[18] However, defendants admit that Parkson "maintained its separate corporate status solely to preserve its entitlement to the regular advertising agency commission in dealing with the various media." Memorandum 72. In other words, Parkson was not an inactive corporation and it did carry on substantial business for profit.

not impose penalties against each corporation with respect to the same violations of the FTC order. Memorandum 71. It is contended that such an award in this action would constitute "multiple penalties" and would be contrary to the intent of the statute which limits the penalty to $5000 for "each violation" of an FTC order.

The fallacy of defendants' argument is that Section 5(*l*) specifically provides that "*any* person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect" is liable to "a civil penalty of not more than $5000 for *each* violation." (Emphasis supplied.) Both defendants are subject to the FTC order sued upon here. If both of them have violated the order, they are each liable to the maximum penalty for each of their violations.

[547] [33] In effect, defendants are asking the court to review the validity of the FTC order which was enforced by the Sixth Circuit in *J. B. Williams, supra.* The Sixth Circuit enforced the order against both defendants and that decision is not reviewable here.[19] *See* page 527 *supra.* Consequently, since each defendant was subject to the order and violated it, each defendant is liable up to the maximum penalty for each violation which has been proved by the United States.

C. *The Number of Violations for which Defendants Are Liable*

[34] The second sentence of Section 5(*l*) provides:

> Each separate violation of [a final FTC] order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

In this action, the United States has sued each defendant for 100 distinct and separate violations of the FTC order. The violations involve the dissemination by defendants of the eleven advertisements, discussed *supra*, on 70 different days between June and October, 1969 and on 100 separate network television programs.

Defendants contend that "the penalty imposed by the statute can be invoked only once for the dissemination of each commercial." Memorandum 76. Under this construction of Section 5(*l*), each defendant would only be liable to a maximum penalty of $55,000, i.e. $5000 for each of the eleven advertisements.

The contention is without merit. First, the order makes clear that it is the dissemination of an illegal advertisement which violates the order, not the advertisement itself. Second, defendants have been unable to cite any court decision which supports their proposition,

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[19] Of course, defendant Parkson could have challenged the propriety of subjecting it to the order, by raising this issue on the appeal of the order. *See, e.g., Doherty, Clifford, Steers & Shenfield, Inc.* v. *Federal Trade Commission*, 392 F.2d 921, 927–929 (6th Cir. 1968.)

whereas numerous decisions support the government's position. *See, e.g., United States* v. *Wilson Chemical Company, Inc.*, CCH 1962 Trade Cases ¶70,478 (W.D.Pa. 1962), *aff'd per curiam*, 319 F.2d 133 (3d Cir. 1963); *Vulcanized Rubber, supra*, 288 F.2d 257; *Piuma* v. *United States*, 126 F.2d 601, 603 (9th Cir.), *cert. denied*, 317 U.S. 637, 63 S.Ct. 28, 87 L.Ed. 513 (1942); *United States* v. *Home Diathermy Company, Inc.*, CCH 1960 Trade Cases ¶69,601 (S.D.N.Y. 1959). Finally, defendants' contention runs counter to the express purpose of Section 5(*l*) which seeks to penalize the violation of FTC orders as a means of protecting the public. Harm results each time the same deceptive advertisement reaches consumers and the harm is cumulative.

[35, 36] For these same reasons, the court also rejects defendants' contention that "it seems clear on the face of the statute that the maximum penalty is $5000 for any day on which the order was violated." Memorandum 78. Defendants cannot invoke the "continuing failure or neglect" proviso in Section 5(*l*) and argue that "each day of continuance of such failure or neglect shall be deemed a separate offense," for the proviso is not applicable here. The claim of the United States is not that defendants failed or neglected to do somethng which the FTC ordered them to do, but rather that they did specific acts which were prohibited by the FTC order. As the statute states, "each separate violation of [a final FTC] order shall be a separate offense." The purpose of the "continuing failure or neglect" proviso is to assure that individuals or corporations who fail to do some act which they are specifically required to do by the FTC may be fined more than $5000. Without the proviso, the failure to act might be considered a single violation of the order, subject only to $5000 penalty, al**[548]** though the violation continued for a substantial period of time. The proviso cannot be relied upon by defendants to limit their liability in this action.[20]

D. *The Amount of Penalties*

Defendants have requested a factual hearing on the question of the amount of penalties to be assessed against them. The court held a hearing on January 2, 1973, at which the Government was instructed to submit information establishing the ability of defendants to pay the penalties demanded in this action. The court believes that the information necessary to assess appropriate penalties is now before the court. Therefore, a further hearing on the issue of penalties would serve no useful purpose.

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[20] In any event, were the proviso applicable, defendants would be liable to a maximum penalty of $610,000 each for the disseminations sued upon here since they continued for 122 days from June 2, 1969 until October 1, 1969.

[37] In determining the amount of penalties to be assessed against defendants, the court thinks that the factors to be considered are their financial ability to pay the penalties demanded, the degree of harm which defendants may have caused by disseminating the challenged advertisements,[21] and their good or bad faith in disseminating these advertisements in violation of the FTC order.[22]

The court believes it appropriate to consider the financial ability of defendants to pay the penalties demanded by the Government in Section 5(*l*) actions. While imposition of maximum penalties against a large corporation may amount to little more than a slap on the wrist, the same penalties may throw a small enterprise out of business. The severity of the sanction imposed necessarily depends on the ability of each particular defendant to pay whatever fines are assessed.

Consequently, the court held the hearing on January 2, 1973 to consider this issue, despite the fact that it had not previously been raised by the parties. At the hearing, it was stipulated that defendant J. B. Williams would have the financial capacity to pay the maximum penalties sought here assuming that the court were to assess such penalties. [Transcript 5–6]

As for defendant Parkson, however, its counsel represented to the court that Parkson has a net worth of less than $500,000 and could not pay the maximum penalties sought against it. Defendant Parkson has submitted an affidavit by Jerome Cossman, Senior Vice President and chief financial officer of both J. B. Williams and Parkson, dated January 5, 1973, which states that in Mr. Cossman's opinion Parkson could not pay a $500,000 judgment. Attached to the affidavit is a Parkson financial statement dated June 30, 1971. (Parkson has not been separately audited since then, according to Cossman.) The financial statement indicates that Parkson's net income for the fiscal year ended June 30, 1971 was $11,903 and that its retained earnings as of that date were $398,731.

The Government argues that the true financial condition of Parkson is reflected in the amount of advertising business that it does, rather than in its financial accounts. The reason for this is that Parkson, which was an affiliate of J. B. Williams in 1969 and is now its wholly-owned subsidiary, does nearly all of its business with its parent corporation. Consequently, Parkson's earnings can be easily controlled by its parent through the terms of their contractual arrangements. Indeed, the Cossman Affidavit states:

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[21] *See United States* v. *Karns*, CCH 1963 Trade Cases ¶ 70,950, at pp. 78,776–77 (S.D.N.Y. 1963); *Wilson Chemical Company, supra.*

[22] *See United States* v. *Beatrice Foods Company*, 52 F.R.D. 14, 18 (D.Minn. 1971); *United States* v. *Beatrice Foods Co.*, 322 F.Supp. 139, 141 (D.Minn.1971); *United States* v. *H. M. Prince Textiles, Inc.*, 262 F. Supp. 383, 389 (S.D.N.Y. 1966); *Home Diathermy, supra.*

> **Parkson's financial arrangement with Williams provides for a monthly [549] service fee which is sufficient to reimburse Parkson for its expenses of operation and *provide a modest profit of approximately $10,000 per year.* [Affidavit, dated January 5, 1973, at paragraph 5.] (Emphasis added.)**

While these contractual arrangements are to be respected, the court believes that the actual financial condition of Parkson is not accurately reflected by these arrangements or by Parkson's financial statement, but rather by Parkson's considerable business operations. The Government has produced a letter from Broadcast Advertisers Reports, Inc. (BAR)[23] which includes an estimate of J. B. Williams' expenditures on network television advertising during the past four years. BAR estimates that J. B. Williams spent far in excess of $10,000,000 per year during this period on network television advertising alone.[24] Geritol advertising materials included in Government Exhibits 1 and 2 make it clear that J. B. Williams has advertised extensively in other media as well.

Parkson handles all of this advertising business. See Cossman Affidavit, dated January 5, 1973, at 2; Rosenhaus Affidavit 1. Parkson's financial statement of June 30, 1971 indicates that its accounts receivable on that date were $1,114,133, reflecting the "monthly budgeted amount" of its media advertising costs which were billed directly to its clients. See Cossman Affidavit paragraph 6 and Financial Statement, note 1. In view of Parkson's substantial business operations, the court cannot say that the imposition of the maximum penalties demanded by the Government against Parkson, if they are otherwise warranted, would necessarily constitute an impossible financial burden on the company or would be unreasonable.

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[23] Hynes Affidavit, Exhibit A, dated January 2, 1973 (Letter from David W. Thurston, Executive Vice President of Broadcast Advertisers Reports, Inc. to Patricia M. Hynes, dated December 27, 1972). The letter states that Broadcast Advertisers Reports, Inc. [BAR] is "the broadcast industry's independent source of network television commercial activity and estimated expenditures. BAR monitors every broadcast minute during the year of the ABC, CBS and NBC television networks. * * * Each week, working with the networks, BAR also develops a total time and talent price for each program, from which average commercial minute costs are derived. These costs are applied to each brand monitored in each program. Obviously, average costs are just that. On any given program, some advertisers may be actually paying less than the average, others more."

[24] Parkson has not disputed the accuracy of these estimates. BAR's estimate of expenditures in network television for J. B. Williams and selected brands for the years 1969 through the first ten months of 1972 were as follows:

Year	J. B. Williams Co.	Geritol Liquid	Geritol Tablets	FemIron Iron Tablets
1969	$26,302,500	$1,649,500	$5,402,200	$2,524,000
1970	22,467,800	1,882,700	5,709,200	1,699,200
1971	17,815,200	2,830,100	4,545,400	1,201,200
10 mos. 1972	*16,339,900	3,710,500	3,776,100	1,104,000

*For 1972, BAR noted, J. B. Williams' brands are listed under Nabisco as the parent company; the figure shown here is the total of the former J. B. Williams brands.

[38] On the other hand, Parkson is a smaller company than J. B. Williams and, therefore, even though the defendants share equal responsibility for the violations found here, the court will make some downward adjustment in the penalties to be assessed against Parkson. The court also realizes that Parkson may have great difficulty in paying the fines assessed in this action in a lump sum. Consequently, the court will entertain an **[550]** application by that defendant to pay the penalties over a period of years, in installments with interest, upon a showing of necessity therefor.

[39] In assessing the penalties in Section 5(*l*) actions, the degree of harm potentially having resulted from the violations charged against defendants should also be given some weight. In a sense, Section 5(*l*) serves the function in deceptive advertising cases of compensating the public for the monetary losses incurred by those individuals who were induced to purchase a product by the deceptive advertising sued upon. However, in such cases, it is difficult to ascertain the amount of money actually wasted by deceived consumers and it is far beyond the competence of the court to make an accurate determination in this regard. Nevertheless, where it is established that unlawful advertising has reached a vast audience at great expense, the court may assume that it has caused significant monetary harm to the public and should take this into account.[25]

[40] In this action, every violation charged in the complaint relates to the dissemination of an unlawful advertisement over network television to what the court recognizes must have been a very large audience.[26] Each Geritol advertisement was directed at the entire viewing audience, while each FemIron advertisement was directed at the entire female audience. There is a high probability that the advertisements induced substantial numbers of viewers to buy the preparations advertised, although the preparations would be of no benefit to them.

The extent of the deception thus caused is indicated by the following findings of the FTC which accompanied the issuance of the original order to cease and desist:

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[25] *See Wilson Chemical Company, supra,* CCH 1962 Trade Cases ¶ 70,478, at pp. 76,957–58. In *United States* v. *Vitasafe Corp.,* 234 F.Supp. 710 (S.D.N.Y.1964), *aff'd per curiam,* 352 F.2d 62 (2d Cir. 1965), Judge Weinfeld imposed $18,000 in penalties for nine violations of an FTC order. Each violation related to conduct which only affected a single individual and where the harm to him or her was apparently minimal. The court did note, however, the "widespread violations" by defendant of the FTC order. 234 F.Supp. at 716.

[26] For example, the disseminations charged in count 4 were made during the following network programs: June 11—ABC News (7:00–7:30 P.M.); June 12—NBC, "Dragnet" (9:30–10:00 P.M.); June 16—ABC, W. Sonnett (8:30–9:30 P.M.); June 18—NBC, "The Virginian" (7:30–9:00 P.M.); and June 19—NBC, "Ironside" (8:30–9:30 P.M.). The disseminations relating to count 7 were as follows: August 21 and August 28—CBS, "The Prisoner" (8:00–9:00 P.M.); September 2—CBS, "Walter Cronkite News" (7:00–7:30 P.M.); and September 3—CBS, "Beverly Hillbillies" (9:00–9:30 P.M.). This sample is entirely typical of the other disseminations sued upon in the complaint. *See* Government Exhibit 2, at 98–116 (Schedule from April 1, 1969 through September 18, 1969 of Geritol television advertising submitted to the FTC by letter from J. B. Williams, dated September 29, 1969.)

> * * * As we have found, respondents advertising is directed to the entire population of whom less than 10% have iron deficiency. * * * Most of this group who experience tiredness do not do so as a result of their deficienc[y] since mild cases produce no symptoms. The inescapable conclusion is that *the number of people in the total population who are tired because of iron * * * deficiency is infinitesimally small.* Unless, therefore, this small group of people, or a majority of them, are the only ones in the entire population who experience tiredness symptoms, respondents' argument must fail. [Respondents argued that there was no valid basis on the record for concluding that in only a small minority of persons is tiredness due to a deficiency of iron.]
>
> The overwhelming weight of the evidence is to the contrary. As we have previously found, the testimony of medical experts * * * establishes that the tiredness symptoms are common manifestations of almost any disease or disorder, and that the commonest causes of tiredness are neurosis and anxiety * * *.
>
> Contrary to respondents' contentions, we conclude that the charge in the complaint that Geritol will benefit only a small minority of persons with tiredness symptoms, is supported by substantial evidence in this record.
>
> Government Exhibit 1, at 96–97. (In the Matter of The J. B. Williams Company, FTC Docket No. 8547, Opinion of the Commission, dated September 28, 1965.) (Emphasis supplied.)

The Sixth Circuit held, on appeal, that there was substantial evidence to support the conclusions of the Commission in this regard. *See J. B. Williams, supra*, 381 F.2d at 889–890.

Therefore, consideration of the degree of harm potentially caused by defendants' violations of the order does not warrant any mitigation of the penalties to be assessed against defendants.

Finally, the court must consider the good or bad faith of defendants in disseminating the unlawful advertisements in this case. This factor is most important to the proper assessment of penalties, since the purpose of Section 5(*l*) is to coerce compliance with FTC orders. If a violation of a FTC order is merely the result of mistake, inadvertence, or even ordinary negligence, there is little reason for imposing a substantial penalty.[27] On the other hand, where a corporation wilfully violates an FTC order or acts with reckless disregard of the injunctions in the order, there is every reason to impose a penalty at or near the maximum prescribed. This is the treatment which the corporation must expect, for having been ordered to cease and desist from illegal practices, the corporation well knows the consequences of continuing those practices and should not be allowed to retain the profits derived thereby. Moreover, this is the most effective means of preventing others subject to FTC orders from flouting their proscriptions.

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[27] The claim of inadvertence or negligence was raised and rejected in *Vitasafe Corp., supra* note 25, 234 F.Supp. at 712.

In evaluating the good or bad faith of defendants, the court takes particular note of their failure to demonstrate any serious intent to comply with the FTC order during the first year and a half in which it was in effect. For example, over a year after the order became final, defendants included in their Second Report of Compliance to the Commission five sets of advertisements which represented that: "For iron-poor, tired blood, try Geritol." Government Exhibit 3, at 27–33, 35–54 (FTC Docket No. 8547, filed January 31, 1969.) The only other advertisements submitted in the report contained the "power" representation discussed *supra*. Four of these are the targets of counts 1–4 of the instant action. *Id.* at 23–26, 34 (Exhibit AA of Second Report of Compliance.)

Defendants' effort to establish in their proof and arguments that it was difficult for them to understand the terms of the order is not well taken, for the meaning of the order is hardly abstruse. Defendents' argument as to "Williams' strenuous efforts to put itself in compliance with the Modified Order" (Memorandum 81) is likewise specious. To comply with the order, all that was required was the use of advertisements which did not make the forbidden representations or which included the disclosures prescribed in paragraph 1(d) of the order. Such a task did not demand substantial modification of defendants' business operations and should positively have been achieved in less than six months, to say nothing of the seventeenth-month period which the FTC allowed. *Cf.* Government Exhibit 4, Dissenting Statement of Commissioner Elman (FTC News Release dated June 25, 1969.)

Thus, the background of the instant action is the history of defendants' efforts to accomplish precisely what the order forbids without incurring any penalty for doing so. Nothing contained in **[552]** the affidavits to Mr. Rosenhaus, principal stockholder and chief executive officer of defendants in 1969, or of Mr. McGlothlin, counsel to defendants in 1969, detracts in the slightest from this conclusion.[28]

With this background in mind, the court turns to considering the good or bad faith of defendants in disseminating the challenged advertisements in the period of June–October, 1969, 17–20 months after the order became final.

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[28] Indeed, the attitude of Mr. Rosenhaus toward compliance with the FTC order is well reflected in his affidavit:

> On June 9, 1969, a representative of Williams received a letter from the Commission, * * * stating "The Commission is of the view that the AA commercials will comply with the order if all references to 'power' are deleted."
>
> * * * * * * *
>
> Within a *short time, much less than 30 days after the Commission's letter,* the AA commercials were completely discontinued, and * * * new commercials were in use.

Of course, if defendants intended to comply with the order, they could have discontinued the commercials immediately. *See* Pisani Deposition; Affidavits of Laffey and McCullough, submitted by the government.

The court has held that dissemination of the advertisements sued upon in counts 1–4 and 8–9 violated the FTC order primarily because of the use of the word "power" in the context of the advertisements. Each such dissemination, which constituted a separate violation of the order, as discussed above, occurred between June 2, 1969 and June 20, 1969.

It is undisputed that the following events took place prior to June 2, 1969. On January 31, 1969, defendants submitted their Second Report of Compliance to the FTC. Exhibit AA of the Report included the scripts of the advertisements here challenged in counts 1–4. Government Exhibit 3, at 23–26, 34. On May 8, 1969, a letter was sent to defendants' counsel from the head of the FTC's Division of Compliance. The letter stated:

> I have been instructed to contact you and inform you that the Commission would be favorably disposed to accepting as compliance with its order to cease and desist * * * the continued use of the AA advertisements *only with deletion from them of all references to "power"*. Government Exhibit 2, at 1. (Emphasis supplied.)

By letter dated May 15, 1969, Mr. McGlothlin wrote the Commission on behalf of defendants as follows:

> Respondents agree to remove the word "power" from the advertisements designated in the last Compliance Report as "AA", without conceding that the use of that word was in violation of the Order. Government Exhibit 2, at 2. *See also id.* at 21.

It is clear that the FTC's advisory instructions were entirely reasonable, since the court has independently found that the use of the word "power" did violate the Order. At the least, the advice thus given to defendants put them on explicit notice of the FTC's views with respect to the "power" representation and should have received close attention by defendants. If defendants disagreed with the FTC's position, they had the option of appealing the determination under 5 U.S.C. §§ 701–706, *see Rettinger* v. *Federal Trade Commission*, 392 F. 2d 454, 457 (2d Cir. 1968), or perhaps seeking a declaratory judgment.

Instead, defendants persisted in disseminating the challenged advertisements containing the word "power" after receipt of the advisory instructions on May 8, 1969 and even after receipt of a formal notice of the FTC's position on June 9, 1969. *See* Rosenhaus Affidavit 9. These disseminations continued until June 20, 1969. The recited facts reveal a total lack of good faith with respect to the dissemination of these advertisements and, if not willful violations of the order, at least reckless disregard of its prohibitions. The violations were only slightly less egregious than if defendants had disseminated the very advertisements relied upon by the FTC when it originally issued the order.

[553] Therefore, the court finds it appropriate to impose the maximum penalty against J. B. Williams as to each of the violations charged in counts 1–4 and 8–9. For the reasons stated at page 549 *supra*, the court imposes a lesser penalty of $4,000 per violation against defendant Parkson.

[41] As for counts 5–7, defendants did not submit the challenged advertisements to the FTC for advice prior to their dissemination,[29] despite the fact that defendants' own employees were well aware of the possibility that the advertisements might violate the outstanding order. *See* p. 539 *supra*. After including the scripts in their Third Report of Compliance, which was submitted to the FTC on July 2, 1969, defendants continued to disseminate these advertisements without awaiting advice by the Commission as to their acceptability.

These facts establish defendants' bad faith with regard to these violations. Defendants' conduct amounted to gross negligence and bordered on recklessness. The court assesses a penalty of $4,000 against J. B. Williams and $3,000 against defendant Parkson with respect to each violation charged in counts 5–7.

[42] Counts 10 and 11 involve dissemination of the FemIron advertisements. Defendants did not submit any FemIron advertising to the FTC for its consideration until they were requested to do so by letter from an FTC attorney, dated July 7, 1969. Government Exhibit 2, at 53–54. Defendants were notified soon thereafter that: "The Division of Scientific Opinions [of the FTC] is of the opinion that FemIron and Geritol have substantially similar properties." Government Exhibit 2, at 56 (Letter from Ms. Saxon, FTC Attorney, dated July 16, 1969.)

The two FemIron advertisements sued upon make specific reference to tiredness and show a close-up of a "tired mother." See pages 542–544 *supra*. They were disseminated in September, 1969 and on October 1, 1969, over one month after defendants were advised that the appropriate division of the FTC considered FemIron to be covered by the order.[30]

The court concludes that the violations charged in counts 10 and 11 were in willful disregard of the FTC order. The maximum penalty will be imposed against J. B. Williams as to each of these violations and $4,000 per violation against defendant Parkson.

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[29] *See Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394, 394 n. 22, 85 S.Ct. 1035, 1047, 13 L.Ed.2d 904 (1965):

If * * * a situation arises in which respondents are sincerely unable to determine whether a proposed course of action would violate the present order, they can, by complying with the Commission's rules, oblige the Commission to give them definitive advice as to whether their proposed action, if pursued, would constitute compliance with the order.

[30] In a letter dated September 3, 1969, the Commission officially notified defendants that FemIron "is subject to the order." Government Exhibit 2, at 64.

IV. *Judgment*

The court will issue an order requiring defendants to forfeit and pay to the United States the following civil penalties for the reasons set forth in this opinion:

	J. B. Williams	Parkson
Count 1	$5,000	$4,000
Count 2	20,000	16,000
Count 3	30,000	24,000
Count 4	25,000	20,000
Count 5	40,000	30,000
Count 6	120,000	90,000
Count 7	16,000	12,000
Count 8	30,000	24,000
Count 9	15,000	12,000
Count 10	90,000	72,000
Count 11	65,000	52,000

Total penalties assessed against J. B. Williams equal $456,000. Total penalties against Parkson equal $356,000.

As the court has indicated *supra*, it will entertain an application by defendant Parkson to pay the penalties in installments, with interest, upon a showing of necessity therefor.

APPENDIX A

Script 1

Parkson Advertising Agency, Inc., #G–218–30, reads as follows:

1. MS ON TED MACK IN LIBRARY STANDING NEXT TO LIGHT BOX.	1. MACK (O.C.): Your bloodstream has been called your lifeline. Look! You could have iron-poor blood cells like these * * *
2. HE FLIPS SWITCH, LIGHTING UP LEFT HALF OF SHADOW BOX TO SHOW BAD BLOOD CELLS AND TITLE: "IRON-POOR BLOOD BEFORE GERITOL"	2. pale, few in number, badly shaped.
3. DISSOLVE TO FILM CLIP OF "POOR" & "RICH" CELLS. IN THIS SEQUENCE WE WILL USE OUR FILM OF THE BLOOD CELLS FRAMES 2 & 3.	3. If that's so, take Geritol to build more blood cells * * * better shaped * * * rich in iron.
4. CUT TO ECU OF TWO BOTTLES & ZOOM BACK.	4. Geritol-iron enters your bloodstream fast carrying its blood-building power to every part of your body.
5. CUT TO INSERT OF TABLET JAR IN MACK'S HAND. SUPER TITLE: "TWICE THE IRON IN A POUND OF CALF'S LIVER".	5. Just two Geritol tablets contain *twice* the iron in a pound of calf's liver.

6. CUT TO MACK. DOLLY BACK TO REVEAL BOTH BOTTLES. TITLE: "BUILDS IRON POWER FAST" LOGO IN CIRCLE: AMERICA'S NUMBER ONE TONIC.	6. Take Geritol to build iron power in your blood *fast*!

APPENDIX B

Script 2

Parkson Advertising Agency, Inc., #G–219–40, reads as follows:

1. OPEN ON ECU OF TED MACK IN LIBRARY SETTING.	1. MACK: Hello, I'm Ted Mack. Have you ever asked yourself * * *
2. DISS TO WOMAN WHO LOOKS QUESTIONINGLY AT CAMERA. SHE IS *NOT* TIRED.	2. WOMAN (O.C.): "Can iron-poor blood happen to me?"
3. DISS TO CU MACK.	3. MACK: Check with your doctor. The answer may be yes. Especially if you're a woman.
4. HE HOLDS UP TABLET BOTTLE.	4. You may need iron * * * to change pale, iron-poor blood into iron-rich, red blood.
5. MACK HOLDS UP TABLET BOTTLE. ECU ON BOTTLE.	5. There's no finer, more effective iron tonic in the whole world than Geritol.
6. CONTINUE ON MACK AS HE TALKS.	6. Geritol-iron enters your bloodstream fast carrying its blood-building power to every part of your body.
7. CUT TO ECU OF TABLET AND LIQUID BOTTLES. TITLE: "TWICE THE IRON IN A POUND OF CALF'S LIVER".	7. Just two Geritol tablets or two tablespoons of Geritol liquid contains *twice* the iron in a whole pound of calf's liver.
8. CUT BACK TO MACK, MOVE BACK TO REVEAL BOTH BOTTLES UP FRONT. TITLE: "BUILDS IRON POWER IN YOUR BLOOD".	8. Get Geritol America's number one tonic * * * it builds iron power in your blood. Geritol really works!

APPENDIX C

Script 3

Parkson Advertising Agency, Inc., #G–219–30, reads as follows:

1. OPEN ON ECU OF TED MACK IN LIBRARY SETTING.	1. MACK: Have you ever asked yourself—
2. DISS TO WOMAN WHO LOOKS QUESTIONINGLY AT CAMERA. SHE IS *NOT* TIRED.	2. WOMAN (O.C.): "Can Iron-poor blood happen to me?"
3. DISS TO CU MACK.	3. MACK: Check with your doctor. The answer may be *yes*—especially if you're a woman.

4. HE HOLDS UP TABLET BOTTLE.	4. You may need iron.
5. MACK HOLDS UP TABLET BOTTLE. ECU ON BOTTLE.	5. There's no finer, more effective iron tonic in the world than Geritol.
6. CONTINUE ON MACK AS HE TALKS.	6. Geritol-iron enters your bloodstream fast carrying its blood-building power to every part of your body.
7. CUT TO ECU OF TABLET BOTTLE. TITLE: "TWICE THE IRON IN A POUND OF CALF'S LIVER."	7. Just two Geritol tablets contain twice the iron in a pound of calf's liver.
8. CUT BACK TO MACK. MOVE BACK TO REVEAL BOTH BOTTLES UP FRONT. TITLE: "BUILDS IRON POWER IN YOUR BLOOD."	8. Take Geritol, America's *Number One Tonic*—it builds iron power in your blood. Geritol really works!

APPENDIX D

Script 4

Parkson Advertising Agency, Inc., #G–556–30, reads as follows:

1. A MAN AND A WIFE ARE FILLING A STATION WAGON WITH VACATION GEAR, WIFE LOOKS SAD BUT NOT TIRED.	1. HUSBAND: Honey, we're going on vacation. Why do you look so sad? WIFE: I found out I have iron-poor blood.
2. WIFE TO TED MACK.	2. MACK: (O.C.): If you have iron-poor blood, don't be sad * * * be glad for GERITOL!
3. CUT TO ECU OF GERITOL TABLETS TITLE: "TWICE THE IRON IN A POUND OF CALF'S LIVER."	3. Geritol-iron enters your bloodstream fast carrying its high potency iron throughout your whole body.
4. DISSOLVE TO MAN AND WIFE COMING INTO THE HOUSE AFTER THEIR TRIP. WOMAN IS SMILING. SUPER: "WEEKS LATER."	4. HUSBAND: It's good to see you smile again. WIFE: Thanks to the Geritol I've been taking.
5. BACK TO MACK.	5. MACK: Check with your doctor. If you have iron-poor blood don't be sad * * * be glad for GERITOL!
6. CUT TO PRODUCT SHOT. SUPER: "BUILDS HIGH POTENCY IRON IN YOUR BLOOD." BULLET: "AMERICA'S NO. 1 TONIC."	6. It builds high potency iron in your blood. Try it!

APPENDIX E

Script 5

Parkson Advertising agency, Inc., #G–556–40–ALT, reads as follows:

1. A MAN AND A WIFE ARE FILLING A STATION WAGON WITH VACATION GEAR. WIFE LOOKS SAD BUT NOT TIRED.	1. HUSBAND: Debby, we're going on vacation. Why do you look so sad? WIFE: I found out I have iron-poor blood.
2. WIPE TO TED MACK IN LIBRARY.	2. MACK (O.C.): If you have iron-poor blood, don't be sad * * * be glad for GERITOL!
3. HOLDS UP BOTTLE OF GERITOL TABLETS. (LEFT HAND).	3. Geritol is the high potency iron tonic that carries blood-building iron throughout your whole body.
4. CUT TO ECU TABLET BOTTLE. TITLE: "TWICE THE IRON IN A POUND OF CALF'S LIVER." UNDERCUT "PLUS 7 VITAMINS."	4. Just two Geritol tablets contain twice the iron in a pound of calf's liver * * * plus 7 vitamins for nutrition.
5. DISS. TO MAN AND WIFE COMING INTO THE HOUSE AFTER THEIR TRIP. WOMAN IS SMILING SUPER: "WEEKS LATER."	5. HUSBAND: It's good to see you smile again. WIFE: Thanks to the Geritol I've been taking.
6. BACK TO TED MACK.	6. MACK: Check with your doctor, and if iron poor blood is your problem * * *
7. CUT TO PRODUCT SHOT. SUPER: "CHANGES IRON-POOR BLOOD INTO IRON-RICH BLOOD."	7. * * * don't be sad * * * be glad for Geritol. High potency Geritol changes iron-poor blood into iron-rich blood.

APPENDIX F

Script 6

Parkson Advertising Agency, Inc., #G–552–30, reads as follows:

1. OPEN ON FIRST WOMAN, WHO QUESTIONS THE CAMERA:	1. SCOTTIE BLOCK: What are *you* so sad about?
2. CUT TO SECOND WOMAN WITH SAD EXPRESSION WHO ANSWERS THE CAMERA:	2. LOIS SMITH: I found out I have iron-poor blood.
3. PULL BACK TO TWO-SHOT. IN BACKGROUND WE SEE KITCHEN COUNTER, CABINET, SINK AND WINDOW.	3. SCOTTIE BLOCK: Then it's time * * *

4. FIRST WOMAN PICKS UP AND UNCAPS BOTTLE OF GERITOL TABLETS.	4. * * * you found out about Geritol!
5. CUT TO CLOSEUP OF GERITOL TABLET BOTTLE. IN FIRST WOMAN'S HAND AS SHE POURS FROM IT TWO TABLETS INTO HAND OF SECOND WOMAN.	5. Geritol can change your iron-poor blood into iron-*rich* blood. I'll start you off.
6. CUT TO CLOSEUP OF SECOND WOMAN.	6. LOIS SMITH: Geritol really works?
7. PULL BACK TO TWO-SHOT AS FIRST WOMAN NOW POURS WATER FROM TAP INTO GLASS.	7. SCOTTIE BLOCK: Of course.
8. CUT TO ECU TABLET PACKAGE.	8. Geritol-iron enters your bloodstream fast * * *
9. MOVE IN ON SECOND WOMAN AS SHE SWALLOWS THE TWO GERITOL TABLETS WITH WATER, WHICH FIRST WOMAN HANDS HER.	9. * * * carrying its blood-building high potency iron throughout your body.
10. SHIMMER DISS. TO SECOND WOMAN HAPPILY EXAMINING DRESSES ON RACK IN DEPT. STORE. SHE HAPPENS TO LOOK UP SMILING AS SHE NOTICES FIRST WOMAN APPROACH. SUPER: "WEEKS LATER".	10. LOIS SMITH: Hello. SCOTTIE BLOCK: You're smiling.
11. CUT TO CLOSEUP OF SECOND WOMAN, STILL SMILING.	11. SCOTTIE BLOCK: Thanks to Geritol!
12. CUT TO GERITOL TABLET AND LIQUID BOTTLES AND PACKAGES SUPER: "BUILDS IRON POWER IN YOUR BLOOD".	12. ANNCR: (V.O.): Iron-poor blood? Be glad for Geritol. Builds high potency in your blood. Try it.

PAPERCRAFT CORPORATION v. FEDERAL TRADE COMMISSION*

No. 71–1681. F.T.C. Docket 8779

(United States Court of Appeals, Seventh Circuit, January 25, 1973)

1. If Other Reasonable Means of Developing Necessary Industry Data Are Available, a Large Number of Subpoenas Duces Tecum Should Not Be Issued in FTC Proceeding Involving Clayton Act Issues.

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*Reported in 472 F.2d 927 (1973). For case before Commission, see 78 F.T.C. 1352; *modified* 79 F.T.C. 420; *further modified* 82 F.T.C. 1781.

[927] A large number of subpoenas duces tecum should not be issued in a Federal Trade Commission proceeding involving Clayton Act issues, if other reasonable means of developing necessary industry data are available, because service of many subpoenas, and the processing of the responses, would inevitably tend to delay the proceedings and might unnecessarily require the disclosure of confidential data.

2. BY FAILING TO PRAY FOR LESSER ALTERNATIVE IN EVENT THAT EXAMINER FOUND WHOLESALE REQUEST EXCESSIVE, PETITIONER WAS FORECLOSED FROM CONTENDING BEFORE APPELLATE COURT THAT EXAMINER SHOULD HAVE ORDERED SOMETHING LESS.

Petitioner, which in Federal Trade Commission proceeding failed to pray in alternative for a lesser number of subpoenas in event that examiner might consider its wholesale request excessive, was foreclosed from contending before the court of appeals that something less should have been ordered by the examiner.

3. F.T.C. MAY REQUIRE A SHOWING OF NEED BEFORE ISSUING 551 SUBPOENAS DUCES TECUM.

The Federal Trade Commission may properly require a showing of need before it will issue 551 subpoenas duces tecum for purpose of establishing precise contours of relevant market in a Clayton Act case.

4. UNLESS BASIS FOR ADMINISTRATIVE ACTION IS ADEQUATELY EXPLAINED, COURTS CANNOT PROPERLY PERFORM REVIEWING FUNCTIONS.

Courts cannot properly perform their reviewing function unless basis for administrative action is adequately explained.

5. NOVEL PROVISIONS WHICH CREATE ARTIFICIAL MARKET BARRIERS SHOULD NOT BE ACCEPTED AS ROUTINE SINCE PURPOSE OF CLAYTON ACT IS TO PRESERVE COMPETITION.

Since purpose of Clayton Act is to preserve competition, novel provisions which create artificial market barriers should not be accepted as routine without careful analysis.

6. DEFERENCE SHOULD BE ACCORDED TO EXPERTISE OF ADMINISTRATIVE AGENCY, BUT WHEN IT SELECTS AS A REMEDY AN UNTRIED AND BLUNT INSTRUMENT WHICH WILL CAUSE IMPAIRMENT OF STATUTORY OBJECTIVES, COURT OF APPEALS REQUIRES A MORE CAREFUL EXPOSITION OF ITS JUSTIFICATION BEFORE SANCTION AS A REMEDIAL TOOL.

Deference should be accorded to expertise of administrative agency, particularly in fashioning of appropriate remedies; but when it selects an untried and blunt instrument which will certainly cause some impairment of statutory objectives, the Court of Appeals requires a more careful exposition of its justification before the court will sanction it as a proper remedial tool.

7. TO THE EXTENT THAT F.T.C. DIVESTURE ORDER RESTRAINED DIVESTING BUSINESS FROM SELLING TO CUSTOMER OF DIVESTED BUSINESS, THE DIVESTITURE ORDER WAS IMPROPER WHERE FINDINGS INDICATED THAT DIVESTED BUSINESS WAS FULLY CAPABLE OF SURVIVAL AS A VIABLE COMPETITOR.

Federal Trade Commission's divestiture order, to extent that it restrained divesting business from selling to customers of divested business for three-

year period, was improper, where findings indicated that divested business was fully capable of survival as a viable com[928]petitor without this special protective provision and did not remotely suggest that divested business' ability to survive was dependent on such a provision.

(Syllabus with substituted captions was taken from 472 F. 2d 927)

Court held that F.T.C. may require showing of need before issuing 551 subpoenas duces tecum regarding Clayton Act case and further, that F.T.C.'s divestiture order was improper where findings indicated that divested business was fully capable of survival as a viable competitor without special protective provision. Modified and affirmed.

Abe Fortas, *Richard M. Schmidt, Jr.*, *David J. McKean*, Washington, D.C., and *Irwin I. Zatz*, Chicago, Ill., for petitioner.

Ronald M. Dietrich, Gen. Counsel, *Karl H. Buschmann*, Atty., Federal Trade Commission, Washington, D.C., for respondent.

Before KILEY and STEVENS, *Circuit Judges* and KILKENNY, *Senior Circuit Judge.**

STEVENS, *Circuit Judge.*

Papercraft Corporation petitions for review of a Federal Trade Commission order directing divestiture of assets acquired from CPS Industries, Inc., pursuant to an exchange of shares in December, 1967. The petition does not challenge the conclusion that the acquisition violated § 7 of the Clayton Act.[1] Papercraft contends: (1) that the Hearing Examiner's refusal to subpoena sales data from 551 companies allegedly engaged in the relevant line of commerce deprived it of a fair hearing, and (2) that the Commission abused its authority by restraining Papercraft from selling to customers of CPS for a three-year period.

I.

Prior to the acquisition, Papercraft and CPS were leading firms in the gift wrap industry. The term "gift wrap," though somewhat vague, encompasses wrapping paper and foil, ribbons, and various related items such as gift boxes and bows. CPS, an older firm, sold primarily high quality specialized merchandise; Papercraft, a younger and more aggressive company, concentrated on promotion of less expensive lines. Before the Commission, Papercraft argued (a) that CPS was a failing company, *cf. International Shoe Co.* v. *F.T.C.*, 280 U.S. 291, 299–303, 50 S.Ct. 89, 74 L.Ed. 431; (b) that since CPS and Papercraft sold largely in different submarkets, they were not in substantial competition with each other, *cf. International Shoe*, *supra* at 295–299, 50 S.Ct. 89; and (c) that if Papercraft's request for 551 subpoenas had been granted, it might have proved that the relevant market was as much as twice as large as indicated by the evidence presented by complaint counsel. Only the third argument is pressed on appeal; there is no claim that the information sought by the requested subpoenas was relevant to the other two defenses.

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* Senior Circuit Judge John F. Kilkenny of the Ninth Circuit sitting by designation.

[1] 38 Stat. 731, as amended in 1950 by 64 Stat. 1125; 15 U.S.C. § 18.

Papercraft made two requests, the first listing 230 companies believed to be sellers of gift wrap paper and ribbons; each requested subpoena called for documents showing the company's total shipments of gift wrapping paper and ribbon during the year 1967. The second request was for 321 subpoenas *duces tecum* seeking comparable data from companies believed to be in the gift box business.

The two requests were opposed for a variety of reasons, some of which were plainly insufficient. Thus, for example, complaint counsel contended that the requests were untimely,[2] and the hearing **[929]** examiner rejected the subpoena request directed to gift box companies on the ground that gift boxes were not part of the relevant product market.[3]

Papercraft did not seek an interlocutory appeal to the full Commission from the Examiner's order denying the application for subpoenas. The issue was therefore first presented to the full Commission as one of the contentions urged on appeal from the examiner's initial decision after the evidentiary record had been completed. In its opinion the Commission set forth reasons, which we consider adequate, for refusing to disturb the hearing examiner's rejection of the subpoena requests.

[1] The Commission first held that subpoenas *duces tecum* should not be issued to 550 companies if other reasonable means of developing

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[2] Papercraft had initially moved the Commission to invoke the investigatory authority conferred by § 6(b) of the Federal Trade Commission Act. 15 U.S.C. § 46(b). The Hearing Examiner certified the motion to the full Commission, recommending denial on the ground that Papercraft had failed to demonstrate that equally probative evidence could not be obtained without a § 6(b) survey. The Commission accepted the Examiner's recommendation. Thereafter Papercraft sought an injunction in the district court to compel the Commission to obtain § 6(b) reports before the administrative hearings commenced. See *Papercraft Corp.* v. *Federal Trade Commission,* 307 F.Supp. 1401 (W.D.Pa.1970). The denial of that relief was followed by a request during the presentation of complaint counsel's case in chief for the issuance of Commission subpoenas; the Hearing Examiner deferred ruling on that request until the close of complaint counsel's case. In the circumstances, even though we recognize that subpoenas could have been requested at an earlier date, we cannot accept the argument that Papercraft's request was not timely. On the other hand, we find no merit in Papercraft's argument that the Commission's opposition to the § 6(b) motion partially on the ground that subpoenas provided one alternative means of obtaining appropriate information should foreclose their opposition to the particular request for 551 subpoenas which was ultimately denied.

[3] Contrary to the opinion of the Hearing Examiner, the Commission concluded that gift boxes were within the relevant product market. It also found, however, that they were relatively insignificant in quantity and that their exclusion did not affect the Examiner's overall assessment of the competitive impact of the merger.

necessary industry data are available.[4] We agree with this holding because the service of so many subpoenas, and the processing of the responses, would inevitably tend to delay the proceedings and might unnecessarily require the disclosure of confidential data. *Cf. F.T.C.* v. *American Tobacco Co.*, 264 U.S. 298, 305–306, 44 S.Ct. 336, 68 L.Ed. 696.

The Commission opinion identified various sources of industry data which the Commission found to be reasonably reliable.[5] Since it does not appear that Papercraft made any serious attempt to develop additional evidence from such sources, or to demonstrate that they were substantially inaccurate,[6] it did not satisfy the Commission's requirement for the issuance of such a large group of subpoenas.

[2] Papercraft argues, however, that the Commission's analysis, though it might justify denial of a wholesale request for 551 subpoenas, does not justify the denial of a more limited number which might have demonstrated error in aspects of the prima facie case. This argument is valid. Papercraft, however, cannot properly complain of denial of a request that it never made. Its failure to pray in the alternative for a lesser number of subpoenas in the event— which certainly was not unforeseeable—that the examiner might consider the wholesale request excessive, forecloses its contention here that something less should have been ordered by the **[930]** examiner.[7] *Cf. F.T.C.* v. *American Tobacco Co.*, 264 U.S. 298, 307, 44 S.Ct. 336, 68 L.Ed. 696.

[3] Much of the argument before us related to the reliability of complaint counsel's evidence defining the size of the relevant market and the respective shares represented by Papercraft and CPS prior to the acquisition. Our holding is not predicated on the theory, which seems to underlie much of the Commission's argument, that its prima facie evidence was so convincing that it is inconceivable that any mate-

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[4] "The issuance of orders requiring special written reports, or of *subpoenas duces tecum*, to 550 companies should obviously be undertaken only if there is no other reasonable way to develop the necessary industry data." A. 369.

[5] These sources included census figures, known sales volumes for leading companies, trade association information, and estimates by experienced executives. The Commission found that the conclusion to be derived from these sources defined a total gift wrap market "in the general range of $150 million," and found nothing in the record to impeach that overall assessment.

[6] Indeed, Papercraft did not even call its own chief executive whose market estimate of $177,000,000 had been quoted in a trade publication.

[7] "The Commission, in the issuance of a subpoena duces tecum, * * * is authorized to deny the application in its entirety if it is 'too sweeping in its terms to be regarded as reasonable.' *Hale* v. *Henkel*, 201 U.S. 43, 76, 77, 26 S.Ct. 370, 380, 50 L.Ed. 652, * * *; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298, 306, 44 S.Ct. 336, 68 L.Ed. 696. * * * Under such circumstances a demand for the whole is not warranted, even though some part of the papers asked for may be relevant." *E. B. Muller & Co.* v. *F.T.C.*, 142 F.2d 511, 520 (6th Cir. 1944). While *Muller* dealt with the issuance of a single subpoena, and the subpoenaed party agreed to make a lesser production, we think the logic is applicable by analogy. The F.T.C. may deny the request in its entirety if the request is too broad in numbers to be regarded as reasonable.

rial contradiction could have been developed in respondent's case. On the contrary, we merely hold that the Commission may properly require a showing of need, which Papercraft failed to make in this case, before it will issue 551 subpoenas *duces tecum* for the purpose of establishing the precise contours of the relevant market in a § 7 case.[8] Papercraft failed to make an adequate demonstration of the need for its exceptional request.

II.

In his discussion of the remedy, the hearing examiner concluded: "Effective competition can be restored only by reestablishing CPS as a full-time company in the production and sale of gift wrap products, as it was prior to its acquisition.[9] He rejected Papercraft's proposal that divestiture be limited to the CPS product lines which were directly competitive with Papercraft products. His recommended order directed complete divestiture within six months, **[931]** required prior approval by the Commission of the plan or agreement of divestiture, and prohibited future acquisitions by Papercraft without the Commission's approval for a ten-year period. Papercraft does not object to these aspects of the order. However, the remedial order also provided in paragraph IX that Papercraft could not sell any decorative gift wrap products to certain customers or former customers of CPS for a period of three years from the date of divestiture. It is that paragraph, as modified by the Commission, which Papercraft challenges here.

As recommended by the hearing examiner, paragraph IX would have prohibited Papercraft from selling to any former customer of CPS unless Papercraft had made sales to that account prior to December 27, 1967, the acquisition date.[10] The Commission initially adopted paragraph IX in this form without any comment on the need or justification for such a provision.

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[8] Other than by seeking to use the compulsory process of the Commission, Papercraft made no attempt to prove its allegation that the relevant market was $300,000,000 and presented nothing to contradict complaint counsel's extensive evidence tending to prove that the market was approximately $150,000,000. Papercraft did not offer affirmative evidence in an effort to show that a more reliable and detailed survey of the relevant market was necessary; consequently, no showing of prejudice has been made. See *N.L.R.B.* v. *Seine and Line Fisherman's Union,* 374 F.2d 974, 981–982 (9th Cir. 1967).

The underlying considerations here are similar to those identified by Judge Learned Hand in *N.L.R.B.* v. *Blackstone Mfg. Co.,* 123 F.2d 633, 635 (2d Cir. 1941):

> "In the case at bar the respondent's only statement of 'the nature of the facts to be proved' was that it wished 'to cross-examine them' (the signers of the cards) 'as to the authenticity of their signatures and as to the present status of any of the alleged authorizations contained on the cards'. This demand the Board might indeed have been obliged to grant, if the respondent had examined the cards and compared them with signatures in its possession, or if it had proved that it had no means of comparison. But it refused even to look at the cards, alleging that it might later be charged with discrimination, a position clearly inconsistent with a desire to cross-examine the signers. The employees were presumably within its reach without subpoena anyway, and the request had every mark of being what the Board declared that it was. While we should indeed be jealous of any denial of process to an employer, the Board is not powerless to prevent itself from being put upon by frivolous and dilatory demands."

A persuasive showing of need as a prerequisite to the wholesale issuance of subpoenas does not offend due process or the Administrative Procedure Act.

[9] A. 325.

Papercraft then filed a petition for reconsideration or reopening, contending that paragraph IX was unprecedented, unsupported by findings or evidence, and would restrain rather than restore competition. The petition pointed out that the CPS business had been operated separately since the acquisition and that the CPS product lines and marketing practices had been preserved. The record indicates that CPS sales and profits had increased materially under Papercraft ownership.

The Commission modified paragraph IX by limiting the prohibition to accounts "which at any time during the two (2) years preceding December 27, 1967, and until divestiture is effected hereunder" had been sold any gift wrap by CPS.[11] The order contained no other comment on paragraph IX.

[4, 5] Paragraph IX is by no means a standard remedial provision. Other divestiture orders have included special provisions designed to insure the survival of the divested business, but in each such instance the supporting findings demonstrated the need for a special protective provision.[12] Such find**[932]**ings are essential for two important reasons: courts cannot properly perform their reviewing function unless the basis for administrative action is adequately explained. *S.E.C.*

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[10] In its recommended form, paragraph IX provided:

"IT IS FURTHER ORDERED that for a period of three (3) years from the date of divestiture The Papercraft Corporation is prohibited from selling any decorative gift wrap products to any customer account which at any time has been sold any decorative gift wrap products by CPS Industries, Inc., unless such customer account was sold such decorative gift wrap products by The Papercraft Corporation prior to December 27, 1967." A. 328–329.

[11] The order entered on September 9, 1971, provided, in part:

"IT IS FURTHER ORDERED that Paragraph IX of the Commission's final order of June 30, 1971, be, and it hereby is, modified to read as follows:

"IT IS FURTHER ORDERED that for a period of three (3) years from the date of divestiture the Papercraft Corporation is prohibited from selling any decorative giftwrap products to any direct customer account of CPS Industries, Inc., which at any time during the two (2) years preceding December 27, 1967, and until divestiture is effected hereunder, has been sold any decorative giftwrap products by CPS Industries, Inc., unless such customer account was sold such decorative giftwrap products by the Papercraft Corporation prior to December 27, 1967.

"IT IS FURTHER ORDERED that respondent's Petition for Reconsideration be, and it hereby is, otherwise denied; * * *." A. 400.

[12] In *Ford Motor Co.* v. *United States*, 405 U.S. 562, 92 S.Ct. 1142, 31 L.Ed.2d 492, even though Autolite's precarious post-divestment position was not attributable to Ford's acquisition, the findings clearly supported the conclusion that it might not survive unless Ford was prohibited from making an independent entry into the market and required, in effect, to subsidize it for a limited period of time. (See 405 U.S. at 582–583, 92 S.Ct. 1142, opinion of Chief Justice Burger.) The position of Ford in the sparkplug market is wholly dissimilar to the position of Papercraft in the gift wrap business, and there are no findings in this record indicating that CPS's post-divestment position will be precarious or that paragraph IX would forestall any significant threat to survival.

In *L. G. Balfour Co.* v. *F.T.C.*, 442 F.2d 21 (7th Cir. 1971), exceptional relief was supported by findings describing an unusual history of predatory behavior in a market which had been dominated by one firm for many years. The order was designed to resurrect competition in a monopolistic market, see 442 F.2d at 23, not, as in this case, to preserve the position of the largest firm in a market containing at least a score of significant competitors.

v. *Chenery Corp.*, 318 U.S. 80, 84, 63 S.Ct. 454, 87 L.Ed. 626; *F.T.C.* v. *Crowther*, 139 U.S.App.DC. 137, 430 F.2d 510, 514 (1970); and since the purpose of the statute is to preserve competition, novel provisions which create artificial market barriers should not be accepted as routine without careful analysis.

Unquestionably, a wholesome purpose may be served by a limited restraint on competition in certain situations.[13] Conceivably, no buyer would purchase the CPS business without the protection afforded by the former owner's covenant not to compete for certain accounts, in certain areas, or in certain product lines for a limited period of time.[14] However, neither Commission counsel nor the findings suggest any such justification for paragraph IX. Instead, taking a position somewhat inconsistent with the Commission's rejection of the defense that CPS was a "failing company" at the time of acquisition, Commission counsel argue that paragraph IX was included "so that CPS can reestablish itself as a viable competitor in the marketplace." [15]

The findings indicate, however, that CPS is fully capable of survival as a "viable competitor" without paragraph IX; certainly they do not remotely suggest that the company's ability to survive is dependent on such a provision.

The findings describe CPS as the largest as well as the oldest significant firm in the industry. They do indicate that CPS suffered losses in 1964 and 1965 as a result of non-recurring costs associated with the relocation of its major plant, and in 1967 as the result of the post-acquisition accounting determination that the value of its inventory should be "written down." The findings also recognize that CPS had a management problem during the mid and late 1960s. They conclude, however, that with proper executive leadership, pretax earnings of $1,900,000 on sales of $19,000,000 could be anticipated.

The Papercraft executives provided CPS with effective management, and, accordingly, CPS has prospered since the acquisition. Upon divestiture, presumably, the key executives would remain with Papercraft, and the new owner of CPS would face the problem of providing effective new leadership for the company. Nothing in the findings or the evidence suggests that competent executive talent is unavailable, or that potential new executives' willingness to join CPS is somehow dependent on the existence of a limited protection against competition from Papercraft. Paragraph IX cannot be rationalized as a solution for the CPS management problem.[16]

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[13] See, *e.g.*, *Mitchel* v. *Reynolds*, 24 Eng. Rep. 347 (K.B. 1711).

[14] Presumably the precise form of a permissible covenant not to compete, along with other elements of the bargain, would be subject to negotiation between Papercraft and any prospective purchaser of the divested asset. The form of such a covenant would, of course, be subject to Commission approval under paragraph IX of the order.

[15] Brief for respondent, p. 41.

[16] If the company is indeed doomed because its management is inadequate, paragraph IX certainly will not enable it to survive.

If the management problem is put to one side, there is nothing in the findings to suggest that CPS will be less able to maintain its position as market leader than if the acquisition had never taken **[933]** place. Indeed, the evidence implies that CPS will be a stronger company following divestiture than it was in 1967. As in the past, it will face competition from about 20 significant producers and many more small concerns, but the Commission has failed to demonstrate that its survival may depend on the imposition of special restraints against just one of those rivals.

The restriction imposed on Papercraft by paragraph IX is not "narrowly drawn," as appellate counsel for the Commission contend. As already noted, Papercraft is a relatively young company, many of whose lines are not competitive with any products sold by CPS. Under paragraph IX, Papercraft could not even sell noncompetitive items to a new customer who had made a single purchase from CPS at some time after December 9, 1965. The restriction would apply even if CPS had received no business from the account since 1966. Moreover, even if such an account had been obtained by Papercraft in 1968 and regularly supplied thereafter with items not handled by CPS, the customer would be required to go elsewhere for such merchandise. In such a case, the restraint would harm the customer and Papercraft, be of no benefit to CPS, and provide a gratuitous competitive advantage to other companies seeking that business.

Perhaps the posited case is purely theoretical, or so improbable as to be insignificant in a fair overall assessment of the impact of the order on the competitive market. Our problem is that we simply cannot tell from the findings, or the portions of the record discussed in the argument, whether the adverse impact on competition which paragraph IX will certainly produce is outweighed by the risk that the market leader will suddenly collapse without this interim protection.

[6, 7] We are conscious of the deference to be accorded to the expertise of the administrative agency, particularly in the fashioning of appropriate remedies.[17] But when it selects an untried and blunt instrument which will certainly cause some impairment of statutory objectives, we require a more careful exposition of its justification before we will sanction it as a proper remedial tool. The Commission failed to make an adequate demonstration of the need for its exceptional remedy.

The order will be modified by the deletion of paragraph IX. As so modified, it is

Affirmed.

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[17] *F.T.C.* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392–393, 79 S.Ct. 818, 3 L.Ed.2d 893; *F.T.C.* v. *National Lead Co.*, 352 U.S. 419, 428, 77 S.Ct. 502, 1 L.Ed.2d 438; *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470, 473, 72 S.Ct. 800, 96 L.Ed. 1081.

ACTION ON SAFETY AND HEALTH, ET AL. v. F.T.C.*

Civ. A. No. 49–73. FTC File No. 99–142.

(United States District Court for the District of Columbia, January 29, 1973)

Suit seeking increased public participation in F.T.C. consent order negotiations dismissed on grounds that court lacked jurisdiction over subject matter. F.T.C.'s grant or denial of intervention is entirely discretional and not judicially reviewable. Plaintiffs did not show that important constitutional rights had been denied.

Peter H. Meyers, Washington, D.C., for plaintiffs.

Robert Rankin, Washington, D.C., for defendant.

Before RICHEY, *District Judge.*

ORDER

This cause having come on for hearing on plaintiff's motion for a temporary restraining order, and upon consideration of the said motion, the suggestion of dismissal made by the United States Attorney pursuant to Rule 12(h)(3), Federal Rules of Civil Procedure, of the complaint and exhibits and memoranda filed in support thereof, of the entire record herein, and of arguments of counsel made in open Court, and it appearing to the Court that it lacks jurisdiction of the subject matter hereof, for the reason that a grant or denial of intervention in Commission non-adjudicative consent negotiations is entirely discretionary with the Commission and is not judicially reviewable; and that no showing has been made that defendant has clearly violated an important constitutional or statutory right of plaintiffs since the Commission's consent order procedure, 16 C.F.R. §§ 2.31–.35, affords plaintiffs ample and meaningful opportunity to comment on executed consent agreements prior to final acceptance or rejection of such agreements by the Commission, it is by the Court this 29th day of January, 1973:

Ordered that the suggestion of the United States Attorney be, and it hereby is, adopted by the Court; and it is further

Ordered that the complaint herein be, and it hereby is, dismissed; and it is further

Ordered that plaintiffs' motion for a temporary restraining order be, and it hereby is, denied.

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 74,336, at 93,579 (1973–1 Trade Cases), *Affirmed:* April 17, 1974, D.C. Cir., p. 922 herein.

STANDARD OIL COMPANY v. F.T.C., ET AL.*

AND

F.T.C. v. J. K. JAMIESON, ET AL.*

Civ. A. Nos. 774–72; 1204–72. F.T.C. File No. 99–126.

(United States District Court for the District of Columbia, February 7, 1973)

Before Bryant, *District Judge.*

Order

The Court having by order dated January 8, 1973, ordered that these two cases be consolidated, and

This matter having come before the Court on defendants' motion in Civil Action No. 774–72 to dismiss the complaint or, in the alternative, for summary judgment in that action, and on the petition of the Federal Trade Commission in Civil Action No. 1204–72 invoking the aid of this Court, pursuant to 15 U.S.C. § 49, in requiring respondent Standard Oil Company, by respondent J. K. Jamieson, to comply with an administrative subpoena *duces tecum* issued by petitioner, and

The Court having considered defendants' motion to dismiss or, in the alternative, for summary judgment, the complaint, exhibits and other papers of record in Civil Action No. 774–72, and the verified petition and other papers of record in Civil Action No. 1204–72, and the Court having heard oral argument in open court on January 31, 1973, it is hereby

Ordered, That the complaint in Civil Action No. 774–72 be and the same is dismissed for lack of jurisdiction over the subject matter, and it is further

Ordered, That the relief requested by petitioner in Civil Action No. 1204–72, be, and hereby is, granted, and it is further

Ordered, That respondent Standard Oil Company, by respondent J. K. Jamieson, be, and hereby is, commanded to appear before a duly designated representative of petitioner, at Room 553, Federal Trade Commission Building, 6th Street & Pennsylvania Avenue, N.W., Washington, D.C., at a time and on a date to be designated by petitioner upon not less than five days notice, and then and there to testify and produce the books, papers and documents requested in a subpoena *duces tecum* issued by the Commission on October 5, 1971, a copy of which is appended to the petition of the Federal Trade Commission in Civil Action No. 1204–72 as Exhibit 1, and it is

Further ordered, That a certified copy of this Order be served forthwith upon respondents J. K. Jamieson and Standard Oil Company by the United States Marshal.

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*Not otherwise reported.

N. C. FREED COMPANY, INC., ET AL. v. BOARD OF GOVERNORS of the FEDERAL RESERVE SYSTEM, ET AL.*

No. 49, Docket 72–1381. F.T.C. File 99–90

(United States Court of Appeals, Second Circuit, February 1, 1973)

1. Assurance of a Meaningful Disclosure of Credit Terms So That Consumer Will Be Able To Compare More Readily Credit Terms Available to Him Is the Avowed Purpose of the Truth in Lending Act.

[1210] Avowed purpose of the Truth in Lending Act is to assure a meaningful disclosure of credit terms so that consumer will be able to compare more readily credit terms available to him and avoid uninformed use of credit.

2. Consumer Credit Protection Act Is Remedial in Nature and Must Be Construed in Liberal Fashion.

Consumer Credit Protection Act is remedial in nature and its terms must be construed in liberal fashion.

3. A Contract Will Be Deemed To Include in Its Terms All Rights Conferred Upon Parties by the Laws of the State in Which Contract Is Executed.

A contract will be deemed to include in its terms all rights conferred upon parties by the laws of the state in which the contract is executed.

4. Implicit in a Contract To Renovate, Remodel or Repair a House Is a Provision That Lien Will Attach To Secure Payment for Work and Material.

Since a contract to renovate, remodel or repair a house imports that work will be done by mechanics and artisans and that materials will be furnished in connection with that work, implicit in contract is a provision that lien will attach to secure payment for work and materials, and statutory provisions for mechanic's and materialmen's liens must be taken as part of contract.

5. It Was the Intent of Congress To Establish a National Policy of Protecting Consumers Whose Residences May Be Jeopardized by Section 125(a) of the Truth in Lending Act.

[1211] Congress intended by Section 125(a) of the Truth in Lending Act to establish a national policy of protecting consumers whose residences may be jeopardized by operation of all types of security interests acquired by creditors in the home-improvement industry, and the goal was to provide uniform protection throughout the nation, irrespective of vagaries among states' lien laws.

6. Regulation of Federal Reserve Board Permitting Consumer To Rescind a Credit Transaction Within Three Days From Date of Its Execution Was Not an Improper Extension of the Statute and Was Valid.

Statutory liens are included in term "security interest" within statute permitting consumer to rescind home improvement contract within three days from date of its execution in any credit transaction wherein a security interest "is retained or acquired" in consumer's residence; thus, regulation

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*Reported in 473 F.2d (1973). *Cert. denied:* Oct. 9, 1973, 414 U.S. 827, 94 S.Ct. 48.

of Federal Reserve Board permitting consumer to rescind a credit transaction within three days from date of its execution where a security interest "is or will be retained or acquired" by a creditor in consumer's home was not an improper extension of statute and was valid.

7. **FEDERAL RESERVE BOARD'S CONSTRUCTION OF STATUTE PURSUANT TO WHICH IT PROMULGATED REGULATION WAS ENTITLED TO DEFERENCE IN ACTION CHALLENGING VALIDITY OF THE REGULATION.**

Federal Reserve Board's construction of statute pursuant to which it promulgated regulation was entitled to deference in action challenging validity of the regulation.

8. **LETTER WRITTEN ONE YEAR AFTER ENACTMENT OF ACT BY SPONSOR OF THE ACT DID NOT CONSTITUTE PART OF LEGISLATIVE HISTORY AND WAS ENTITLED TO NO WEIGHT IN DETERMINING LEGISLATIVE INTENT.**

Letter written one year after enactment of act by sponsor of the act did not constitute part of legislative history and was entitled to no weight in determining legislative intent.

(Syllabus, with substituted captions, taken from 473 F.2d 1210)

Court held that statutory liens are not excluded from operation of statute permitting consumer to rescind home improvement contract within three days of its execution in any credit transaction where a security interest "is retained or acquired" and, therefore, Federal Reserve Board did not exceed its authority under the statute in defining "security interest" to include statutory liens.

Thomas J. Press, Atty., Dept. of Justice, Washington, D.C. (*L. Patrick Gray, III*, Asst. Atty. Gen., *H. Kenneth Schroeder, Jr.*, U.S. Atty., *Alan S. Rosenthal*, Atty., Dept. of Justice, Washington, D.C. of counsel), for defendants-appellants.

Joseph J. Lyman, Washington, D.C., for plaintiffs-appellees.

Brief of *amicus curiae* in support of defendants-appellants filed by *Mark E. Budnitz*, Atty., the *National Consumer Law Center, Inc.*, Chestnut Hill, Massachusetts.

Before MOORE, HAYS and MULLIGAN, *Circuit Judges.*

MOORE, *Circuit Judge*:

The Board of Governors of the Federal Reserve System (the Board) and the Federal Trade Commission (FTC) appeal from a judgment and order of the United States District Court for the Western District of New York declaring invalid a regulation promulgated by the Board pursuant to the Truth-in-Lending Act, which comprises Title I of the Consumer Credit Protection Act[1] (the Act). The action for declaratory judgment and injunction was brought below by appellees N. C. Freed Company, Inc., and International Roofing Corp., two corporations in the home improvement industry organized under the laws of the State of New York, pursuant to the Declaratory Judgment Act

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[1] 15 U.S.C. § 1601 et seq.

(28 U.S.C. § 2201) and the Administrative Procedure Act (5 U.S.C. §§ 701–706).[2] Appellees sought, and the district court granted, a two-part order (1) declaring invalid 12 CFR § 226.9(a),[3] which was designed to implement **[1212]** Section 125(a) of the Act,[4] on the ground that the Board exceeded its Congressionally conferred authority in overextending the reach of said Section; and (2) enjoining the FTC and all other federal agencies from enforcing the regulation.

I.

The relevant facts are not disputed by the parties. The business of the appellees is derived almost entirely from credit transactions with homeowners wishing to have improvements made on their homes. The usual business procedure followed by the appellees involves salesmen who call upon the homeowner in an effort to secure contracts for the performance of home repair work. The contracts ordinarily provide that the appellees will perform the work on the homeowner's premises for an agreed price, on credit terms. At the time the contract is executed the homeowner-obligor is not required to execute a (second) mortgage, deed of trust, or other indenture on his residence as a condition for the extension of credit. He is, however, required to sign an unsecured promissory note to the contractor's (appellees') order, for the contract price of the work. Typically, the promissory note is then negotiated or assigned by appellees to a bank or other financial institution. By operation of law in many states such a promissory note spawns various statutory liens, such as mechanic's, materialmen's, artisan's, and similar type liens, on the consumer's home at the time the work is commenced.[5]

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[2] The appellees' standing to challenge the regulation in question was conceded. *See Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 139–140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Flast* v. *Cohen,* 392 U.S. 83, 99, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); and *Barlow* v. *Collins,* 397 U.S. 159, 166–167, 90 S.Ct. 832, 25 L.Ed. 2d 192 (1970).

[3] 12 CFR § 226.9(a) provides:

(a) *General rule.* Except as otherwise provided in this section, in the case of any credit transaction in which a security interest *is or will be retained or acquired* in any real property which is used or is expected to be used as the principal residence of the customer, the customer shall have the right to rescind that transaction until midnight of the third business day, following the date of consummation of that transaction or the date of delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later, by notifying the creditor by mail, telegram or other writing of his intention to do so. Notification by mail shall be considered given at the time mailed; notification by telegram shall be considered given at the time filed for transmission; and notification by other writing shall be considered given at the time delivered to the creditor's designated place of business. (footnote omitted, emphasis added.)

"Security interest" is defined in 12 CFR § 226.2(z) as follows:

(z) "Security interest" and "security" mean any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real poperty, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation.

[4] 15 U.S.C. § 1635(a). This section provides:

(a) *Disclosure of obligor's right to rescind.*

Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest *is retained or acquired* in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section. (emphasis added.)

Section 125(a) of the Act requires that a creditor (*e.g.*, appellees or a financial **[1213]** institution) furnish the consumer with a notice of the right to rescind the home improvement contract within three days from the date of its execution in any credit transaction [6] wherein a security interest *is retained or acquired* in the consumer's residence. Pursuant to Section 105 of the Act,[7] which directs the Federal Reserve Board to "prescribe regulations to carry out the purposes of [Section 125]", the Board promulgated the challenged regulation, which provides that a consumer shall have the right to rescind a credit transaction within three days from the date of its execution where a security interest *is or will be retained or acquired* by a creditor in the consumer's home.[8] The present controversy centers upon the verb tense difference between the language of Section 125(a), "is retained or acquired," and that of the regulation, "is or will be retained or acquired." The appellees argued successfully below that the Board has improperly extended the reach of Section 125(a) to cover non-consensual or statutory liens arising *in futuro*, and that Congress had intended that the right of rescission prescribed by the Section would pertain only to second mortgages or other consensual liens given by the homeowner at the time the contract is executed. On cross-motions for summary judgment the district court entered judgment for appellees, concluding that the regulation exceeded the Board's authority and was thus unlawful:

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[5] *See e.g.*, N.Y. Lien Law § 3 (McKinney's Consol. Laws, c. 33, 1966).

[6] Under § 125(a) and the applicable regulations a "consumer credit" transaction is one for which a finance charge (see 12 CFR § 226.2) is or may be imposed or which, pursuant to an agreement, is or may be payable in more than four installments. It is not disputed by the parties herein that the appellees engage in consumer credit transactions within this definition.

[7] 15 U.S.C. § 1604. This section provides, in relevant part:

> The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

[8] See note 3 *supra*.

> That much of the regulation pertaining to security interests that *will be* retained or acquired is beyond the Board's power and is an invalid implementation of Section 125(a).
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> * * * * * * *
>
> The plain fact is that Congress in enacting Section 125(a) made rescindable only those contracts which acquired a security interest through a mortgage, deed of trust, or other consensual type lien, and did not include liens which might arise in the future by operation of law.[9] (emphasis added).

The Federal Reserve Board and the FTC on appeal argue that the challenged regulation is both necessary and proper to effectuate the purposes of the Truth-in-Lending Act, and that, in seeking to protect unwitting consumer-homeowners from home improvement frauds, Congress did not intend to restrict protection provided by the Act solely to consensual liens, such as second mortgages, but intended to include *all liens* resulting from a consumer credit transaction. The narrow issue we must here decide is whether the Federal Reserve Board exceeded its authority by including statutory liens within the rescission provision of the Truth-in-Lending Act. Our close reading of the legislative history leads us to agree with the position taken by appellants Federal Reserve Board and Federal Trade Commission and, accordingly, we reverse the judgment below.[10]

II.

[1214] [1, 2] The avowed purpose of the Consumer Credit Protection Act, enacted in 1968 after eight years of Congressional consideration, was to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[11] The Act is remedial in nature, designed to remedy what Congressional hearings revealed to be unscrupulous and predatory creditor practices throughout the nation.[12] Since the statute is remedial in nature, its terms must be construed in liberal fashion if the underlying Congressional purpose is to be effectuated. See *Peyton* v. *Rowe*, 391 U.S. 54, 64–65, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968); *Tcherepnin* v. *Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967).

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[9] *N. C. Freed Company, Inc., and International Roofing Corp. v. Board of Governors of the Federal Reserve System and Federal Trade Commission,* Civil No. 1970–43 (W.D.N.Y., filed Sept. 29, 1971) at 6, 7–8.

[10] We note that the District of Columbia Circuit Court of Appeals has recently ruled on the precise issue raised in this appeal. We concur with the conclusions reached by Judge Robb in *Gardner and North Roofing and Siding Corp. v. Board of Governors of Federal* Reserve System, 464 F.2d 838 (D.C.Cir. 1972).

[11] 15 U.S.C. § 1601. For discussion of the historical background of consumer credit regulation, *see* Jordan and Warren, A Proposed Uniform Code for Consumer Credit, 8 B.C.Ind. & Com.L.Rev. 441, 441–49 (1967).

In *Tcherepnin* the Supreme Court held that the term "securities", for purposes of the Securities Exchange Act, should be construed broadly because of the remedial nature of that statue, legislation designed to protect investors through the requirement of full disclosure by issuers of securities. The Court stated that in defining "security" under the Exchange Act (as we must determine the proper scope of "security interest" under the Truth-in-Lending Act), "form should be disregarded for substance and the emphasis should be on economic reality." (*Id.*) *See also Johnson* v. *Southern Pac. Co.*, 196 U.S. 1, 14–18, 25 S.Ct 158, 49 L.Ed. 363 (1904); *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 388–389, 79 S.Ct. 818, 822, 3 L.Ed.2d 893 (1959) ("We deal with remedial legislation of a regulatory nature where our task is to fit, if possible, all-parts into an harmonious whole."

One "economic reality" of the home improvement industry is that, in work such as that performed by the appellees, second mortgages and statutory liens are used extensively to secure payment of home improvement contracts that are ordinarily "insecure" business ventures.[13] Our reading of the legislative history demonstrates that although Congress was concerned in Section 125(a) *primarily* with abuses flowing from creditor use of *second mortgages* as a security device, it was equally concerned with abuses stemming from use of other types of liens:

> [A]nother provision of the bill is also vitally important. That is the Cahill amendment, or rather a series of amendments in the House, to strike at home improvement racketeers who trick home owners, particularly the poor, into signing contracts at exorbitant rates, *which turn out to be liens on the family residences.* Any credit transaction which involves a security **[1215]** interest in property must be clearly explained to the consumer as involving a *mortgage or lien;* any such transaction involving the consumer's residence—other than

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[12] Prior to passage of the Act the extent of home improvement frauds was staggering, with costs to consumers, according to the National Better Business Bureau report for 1965, totalling somewhere between $500 million and $1 billion annually. Hearings on S.J.Res. 130, S. 3065 and S. 3066 Before the Senate Commerce Committee, 90th Cong., 2d Sess., ser. 90–64, at 75 (1968), in Unfair Practices in the Home Improvement Industry and Amendments to the FTC Act (1968) [hereinafter cited as Hearings on S.J. 130].

During Congressional debate it was noted that:

> [M]isrepresentations are made directly to the borrower by the mortgage discount lender or a broker who offers to arrange home improvement repairs or consolidation of all homeowner's debts into "one easy monthly payment." * * * [I]n many cases [the homeowner] is never informed nor aware that his home is being made subject to a mortgage. 114 Cong.Rec. pt. 2, 1611 (1968) (remarks of Representative Cahill).

[13] Hearings on S.J.Res. 130, *supra*, at 10, 43, 70, 241–42.

> in a purchase-money first mortgage for the acquisition of the home—carries a 3-day cancellation right.[14] (emphasis added.)

The typical home improvement contract is procured, usually under pressure conditions, by a prime contractor (such as the appellees) who frequently possesses little or no capital of its own; the actual work is often done by various subcontractors.[15] When the promissory note signed by the homeowner is assigned or negotiated to a financial institution, which can then assert holder-in-due-course status gainst him,[16] his premises become vulnerable not only to the statutory liens available to the prime contractor, but also to the various mechanic's and materialmen's liens of the subcontractors, as well as to the secured position of the holder-in-due-course financial institution. Thus, if the homeowner should default in payment to the prime contractor, the latter could levy on the home to obtain payment, that is, unless the contractor has waived its statutory liens. But even though the prime contractor may waive its liens in the contract, it usually cannot waive statutory liens arising in favor of subcontractors,[17] so that if the prime contractor fails to pay its subcontractors the latter can also levy on the home to collect payment.[18] Conceivably, then, in many states even if the homeowner has already paid the prime contractor, in order to protect his home from subcontractor statutory liens, he may also have to pay the subcontractors, thus paying twice for the same work.

[3–5] The appellees recognize the existence of this problem but they argue, and the district court agreed, that, because Section 125(a) speaks of a mortgage or lien that *is retained or acquired*, liens arising in the future by operation of state law were meant to be excluded since they are not "retained or acquired" at the time the contract is executed by the parties. This argument, however, flies in the face of established authority that a contract will be deemed to include in its terms all rights conferred upon the parties by the laws of the state in which the contract is executed. See *Von Hoffman* v. *City of Quincy*, 4 Wall. (71 U.S.) 535, 550, 18 L.Ed. 403 (1866), where the Supreme Court early held that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." Hence statutory liens do not, as the district court ruled, arise only in the future; they may be retained or acquired at the time the credit transaction is executed. In some states mechanic's liens relate back to, and attach, as of the time of the original contract.[19] In numerous states mechanic's liens relate back to, and attach, as of the time work on the home is **[1216]** commenced or materials are furnished.[20] It is clear to us that in Section 125(a) Congress intended to establish a national policy of protecting consumers whose residences are jeopardized by operation of all types of security interests acquired by creditors in the home improvement industry, and that the goal was to provide uniform protection throughout the nation, irrespective of the vagaries among the states' lien laws.[21] Because of the various differences among the states in the treatment of statutory liens, and the opportunities for evasion of Section 125(a) which these differences make possible, consumers can be effectively protected only if *all* statutory liens are included within the regulatory ambit of that Section. With an awareness of the multifarious pitfalls created by statutory liens, through which a homeowner may unwittingly lose one of his most precious posssessions, his home, it would be most incongruous for us to construe Section 125(a) in the manner urged by the appellees: that is, that Congress intended the statute to require disclosure and three-day right of rescission as to some, but not all, of the various security interests created by a home improvement contract. We think that the only way in which the Act's objective of "meaningful disclosure" of credit terms may be achieved is if the various statutory liens are included and treated uniformly under the Truth-in-Lending Act; this Congress intended through the operation of Section 125(a), and this the

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[14] 114 Cong.Rec., pt. 11, 14388 (1968) (remarks of Representative Sullivan). Representative Patman, summarizing the Conference Report accompanying the bill, stated concerning § 125(a):

> This section, passed by the House, deals *primarily* with mortgage transactions where unwanted home improvements are sold to homeowners by sharp or fraudulent operators. *Id.* at 14384 (emphasis added).

[15] Hearings on S.J.Res. 130, *supra*, at 75, 104, 171. *See also*, Note, Mechanics' Liens and Surety Bonds in the Building Trades, 68 Yale L.J. 138, 138–39 (1958).

[16] *See generally*, Comment, Judicial and Statutory Limitations on the Rights of a "Holder in Due Course" in Consumer Transactions, 11 B.C.Ind. & Com.L.Rev. 90 (1969).

[17] The laws with respect to waiver of statutory liens vary among the states. See Annot., 76 A.L.R.2d 1087 (1961).

[18] Hearings on S.J. Res. 130, *supra*, at 42–43, 241–42.

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[19] *See e.g.*, Ill.Ann.Stat., c. 82 § 1 (Supp. 1972); Me.Rev.Stat.,Ann., tit. 10, c. 603 § 3251 (Supp. 1972–73).

[20] *See* Annot., Osborne, Mortgages, § 214 at 397–98 (2d ed. 1970); 3 Powell, The Law of Real Property, ch. 38 ¶ 488, at 758.15–758.17 (1967). In some states an assignment of the right to a mechanic's lien may be made at the time the contract is executed, even though the lien has not been filed by the assignor, and even though the work has not yet commenced. *See e.g.*, Colo.Rev.Stat. § 86–3–17 (1963).

Congressional hearings also revealed an unsavory practice of contractors and subcontractors known as "spiking the job," through which statutory liens are immediately invoked to the advantage of the contractors and subcontractors, and the disadvantage of the homeowner. In this practice, the creditor (contractor or subcontractor) goes to the consumer's home within hours after the contract is signed and makes a token performance of work or furnishing materials. The creditor pressures the homeowner into the belief that the contract is now nonrescindable because work has commenced; then he leaves and no further work is done on the contract for perhaps weeks or months. Hearings on S.J. 130, *supra*, at 10. 18. 44. 105.

[21] For discussion regarding the substantial lack of uniformity among state lien laws, *see* Osborne, Mortgages, § 214 at 394–95 (2d ed. 1970); 3 Powell, The Law of Real Property, ch. 38, ¶ 484, at 730–736 (1967).

Federal Reserve Board recognized in 12 CFR 226.9(a). Carving statutory liens out of the protection provided by Section 125(a) would not only render impossible such uniformity among the states, it would defeat the goal of providing "meaningful" disclosure to the consumer. We refuse to perform such a surgical procedure.

Ruling on this precise issue in *Gardner and North Roofing and Siding Corp.* v. *Board of Governors of Federal Reserve System*, 464 F.2d 838 (D.C.Cir. 1972), the District of Columbia Circuit has, we think, correctly determined the question:

> We think it a reasonable construction of the statute that Congress intended to require disclosure of all the consequences flowing from the signing of a home improvement contract, including not only the consequences spelled out in the contract, but also those necessarily inherent therein. Any other construction would expose the homeowner to hidden and perhaps fatal traps; it would lead to precisely the kind of imposition that Congress intended to prevent. Viewed in this light we think the challenged regulation is entirely consistent with the legislative purpose and is a reasonable and proper device for carrying it out. 464 F.2d at 842.

III.

[1217] [6–8] We conclude that, in ruling that the right of rescission provided by Section 125(a) applies only to cases in which the creditor retains or acquires a *consensual* lien, or second mortgage, the district court relied on a too technical and narrow construction which eviscerates the statute, and which renders consumers susceptible to the very abuses Congress sought to prevent. We hold that the Federal Reserve Board did not exceed its authority in defining "security interest" to include statutory liens, and in interpreting the right of rescission provided in Section 125(a) as extending to such statutory liens. The challenged regulation constitutes a clarification, and not an improper extension, of the statute and it therefore does not exceed the bounds of the mandate given the Board by Congress.[22] Since the regulation is clearly consistent with the legislative purpose,[23] it may not be overturned. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194, 61 S.Ct. 845, 85 L.Ed. 1271 (1941). And since the regulation constitutes a contemporaneous construction of a statute by the agency charged by Congress with the administration of the Act, the Board's construction is entitled to deference, *Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); Gardner and North Roofing and Siding Corp., *supra*, 464 F.2d at 842. Appellees' position on appeal, relying as it does on a hypertechnical construction of the language in Section 125(a), would enable disreputable firms to act in an underhanded manner. We fail to see how the three-day right of rescission provided in Section 125(a), as implemented in 12 CFR § 226.9(a) can cause harm to reputable business firms.

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[22] *See* note 7, *supra.*

[23] The appellees place great reliance on a letter dated June 16, 1969, from Congressman Cahill, a sponsor of the Act written one year after enactment, to support a contrary view of legislative intent. The letter does not constitute part of legislative history and is entitled to no weight in this Court. *See National School of Aeronautics, Inc.* v. *United States*, 142 F. Supp. 933, 938, 135 Ct.Cl. 343 (1956):

> No member of a legislature, outside the legislature, is empowered to speak with authority for the body. If he may testify voluntarily, other members of his legislative body with different views or different recollections may be summoned to give their differing versions. The debate, which, so far as the lawmaking body is concerned, should have been ended by the enactment of the statute, would be transferred to the court, with disturbing possibilities of embarrassment and friction.

Accordingly, we reverse the judgment below.

ZALE CORPORATION AND CORRIGAN-REPUBLIC, INC. v. FEDERAL TRADE COMMISSION*

No. 71–2633. F.T.C. Docket 8810

(United States Court of Appeals, Fifth Circuit, February 13, 1973)

1. Order of F.T.C. Requiring Parent and Subsidiary Corporations To Cease and Desist From Future Violations of Regulation Z Was Not Inappropriate by Reason of Parent's Statement That Offending Retail Installment Contract Had Been Remedied.

[1318] Order of Federal Trade Commission requiring parent and subsidiary corporations to cease and desist from future violations of regulation Z promulgated pursuant to Truth in Lending Act was not inappropriate by reason of parent's statement that offending retail installment contract had been remedied to comply with regulation Z, where Commission found still other violations, such as new contract's notice provision, and certain admitted violations involved incorrect amounts or rates in actual transactions rather than in use of terminology or disclosure sequence which was preprinted on contract, and whether or not practices had actually been abandoned could only be determined through subsequent enforcement procedures.

2. Parent Corporation Was Properly Held Accountable for Its Own and Its Subsidiary's Violations of Regulation Z Where Source of Majority of Violations Originated With Parent Corporation.

Parent corporation was properly held accountable for its own and its subsidiary's violations of regulation Z promulgated pursuant to Truth in Lending Act, where source of majority of violations was retail installment contract prepared by parent and distributed by it to its subsidiary and division stores alike, accountability for use of contract was with parent, advertising done was in parent's name vis-a-vis names of specific stores, and organization denied recognition of separate corporate structure employed.

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*Reported in 473 F.2d 1317 (1973). For case before Commission, see 78 F.T.C. 1195. Rehearing denied: March 9, 1973.

3. **Order of F.T.C. Was Not Overly Broad in its Prohibition Against Violation of Sections of Regulation Assertedly Not Violated.**

Order of Federal Trade Commission requiring parent and subsidiary corporations to cease and desist from violations of regulation Z promulgated pursuant to Truth in Lending Act was not overly broad in its prohibition against violation of sections of regulation assertedly not violated, where each section referred to in order corresponded to a significant violation found by Commission and supported by record.

4. **Order of F.T.C. Was Due To Be Sustained Unless Unreasonable in Consideration of Violations Found.**

Order of Federal Trade Commission requiring petitioners to cease and desist from violations of Truth in Lending Act was due to be sustained unless unreasonable in consideration of violations found.

(Syllabus, with substituted captions, was taken from 473 F.2d 1317)

On petition for review, court held that parent corporation was properly held accountable for its own and its subsidiary's violations of Regulation Z under the Truth in Lending Act; that injunction against future violations was not inappropriate; and that cease and desist order was not overly broad. Petition for review denied.

Sam G. Winstead, *Jack Pew*, *Jr.*, Dallas, Texas, for petitioners.

Ronald M. Dietrich, Gen. Counsel, *Harold D. Rhynedance*, *Jr.*, Asst. Gen. Counsel, *Robert E. Duncan*, Atty., Federal Trade Commission, Washington, D.C., for respondent.

Before GEWIN, COLEMAN and INGRAHAM, *Circuit Judges.*

INGRAHAM, *Circuit Judge:*

[1319] The issues on this petition to review an order of the Federal Trade Commission, requiring the petitioners to cease and desist from violations of Regulation Z[1] promulgated under the Truth in Leading Act,[2] are (1) Whether the parent corporation shall be held

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[1] 12 C.F.R. 226.1, et seq.

[2] Title I of the Consumer Credit Protection Act (the Truth in Lending Act) provides in part:

Sec. 105 "The Board [of Governors of the Federal Reserve System] shall prescribe regulations to carry out the purposes of this title. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to revent circumvention or evasion thereof, or to facilitate compliance therewith" 82 Stat. 148 (1968), 15 U.S.C. § 1604 (1970).

Sec. 108(c) "Except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other Government agency under subsection (a) of this section, the Federal Trade Commission shall enforce such requirements. For the accountable for its own and its subsidiary's violations of the Regulation; (2) whether an injunction against future violations of the Regulation is appropriate where the parent corporation has conceded the violation but asserts their non-recurring nature; and (3) whether the cease and desist order entered in this case was overly broad in its prohibition of violating sections of the Regulation assertedly not violated.

Petitioners are the Zale Corporation and its owned or controlled subsidiaries (the Zale Corporate Enterprise). Zale itself is a combination operating and holding company, and as a holding company controls a network of 1056 wholly owned subsidiaries, including the subsidiary, Corrigan-Republic, Inc. The Corporate Enterprise engages in a nationwide business of selling retail jewelry and other merchandise, generating a large volume of consumer credit transactions.[3]

The consumer credit transactions of the Zale Corporate Enterprise were the subject of FTC's inquiry. Specifically, the Commission attacked the Enterprise's uniform retail installment contract as used in the subject period, July 1, 1969 to December 31, 1969. Zale has conceded this form's violation of Regulation Z in thirteen particulars by failing to:

1. Properly disclose the "dollar finance charge per $100 of unpaid balance;"

2. properly disclose the term "finance charge" more conspicuously than other required terminology;

3. exclude the amount of the "finance charge" in the computation of the "amount financed;"

4. properly disclose the term "finance charge" in proper meaningful sequence;

5. properly include the charge for credit life insurance in the term "amount financed."

6. disclose the amount of the "dollars finance charge per year per $100 of unpaid balance" with an accuracy to the nearest quarter of one percent;

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purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement imposed under this title shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act" 82 Stat. 150 (1968), 15 U.S.C. § 1607(c), (1970).

The enforcement provision relates to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1).

[3] For fiscal 1970 aggregate net sales of Zale Corporation and its subsidiaries were $384,172,196, 33% of which involved extension of consumer credit.

7. **[1320]** use the term "cash downpayment" when the downpayment was in money;

8. properly use the term "unpaid balance of cash price;"

9. treat an existing consumer obligation as a new transaction when the obligation was increased;

10. clearly identify the property in which a security interest was retained;

11. accurately identify the method used for computing any charge that is deducted from the amount of any rebate of unearned finance charge;

12. include the proscribed notice when required disclosures are made on both sides of the document; and

13. make the required disclosures on the reverse side of the contract in the necessary clear, conspicuous and meaningful sequence.

[1] Zale, however, contends that the offending form has been remedied to comply with the Regulation. The Commission disagrees, finding still other violations such as the new form's notice provision. See 12 C.F.R. 226.6(a). Additionally, it should be noted that certain of the admitted violations involve incorrect amounts or rates in the actual transactions rather than in the use of terminology or disclosure sequence which is preprinted on those forms. Whether or not such practices have actually been abandoned can only be determined through subsequent enforcement procedures. Hence, while respecting the good corporate name of the Zale Enterprise, there is no valid assurance that if Zale were free of the Commission's restraint it would not continue its former course. *Compare Sears, Roebuck & Co.* v. *FTC*, 258 F. 307 (7th Cir., 1919), and *Clinton Watch Co.* v. *FTC*, 291 F.2d 838 (7th Cir., 1961). "Courts properly leave to the Commission's non-abusive discretion the question whether the public interest require the protection of an order in cases where unlawful practices have been discontinued." *Cotherman* v. *FTC*, 417 F.2d 587, 594 (5th Cir., 1969). Zale's statement that it has amended its form and no longer will violate the Act was unpersuasive before the Commission and is insufficient to convince us that the Commission abused its discretion in entering a cease and desist order.

> Even though Sullivan and Cotherman promised never to re-enter the lending business, the Commission is not bound "simply by the promise[s] of the petitioner[s]". *C. Howard Hunt Pen Co.* v. *FTC*, 3 Cir. 1952, 197 F.2d 273, 281; *see Eugene Dietzgen Co.* v. *FTC*, 7 Cir. 1944, 142 F.2d 321, 330–331; *Stanley Laboratories Inc.* v. *FTC*, 9 Cir. 1943, 183 F.2d 388, 390. A *promise* to go and sin no more is merely one of the circumstances that the Commission should consider in deter-

mining how the public interest in stopping the deceptive practices can best be accomplished. On the record as a whole we cannot say that the Commission abused its discretion in issuing the cease and desist order against Cotherman and Sullivan.

Cotherman v. *FTC*, *supra*.

Zales next questions the scope of the Commission's order and the Commission's power to look at the parent Zales for all violations occurring in the daily use of the credit forms in the Enterprise—to Zales the latter vests review in the district court.

[2] We conclude that the FTC appropriately entered its decree against the Zale Enterprise due to the presence in the record of the following factors:

1. The source of the majority of violations is the form prepared by the parent Zale and distributed by it to its subsidiary and division stores alike.
2. Accountability for the use of the form lies with the parent Zale.
3. The advertising done is in the Enterprise named vis-a-vis the names of specific stores.
4. The Enterprise organization denies recognition of the separate corporate *infra* structure employed.

[1321] The following facts supported by this record are borrowed from the government's brief:

> The parent Zale Corporation and its subsidiaries have consistently maintained common or overlapping officers and directors. A meeting of all the directors and officers of Zale and its 1,056 subsidiaries would consist of only forty-one individuals. Of these, thirty-two are directors or officers of the Zale Corporation, and of these thirty-two individuals, thirteen are directors or officers in one or more subsidiaries. Thus, there are only nine individuals holding positions as officers or directors in the 1,056 subsidiaries who are not also officers or directors of the parent Zale.
>
> The following table shows the overlapping of directors and officers of the parent and its subsidiaries:

Name	*Zale Corporation*	*Zale's Divisions except Butler Shoe Division*	*Zale's Butler Shoe Division*
Ben A. Lipshy	President, Director.	President, Director.	Director and President of one corporation.
Donald Zale	Exec. Vice President, Director.	Director	Director of one corporation.
Leo Fields	Group Vice President, Director.	Director or officer or both.	Director of one corporation.
John P. Dickens	Vice President, General Counsel.	Vice President or Asst. Secretary or both.	Vice President and Asst. Secretary of one corporation.
Lew Zale	Group Vice President, Director.	Director or Vice President for all except subsidiaries in three divisions.	Vice President of one corporation.
Esir Wyll	Secretary	Secretary	Secretary of one corporation.
Clarence Feuer	Vice President	----------------	Vice President of 193 corporations.
Sidney Flanzbaum	Vice President	----------------	President of 54 corporations.
Shearn Robinsky	Treasurer	Treasurer	Treasurer of one corporation.
Marvin Rubin	Senior Vice President.	Vice President Zale Store Division only.	--------------------
I. D. Shapiro	Vice President, Director.	----------------	President of 193 corporations, Director of 247 corporations, Vice President of 54 corporations.
Albert Greenfield	Senior Vice President.	----------------	Director, Vice President in 247 corporations.
George Heard	Vice President, Director.	----------------	Director in 247 corporations, Secretary-Treasurer in 247 corporations, Vice President in one corporation.

Thus the integrated operation interlocking directorate and unified advertising strongly militate for finding the Enterprise to be the appropriate subject for the Commission's order and for application of the exceptions to recognition of separate corporate entities where to do so frustrates a statutory policy. *NL* **[1322]** *RB* v. *Deena Artware, Inc.*, 361 U.S. 398, 80 S.Ct. 441, 4 L.Ed.2d 400 (1960); *Anderson* v. *Abbott*, 321 U.S. 349, 64 S.Ct. 531, 88 L.Ed. 793 (1943); *P. F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261 (6th Cir., 1970), *cert. den.* 400 U.S. 926, 91 S.Ct. 188, 27 L.Ed.2d 186; *Delaware Watch Co.* v. *FTC*, 332 F.2d 745 (2nd Cir., 1964). As then Judge Cardozo said in *Berkey* v. *Third Ave. Ry. Co.*, 244 N.Y. 84, 95, 155 N.E. 58, 61 (1926):

> Liability of the parent has never been adjudged when the subsidiary has maintained so consistently and in so many ways as here the separate organization that is the mark of a separate existence, and when the implication of a contract for unity of operation would be the implication of a contract for the commission of a crime.
>
> The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it. We say at times that the corporate entity will be ignored when the parent corporation operates a business through a subsidiary which is characterized as an 'alias' or a 'dummy.' All this is well enough if the picturesqueness of the epithets does not lead us to forget that the essential term to be defined is the act of operation. Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice. Ballantine, Parent and Subsidiary Corporations, 14 Cal.Law Review, 12, 18, 19, 20. The logical consistency of a juridical conception will indeed be sacrificed at times, when the sacrifice is essential to the end that some accepted public policy may be defended or upheld. This is so, for illustration, though agency in any proper sense is lacking, where the attempted separation between parent and subsidiary will work a fraud upon the law. * * * At such times unity is ascribed to parts which, at least for many purposes, retain an independent life, for the reason that only thus can we overcome a perversion of the privilege to do business in a corporate form. We find in the case at hand neither agency on the one hand, nor, on the other, abuse to be corrected by the implication of a merger. On the contrary, merger might beget more abuses than it stifled. Statutes carefully framed for the protection, not merely of creditors, but of all who travel upon railroads, forbid the confusion of liabilities by extending operation over one route to operation on another. In such circumstances, we thwart the public policy of the state instead of defending or upholding it, when we ignore the separation between subsidiary and parent and treat the two as one.

Compare Berger v. *Columbia Broadcasting Systems, Inc.*, 453 F.2d 991 (5th Cir., 1972). *See, generally*, Cary on Corporations (4th ed. 1969).

The Commission did not err in considering Zale an enterprise and drafting its order accordingly. Cf. *NLRB* v. *Condenser Corp.*, 128 F.2d 67 (3rd Cir., 1942); *accord*, *NLRB* v. *Concrete Haulers*, 212 F.2d 477 (5th Cir., 1954). *See Carter Products, Inc.* v. *FTC*, 323 F.2d 523 (5th Cir., 1963), and *Cotherman, supra.*

[3] Nor did the Commission err in the scope of its order. Each section referred to in its order corresponds to a significant violation found by the Commission and supported by the record.[4]

[4] The Commission's order is not the blanket order condemned in *Grand* **[1323]** *Union Co.* v. *FTC*, 300 F.2d 92 (2nd Cir., 1962), nor does it forever restrain Zale from engaging in lawful activity, *Cotherman* v. *FTC*, *supra*, and is due to be sustained unless unreasonable in consideration of the violations found. *FTC* v. *Mandel Bros.*, 359 U.S. 385, 79 S. Ct. 818, 3 L.Ed.2d 893 (1958); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 66 S.Ct. 758, 90 L.Ed. 888 (1959).

We cannot say that the Commission's order was not reasonably related to the demonstrated violations of the Act, nor can we say that the Commission abused the wide discretion that it has in a choice of remedy deemed adequate to cope with the unlawful practices found in this record.

The petition for review is denied.

COCA-COLA COMPANY, ET AL. v. FEDERAL TRADE COMMISSION*

No. 72-2270. F.T.C. Docket 8855

(United States Court of Appeals, Fifth Circuit, February 15, 1973)

1. SINCE THE GENERAL RULE IS THAT ADMINISTRATIVE TRIBUNALS ARE IMMUNE FROM INTERLOCUTORY REVIEW AND SINCE AGENCY HAD NOT EXCEEDED ITS JURISDICTION, JUDICIAL REVIEW OF F.T.C.'S INTERLOCUTORY RULING WOULD BE PREMATURE.

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[4] The FTC in its order stated:

"The order proposed by the examiner is not, as respondents suggest, a broad undifferentiated order simply prohibiting respondents from violating the statute or the regulation irrespective of whether the particular provision applies to the type of business in which respondents are engaged. Rather, the examiner's order is carefully limited to those full sections of the implementing regulation that regulate the specific kinds of practices to be engaged. The order prohibitions are carefully tailored to exclude any section of this regulation which bears no relationship to the practices of Zale Corporation and its network of subsidiaries.[9]"

"[9] The examiners order includes within its prohibitions three full sections of Regulation Z. These sections embrace the practices in which respondents admittedly engaged and in which there were admitted violations. These sections also cover the types of practices in which respondents' activities are concentrated. For example, Section 226.7 governs the specific disclosure requirements for credit other than open end. The retail installment contract of the Zale Store Division owned by the Zale Corporation falls directly under this section. Section 226.8 governs the specific disclosure requirements for open end credit. The periodic statement of Corrigan-Republic which was used throughout the Fine Jeweler's Guild Division, owned by the Zale Corporation falls under this section. Section 226.6 sets out the general disclosure requirements of type, size, and placement that ties into the other two sections."

*Reported in 475 F.2d 299 (1973); *Cert. denied,* Oct. 9, 1973, 414 U.S. 877, 94 S.Ct. 121. **Decision of the District Court for the Northern District of Georgia, Atlanta Division, is reported in 342 F. Supp. 670 (1972), p. 276 herein.**

[**300**] Judicial review of Federal Trade Commission's interlocutory ruling, in connection with its administrative proceeding against soft drink manufacturer and bottlers for alleged antitrust violations, denying the affirmative defense of failure to join indispensable party would be premature, since, *inter alia*, the general rule is that administrative tribunals are immune from interlocutory review of procedural rulings and since, in respect to the most widely recognized exception, it could not be said that the Commission had exercised authority in excess of its jurisdiction or otherwise acted in a manner clearly at odds with the specific language of a statute.

2. ABSENT AN EXPLICIT REQUIREMENT, PROCEDURE FOR REVIEW PRESCRIBED BY STATUTE OUGHT TO BE DEEMED EXCLUSIVE.

Procedure for review prescribed by statute ought to be deemed exclusive absent an explicit requirement.

3. CLASS OF CASE WHERE AGENCY HAS EXERCISED AUTHORITY IN EXCESS OF JURISDICTION OR IN A MANNER AT ODDS WITH SPECIFIC LANGUAGE OF A STATUTE IS MOST WIDELY RECOGNIZED EXCEPTION TO RULE AGAINST JUDICIAL CONSIDERATION OF INTERLOCUTORY RULING.

Most widely recognized exception to the general rule against judicial consideration of interlocutory agency rulings is the class of cases where an agency has exercised authority in excess of its jurisdiction or otherwise acted in a manner that is clearly at odds with the specific language of a statute.

4. FACT THAT AN ATTACK IS VOICED IN CONCLUSORY LANGUAGE OF DENIAL OF DUE PROCESS DOES NOT WARRANT STOPPING ADMINISTRATIVE AGENCY, ALTHOUGH ASSERTION OF CONSTITUTIONAL RIGHT NOT TRANSPARENTLY FRIVOLOUS GIVES DISTRICT COURT JURISDICTION TO HEAR ATTACK ON INTERLOCUTORY ORDER.

Although an assertion of constitutional right not transparently frivolous gives the district court jurisdiction to hear an attack on an interlocutory agency order, the fact that the attack is voiced in conclusory language of a denial of due process and like constitutional rights does not warrant stopping an administrative agency in its tracks.

5. DISTRICT COURT HAS JURISDICTION TO INQUIRE INTO PRELIMINARY QUESTION OF APPROPRIATENESS OF JUDICIAL VINDICATION OF ALLEGED RIGHTS WHEN PARTIES BRING SUIT IN DISTRICT COURT ALLEGING DEPRIVATION BY ADMINISTRATIVE AGENCY.

When parties bring suit in district court alleging the deprivation by an administrative agency of specific constitutional or statutory rights, the district court has jurisdiction to inquire into the preliminary question of whether judicial vindication of the alleged rights is appropriate in a given procedural setting and, if so, whether such rights have been infringed and how they ought to be redressed.

6. UNTIL ADMINISTRATIVE PROCEEDINGS ARE AT AN END, A CONTENTION OF RES JUDICATA IS NOT COGNIZABLE BY COURTS.

A contention of *res judicata* is not cognizable by courts until administrative proceedings are at an end.

7. THE "RIGHT" TO BE FREE FROM DEFENDING A MULTIPLICITY OF LAWSUITS IS AN EQUITABLE PRINCIPLE RATHER THAN A STATUTORY OR CONSTITUTIONAL RIGHT.

The "right" to be free from defending a multiplicity of lawsuits is not a statutory right, nor a constitutional right and, in certain contexts, not a right at all but an equitable principle properly looked to by an equity court only after it has satisfied itself that it has the power and responsibility to do equity.

8. UNLESS NECESSARY TO VINDICATE UNAMBIGUOUS STATUTORY OR CONSTITUTIONAL RIGHT, EXTRAORDINARY REMEDY OF JUDICIAL INTERVENTION IN AGENCY PROCEEDINGS STILL IN PROGRESS IS UNAVAILABLE.

Extraordinary remedy of judicial intervention in agency proceedings still in progress is unavailable unless necessary to vindicate an unambiguous statutory or constitutional right, and only when this condition is satisfied will a court look to the general body of equitable jurisprudence and other appropriate sources for the purpose of fashioning relief.

9. WHEREVER AGENCY RULING DIFFERS FROM AN EQUITABLE MAXIM, JUDICIAL INTERVENTION TO "CORRECT" INTERLOCUTORY RULING IS NOT AVAILABLE.

[301] Judicial intervention to "correct" an interlocutory agency ruling is not available wherever an agency ruling differs from some equitable maxim.

10. IMMUNITY FROM INTERLOCUTORY REVIEW OF PROCEDURAL RULINGS SHOULD ATTACH TO ADMINISTRATIVE TRIBUNALS.

Administrative tribunals ought to be immune from interlocutory review of procedural rulings.

(Syllabus, with substituted captions, taken from 475 F. 2d 299)

Since the general rule is that administrative tribunals are immune from interlocutory review of procedural rulings and since the Commission could not be said to have exceeded its jurisdiction, court held that judicial review of Commission's interlocutory ruling would be premature. Affirmed.

Charles Gowen, Atlanta, Ga., *Edward Wolfe*, *Mario Diaz-Cruz*, *Thomas Kiernan*, New York City, for Coca-Cola Co.

Kilpatrick, Cody, Rogers, McClatchey & Regenstein, *Emmet J. Bondurant*, Atlanta, Ga., *Gordon Spivak*, New York City, for Coca-Cola-Thomas, 3rd.

Randolph W. Thrower, *William M. Hames*, Atlanta, Ga., Elberton Coca-Cola Bottling Co.

John W. Stokes, Jr., U.S. Atty., *Julian M. Longley, Jr.*, Asst. U.S. Atty., Atlanta, Ga., *Ronald M. Dietrich*, *James P. Timony*, *Harold D. Rhynedance, Jr.*, General Counsel, Federal Trade Commission, Wash., D.C., for defendant-appellee.

Before JOHN R. BROWN, *Chief Judge*, INGRAHAM, *Circuit Judge*, and MCRAE, *District Judge*.

WILLIAM A. MCRAE, JR., *District Judge:* *

The litigation from which this appeal arises is peripheral to proceedings that the Federal Trade Commission, defendant-appellee, (FTC) initiated on July 15, 1971, against The Coca-Cola Company, Coca-Cola Bottling Co., Inc., Coca-Cola Bottling Works, Inc., and Coca-Cola Bottling Works 3rd, Inc., plaintiffs-appellants (The Companies). The FTC brought these administrative proceedings (Docket No. 8855) pursuant to its authority and responsibility "to prevent * * * corporations * * * from using unfair methods of competition in commerce * * *" 15 U.S.C. § 45(a)(6). The FTC has alleged principally that territorial restraints incident to sales and trademark licensing by The Companies constitute an antitrust violation. The merits of this contention, which the FTC has made the basis of complaints against seven similar enterprises,[1] are not at issue here.

In Docket No. 8855, The Companies set up as an affirmative defense the failure to join as indispensable parties each of the seven hundred ninety-two individual bottling companies with whom The Companies have contractual relationships or, alternatively, the failure to join representative bottling companies sufficient to protect mutually antagonistic interests of relevant subclasses of bottling companies.[2] Thereafter, the FTC permitted seven bottling companies [3] in their individual capacities to intervene in Docket No. 8855, and these Bottlers-Intervenors adopted the position of The Companies on the indispensable party issue.

On January 7, 1972, the hearing examiner denied the motions to dismiss. [**302**] Seeking intra-agency reconsideration of the hearing examiner's adverse decision on the indispensable parties question, The Companies and the Bottlers-Intervenors asked for and obtained *de novo* review by the Commission. After a hearing, the Commission, also, denied the motions to dismiss in Docket No. 8855 on March 23, 1972.

[1] On April 18, 1972, The Companies and the Bottlers-Intervenors filed their complaint in the Northern District of Georgia seeking a declaratory judgment on the indispensable parties question and asking that the FTC be enjoined from proceeding further unless there was

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*Judge McRae prepared the above opinion before his death January 27, 1973.

[1] The six other manufacturers of soft drink syrups are Dr. Pepper, Cott, Crush, Royal Crown Cola, Pepsi Cola and The Seven-Up Company. The same contentions plaintiffs make here were unsuccessfully pressed by The Seven-Up Company in *The Seven-Up Company* v. *Goodhope et al.*, 349 F. Supp. 551 (E.D.Mo., Sept. 12, 1972) and by Pepsi Co., Inc., in *Pepsi Co., Inc.*, v. *Federal Trade Commission et al.*, 343 F. Supp. 396 (S.D.N.Y.1972), *aff'd* Nos. 72–1911, 72–1912, 472 F.2d 179 (2 Cir. 1972) (Medina J., dissenting).

[2] At oral argument, counsel for appellants suggested that at least three classes of bottlers should be represented: "true metropolitan," "quasi-metropolitan" and "non-metropolitan."

[3] Appellants Elberton Coca-Cola Bottling Co., Roddy Manufacturing Company, Westminister Coca-Cola Bottling Company, Inc., Coca-Cola Bottling Company of Keene, Inc., Ann Arbor Coca-Cola Bottling Company, The Scioto Coca-Cola Bottling Company, and Texas Coca-Cola Bottling Company (hereinafter Bottlers-Intervenors).

joinder of the parties adjudged indispensable. The District Court, 342 F. Supp. 670, granted FTC's motion to dismiss and denied relief. We affirm that disposition of the case. The Court below did not reach the merits of the controversy about the indispensability of the contract bottlers or appropriate class representatives, nor do we. We agree that judicial resolution of that question at this juncture would be premature.

In *Frito-Lay, Inc.* v. *Federal Trade Commission*, 380 F.2d 8 (5th Cir. 1967), this Court declined to disturb the decision of the District Court not to interfere in the ongoing Commission proceeding even though the plaintiff there alleged that "the administrative proceeding was outside of the jurisdiction of the Commission." *Id.* at 9. Plaintiffs in the present case allege nothing that comes so close as the allegations in *Frito-Lay, Inc.*, to fitting within the tightly circumscribed exceptions to "the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51, 58 S.Ct. 459, 463, 82 L.Ed. 638 (1938).

[2] The Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, contemplates judicial review only of "an order of the Commission to cease and desist," 15 U.S.C. § 45(c), and then only "in the court of appeals of the United States." *Id.* This scheme is fully consonant with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*[4] The Supreme Court has said, moreover, that where Congress "has enacted a specific statutory scheme for obtaining review, * * * the doctrine of exhaustion of administrative remedies * * * requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness." *Whitney Nat'l Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422, 85 S.Ct. 551, 558, 13 L.Ed.2d 386 (1965). If a procedure for review prescribed by statute ought to be deemed exclusive absent an explicit requirement, there can be little doubt in the present case that the mandatory provision of the Federal Trade Commission Act that "the jurisdiction of the court of appeals * * * shall be exclusive," 15 U.S.C. § 45(d) means what it says. This is not to suggest, however, that a different disposition of this case would have been warranted if the plaintiffs had come directly to this Court. *Texaco, Inc.* v. *Federal Trade Commission*, 301 F.2d 662 (1962).

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[4] Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

The present case is not one raising "questions particularly high in the scale of our national interest because of their international complexion," *McCulloch* v. *Marineros de Honduras*, 372 U.S. 10, 17, 83 S.Ct. 671, 675, 9 L.Ed.2d 547 (1963) [**303**] and, therefore, affording "a uniquely compelling justification for prompt judicial resolution," *id.*, of a controversy normally left to an agency for initial disposition. Nor is the present case one in which the imposition of criminal sanctions turns on the procedural niceties of administrative law. *See*, *e.g.*, *Gutknecht* v. *United States*, 396 U.S. 295, 90 S.Ct. 506, 24 L.Ed.2d 532 (1969); *United States* v. *Davila*, 429 F.2d 481 (5th Cir. 1970).

[3] The most widely recognized exception to the general rule against judicial consideration of interlocutory agency rulings is the class of cases where an agency has exercised authority in excess of its jurisdiction or otherwise acted in a manner that is clearly at odds with the specific language of a statute. The leading case of this kind is *Leedom* v. *Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). In *Kyne*, the National Labor Relations Board had grouped professionals with non-professionals in the same bargaining unit without a vote of the professionals, in defiance of an express statutory prohibition. Since this "was an attempted exercise of power that had been specifically withheld," at 189, 79 S.Ct. at 184, it was properly enjoined by the District Court. The rule that only "a plain contravention of a statutory mandate" justifies district court intervention before termination of election procedures in labor cases has been followed in this Circuit, *Boire* v. *Miami Herald Publishing Co.*, 343 F.2d 17, 24 (1965), and an analogous rule has been applied to Federal Trade Commission proceedings. *Federal Trade Commission* v. *J. Weingarten, Inc.*, 336 F.2d 687 (5th Cir. 1964).[5] The rule that agency action "contrary to a specific mandate of * * * [an] Act [of Congress]" Templeton, *supra* at 1069, is remedial judicially before administrative proceedings are at an end has been applied in the context of other agencies, notably in selective service cases, see, *e.g.*, *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 89 S.Ct. 414, 21 L.Ed.2d 402 (1968); *Breen* v. *Selective Service Board*, 396 U.S. 460, 90 S.Ct. 661, 24 L.Ed.2d 653 (1970). What is as clear as this exception to the general requirement of exhaustion of administrative remedies, however, is that plaintiffs in the present case do not fit within it.

[4, 5] The remaining "exception" to the requirement that courts await final agency action before reviewing disputes engendered by the conduct of administrative proceedings "has," as the learned trial judge

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[5] The decision in *Templeton* v. *Dixie Color Printing Co.*, 444 F.2d 1064 (5th Cir. 1971) stands for the proposition that the question of the propriety of district court action does not turn on whether clear statutory language requires action to be taken or to be forborne.

observed, "only limited application in the Fifth Circuit," citing *Boire* v. *Miami Herald Publishing Co.*, 343 F.2d 17, 21 n. 7 (5th Cir. 1965). Although by now it is probably a correct statement of the law even in our own circuit that an "assertion of constitutional right * * * not transparently frivolous * * * [gives] the District Court jurisdiction" to hear an attack on an interlocutory agency order, *Fay* v. *Douds*, 172 F.2d 720 (2nd Cir. 1949) (L. Hand); *Contra*, *Volney Felt Mills, Inc.* v. *Le Bus*, 196 F.2d 497 (5th Cir. 1952), the "fact that the attack is voiced in conclusory language of a denial of due process and like constitutional rights does not warrant stopping * * * [an administrative agency] in its tracks." *Bokat* v. *Tidewater Equipment Co.*, 363 F.2d 667, 672 (5th Cir. 1966). When, as in the present case, parties bring suit in District Court alleging the deprivation of specific constitutional rights or, indeed, specific statutory rights, *Leedom* v. *Kyne*, *supra*, the District Court has jurisdiction to inquire into the preliminary question of whether judicial vindication of the alleged rights is appropriate in a given procedural setting, and if so, whether such rights have been infringed and how they ought to be redressed.

[6] In the present case, the plaintiffs specifically complain that, if the proceed**[304]**ings before the Commission continue and FTC prevails, The Companies will be subject to two inconsistent decrees, *viz.*, the apprehended Commission order and a consent decree entered by a District Court in *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.*, 269 F. 796 (D.Del. 1920). A contention of *res judicata* is not cognizable by courts until administrative proceedings are at an end, *SEC* v. *Otis & Co.*, 338 U.S. 843, 70 S.Ct. 89, 94 L.Ed. 516 (1949), and we intimate no view as to the merits of this contention. The plaintiffs go further, projecting the outline of disarray and disaster sketched by the technical *res judicata* argument by conjuring up the vision of The Companies defending some 800 lawsuits simultaneously. This formidable problem, plaintiffs argue, might be avoided by the expedient of making all potential litigants parties to the Commission proceeding.[6]

[7-9] The "right" to be free from defending a multiplicity of lawsuits is not a statutory right, not a constitutional right and, in the context of the present case, not a right at all but an equitable principle properly looked to by an equity court only after it has satisfied itself that it has the power and responsibility to do equity. The extraordinary remedy of judicial intervention in agency proceedings still in progress

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[6] Like the majority in *Pepsi Co. Inc.* v. *Federal Trade Commission et al.* Nos. 72-1911, 72-1912, 472 F.2d 179 (2nd Cir. 1972), we are "astonished" at the "proposition that a court would hold one person liable to another for doing something within the United States which a federal administrative agency, acting within its jurisdiction, has found to be necessary for the enforcement of a federal regulatory statute."

is unavailable unless necessary to vindicate an unambiguous statutory or constitutional right, and only when this condition is satisfied will a court look to the general body of equitable jurisprudence and other appropriate sources for the purpose of fashioning relief. To adopt the plaintiffs' position, on the other hand, would be to make the rule that judicial intervention to "correct" an interlocutory agency ruling is available wherever an agency ruling differed from some equitable maxim.

In part, plaintiffs' argument is grounded not on a right unequivocally vested in them by statute but on asserted constitutional rights of third parties, namely the non-joined bottlers' respective rights to due process. It is always refreshing when giant corporations evince solicitous regard for others' rights—and we have learned to expect refreshment from The Coca-Cola Company—but it is no occasion for judicial review of interlocutory agency decisions. As to the plaintiffs' own right in this regard, we have little to add to Judge Friendly's scholarly discussion in *Pepsi Co., Inc.* v. *Federal Trade Commission et al.*, Nos. 72–1911, 72–1912, 2nd Cir.1972, 472 F. 2d 179. See, *e.g. United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967).

[10] The plaintiffs are asking that a procedural, "case-handling" decision be overturned *in media res* to require joinder "with the concomitant complication and clutter of the hearing." L. Jaffe, Judicial Control of Administrative Action 444 (1965). If trial courts are insulated from this kind of interference, see 28 U.S.C. § 1292(a), certainly administrative tribunals ought to be and, indeed, they generally have been immune from interlocutory review of procedural rulings. *E.g., Texaco, Inc.* v. *Federal Power Commission*, 117 U.S.App.D.C. 268, 329 F.2d 223 (1963), *cert. denied*, 375 U.S. 941, 84 S.Ct. 346, 11 L.Ed.2d 272 (1964); *Chicago Automobile Trade Association* v. *Madden*, 328 F.2d 766, 769 (7th Cir.) *cert. denied*, 377 U.S. 979, 84 S.Ct. 1885, 12 L.Ed.2d 747 (1964). If plaintiffs eventually prevail on review of the final order and it is necessary to begin anew with Commission proceedings, it will not be the first time events have taken that course. See *Riss & Co.* v. *United States*, 341 U.S. 907, 71 S.Ct. 620, 95 L.Ed. 1345 (1951). For the time **[305]** being plaintiffs "must, as all others similarly situated must, wait with such fortitude and patience as * * * [they] can muster." *Volney Felt Mills, Inc.* v. *Le Bus*, 196 F.2d 497, 498 (5th Cir. 1952).

Affirmed.

ASH GROVE CEMENT CO. v. FEDERAL TRADE COMMISSION, ET AL.*

Civ. Action No. 1298–71. F.T.C. Docket 8785

(United States District Court, District of Columbia,
February 22, 1973)

On motion by defendants for judgment on pleadings or in the alternative for summary judgment, court held that respondent in an antimerger case did not show the requisite irreparable injury, and injunction to prevent F.T.C. hearings from being held prior to F.T.C. production of requested documents was denied. F.T.C. was ordered, by the court, to describe with particularity each document for which exemptions under the Freedom of Information Act were claimed. Chronological minutes of Commission meetings, held confidential *per se* by the Commission, were ordered to be treated as other documents claimed to be exempt from disclosure under the Freedom of Information Act when F.T.C.'s claim of confidentiality was rejected.

David J. McKean, Wash., D.C., for plaintiff.

Arnold T. Aikens, Wash., D.C., for defendants.

MEMORANDUM ORDER

RICHEY, D. J.: This case, which has come before the Court on defendants' motion for judgment on the pleadings, or in the alternative, for summary judgment, raises numerous questions.

(1) The complaint in this action includes prayers to enjoin and declare illegal Federal Trade Commission hearings that might proceed prior to defendants' complete production of documents in this case. The first question before the Court is whether defendants' motion in this case should be granted insofar as it relates to these prayers. The Court feels this part of the motion should be granted. It is axiomatic that to obtain an injunction plaintiff must show irreparable injury. Plaintiff has not adequately made such a showing under any of the traditional tests. See *Bannercraft Clothing Co., Inc.* v. *Renegotiation Bd.*, No. 24,685 (D. C. Cir. July 6, 1972). Moreover, the Clayton Act antitrust proceedings, out of which this case grows, differ substantially from the Renegotiation Act proceedings analyzed in *Bannercraft*. Section 7 Clayton Act proceedings do not involve "informed negotiation" between parties, as the term was used in *Bannercraft*, *supra* (slip opinion, at 19). Nor are agency determinations of the Federal Trade

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶74,374 at 93,724 (1973–2 Trade Cases). For case before the Commission, **see 85 F.T.C. 1123. See also,** pp. 250, 796, 815 herein.

Commission subject to a series of *de novo* review. Hence, the case is distinguishable from *Bannercrafts*, in which issuance of preliminary injunctions was affirmed.

(2) The next question is whether allegations in the complaint relating to the Federal Trade Commission Act, the Administrative Procedure Act, the Fifth Amendment, and the Federal Declaratory Judgment Act should be dismissed as abandoned by plaintiff. The Court does not reach the question of abandonment since it finds it has no jurisdiction to entertain claims at law other than those brought under the Freedom of Information Act. *Sterling Drug, Inc.* v. *FTC*, U.S. App. D.C. at—, 450 F. 2d 698, 710–12 (D.C. Cir. 1971); *Frito-Lay, Inc.* v. *FTC*, 380 F. 2d 8 (5th Cir. 1967). *Cf. Nader* v. *Volpe*, No. 72–1118 (D.C. Cir. July 17, 1972).

(3) The Court determines that defendants' motion for judgment on the pleadings or summary judgment will be denied in all respects except those heretofore discussed. The Court finds that plaintiff's request for those documents contained in Appendix A to the Tobin affidavit, defendants' exhibit 12, is now moot, since these documents have been made available to plaintiff.

(4) The list of identifiable documents presently unavailable to plaintiff "together with a statement as to why each such document was withheld" is purportedly contained in the 25 page Appendix B to the Tobin affidavit. Defendants assert they have already explained "in detail" in the Tobin affidavit why the documents listed in Appendix B are exempt. Yet the affidavit itself, to the extent it refers to specific documents, simply states in conclusory language that the documents are exempt because they fall within certain exemption sections of the Freedom of Information Act or other law. The Appendix B description of the documents themselves is not much more helpful. Ultimately the Commission bears the burden of proving an exemption with respect to each specific document. Before the Court takes further action in the case, including *in camera* inspection, defendants must insure that each alleged 5 U.S.C. § 552(b)(4) document is described with particularity. For example, are "interview reports" claimed to be exempt because they contain secret processes or customer lists? What is the age of the information contained in the various documents, and did a party providing the information request that it be kept confidential? What does "sales information" include? Where sales, production and profit figures are sought, are they broken down by brand name or otherwise, so that disclosure would prove particularly injurious to plaintiff's competitors? *Cf. United States* v. *Lever Bros. Co.*, 193 F. Supp. 254, 257 (S.D.N.Y. 1961). Where documents are allegedly exempt pursuant to 5 U.S.C.

§ 552(b)(3) (specific exemption from disclosure by statute), which statute is invoked for which document and why is such statute applicable? In addition, to simplify the Court's ultimate task, the Court orders defendants to carefully review each 5 U.S.C. §§ 552(b)(3) and (4) document and disclose to plaintiff those portions, if any, which defendants feel may be voluntarily revealed upon defendants' own deletion.

Defendants are requested, but not ordered, to attempt a similar review, deletion and disclosure with respect to the remaining documents, including those listed as inter- or intra-agency memoranda and investigatory files, 5 U.S.C. §§ 552(b)(5) and (b)(7), respectively.

If they so desire, defendants are free to explain, for example, why no portions of the alleged § 552(b)(5) inter- or intra-agency documents contain (a) memoranda already revealed as the basis for agency rulings; see *American Mail Line, Ltd.* v. *Gulick*, 133 U.S. App. D.C. 382, 411 F.2d 696 (1969), (b) "purely factual reports and scientific studies," *Bristol-Myers Co.* v. *FTC*, 138 U.S. App. D.C. 22, 26, 424 F.2d 935, 939, *cert. denied*, 400 U.S. 824 (1970), or (c) private transmittals of binding agency opinions and interpretations constituting "secret law." See *Sterling Drug, Inc.* v. *FTC*, U.S. App. D.C.—, 450 F.2d 698, 708 (1971).

(5) Defendants are ordered to produce Commission Minutes that have been requested and not made public or made available to plaintiff. Since defendants have nowhere indicated the Minutes are exempted from disclosure, we hold that they have conceded that disclosure is proper.

SECOND MEMORANDUM ORDER

Richey, D. J.: In the companion case hereto, *Missouri Portland Cement Company* v. *Federal Trade Commission, et al.*, CA 474–71 (D.D.C.), the Honorable Judge June L. Green issued a Memorandum Order, on August 16, 1972, requiring these defendants to disclose to plaintiff Missouri Portland those Federal Trade Commission minutes requested by plaintiff which defendants had not indicated were exempt. Plaintiff herein, Ash Grove Cement Company, subsequently, at the September 7, 1972 calendar call, requested the entry of a similar Order. Pursuant to the Court's suggestion, Ash Grove filed a Motion for that purpose on September 14, 1972 and on September 29, 1972 defendants filed an Opposition to which they attached (A) an alternative proposed Order and (B) a copy of a Motion filed in *Missouri Portland* case for Reconsideration or Clarification of Judge Green's Memorandum Order. Ash Grove filed a Reply to defendants' Opposition on October 6, 1972.

In November, 1972, defendants and Missouri Portland requested leave to supplement the record in the *Missouri Portland* case, subsequently did so, and on December 15, 1972, Judge Green filed a second Memorandum Order requiring defendants to "treat chronological minutes in the same manner as the Court ordered they are to treat other purported 5 U.S.C. Section 552(b)(5) documents." *Missouri Portland Cement Company* v. *Federal Trade Commission*, CA 474–71, Memorandum Order, filed December 15, 1972 at 2. Defendants were further ordered to comply with Judge Green's two Memorandum Orders by January 15, 1973. *Ibid.* at 7.

In their Opposition filed herein, defendants characterize plaintiff's September 14, 1972 Motion as an "ostensible attempt to take advantage of an inadvertent misconstruction of the matter in the companion suit, *Missouri Portland*." Opposition at 7. It is apparent however, that with the exception of Paragraph 9(f) of the Complaint, the same documents are requested of the same defendants in each lawsuit. The same issues and objections have been raised in both lawsuits and this Court will impose no insuperable or unjust burden on defendants by now requiring them to do what they have already been required to do in the companion *Missouri Portland* case. Assuming that defendants have now meaningfully complied with the two Memorandum Orders issued by Judge Green, the only imposition attendant to the entry of similar orders herein will be the copying of documents already filed or submitted, *in camera*, in the *Missouri Portland* case.

Since defendants have attached to their September 29, 1972 Opposition a copy of their Motion to Reconsider or Clarify the April 16, 1972 Memorandum Order issued by Judge Green, this Court will additionally construe defendants' Opposition as a Motion to Reconsider or Clarify the Order proposed by plaintiff's September 14, 1972 Motion should it be entered by the Court. The Court having decided to enter herein the Order attached to Ash Grove's September 14, 1972 Motion, it now considers Attachment B to defendants' Opposition as a Motion to Reconsider or Clarify that Order.

I

There are two types of Commission minutes.

A

Chronological minutes are:

> * * * accounts of the Commission's executive meetings and conferences * * * the deliberations of the Commission such as exchange of opinions between individual Commissioners, their recommendations, motions, discussions, and statements. They also contain staff recommendations and involve pending cases,

internal reorganization procedures, personnel actions, policy determinations and generally reflect the Commission's decision making process. Secretary Tobin's affidavit, ¶ 6, at 3, Attachment B to Defendants' Opposition.

Such minutes, printed in bound volumes, are not contained in the Commission's files, but are kept in the custody of the Secretary. They are generally not available to the Commission's Staff. *Id.* Defendants assert they had not heretofore claimed exemption for the minutes because they "did not consider [them] to be the object of plaintiff's request * * *.", Attachment B, Defendants' Memorandum at 2. Moreover, defendants now assert that the chronological minutes "reflect without exception the Commission's decision making process, as well as the internal communications between individual Commissioners" and are "confidential *per se*." *Id.* They ask that the Court "relieve defendants from producing any chronological minutes of the Commission", *Id.* at 3, and ground their claim of exemption on 5 U.S.C. § 552(b)(5), Attachment B, Proposed Order, at 1. In the companion *Missouri Portland* case, these defendants further stated that "[p]laintiff has not challenged the confidentiality of the Commission's 'chronological minutes' ". *Missouri Portland Cement Co.* v. *FTC*, CA 474–71, Defendants' Reply, at 2. However, the plaintiff herein, both in its September 14, 1972 Motion for Entry of Memorandum Order *and* in its October 6, 1972 Reply to Defendants' Opposition, has requested *inter alia*, that the Court require the immediate production of all Commission minutes including those outlined in Paragraph 6 of the Tobin affidavit. Paragraph 6 of the Tobin affidavit refers to the chronological minutes. Since plaintiff does, therefore, insist on disclosure of chronological minutes, the Court concludes (1) that the broad language of the complaint was in fact intended to encompass such minutes, and (2) that plaintiff does not concede the minutes are confidential.*

When a request for disclosure of information is made and defendant is an agency subject to the Freedom of Information Act, the ordinary procedure is for the Court to inspect the documents *in camera*. *E.g.*, *Fisher* v. *Renegotiation Bd.*, No. 24,685 (D.C. Cir. November 10, 1972); *Sterling Drug Inc.* v. *FTC*, 146 U.S. App. D.C. 237, 450 F.2d 698 (1971); *Soucie* v. *David*, 145 U.S. App. D.C. 144, 448 F.2d 1067 (1971); *Bristol-Myers Co.* v. *FTC*, 138 U.S. App. D.C. 22, 424 F.2d 935, *cert. denied*, 400 U.S. 824 (1970); *Ackerly* v. *Ley*, 137 U.S.

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*Any doubt as to plaintiff's position on the confidentiality of chronological minutes of the Commission has been laid to rest by plaintiff's October 6, 1972 Reply at 9–11.

App. D.C. 133, 420 F.2d 1336 (1969). Accordingly, defendants will treat chronological minutes in the same manner as the Court has ordered they are to treat other purported 5 U.S.C § 552(b)(5) documents. See Memorandum Order of February 22, 1973. The Court understands defendants' position that chronological minutes are even more confidential than other minutes of the Commission. At the same time, where, as here, a defendant asserts an exemption pursuant to 5 US.C. § 552(b)(5), the United States Court of Appeals has warned that "* * * courts must beware of the 'inevitable temptation of a governmental litigant to give [this exemption] an expansive interpretation in relation to the particular records in issue * * *' ", 145 U.S. App. D.C. 144, 155, 448 F.2d 1067, 1078 (1971), quoting 137 U.S. App. D.C. 133, 138, 420 F.2d 1336, 1341 (1969).

Finally, the Court notes that it appears defendants do not intend to raise the Constitutional defense of executive privilege. This case does not involve national security or foreign affairs. Although defendants have cited a case dealing with the privilege—*Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd sub nom., V. E. B. Carl Zeiss, Jena* v. *Clark*, 128 U.S. App. D.C. 10, 384 F.2d 979, *cert. denied*, 389 U.S. 952 (1967)—they have not specifically and formally raised the defense, as required. *United States* v. *Reynolds*, 345 U.S. 1 (1952). If defendants do intend to raise the privilege, they must do so within 10 days of the filing of the Memorandum Order. Assertion of the defense does not preclude *in camera* inspection. 145 U.S. App. 144, 148–49, 448 F.2d 1067, 1071–72 (1971).

B

The word "minutes" is also used to describe various memoranda printed in blue mimeographed lettering. Tobin affidavit, at 2–3. Defendants did originally claim exemptions for such "minutes", howsoever, they were actually denominated. Since plaintiff disputes defendants' claimed exemptions for such minutes, defendants will treat the documents in the same manner as the Court on February 22, 1973 ordered they are to treat other purported 5 U.S.C. § 552(b)(5) documents.

II

Defendants shall comply with the directives of this and the First February 22, 1973 Memorandum Orders within 30 days of the date of filing of this Memorandum Order.

GENERAL FOODS CORP. v. F.T.C.*

Civ. A. No. K-1-73-CA. F.T.C. Docket 8883.

(United States District Court, Western District of Michigan, Southern Division, February 22, 1973)

In an action requesting preliminary injunction, court held that there was an insufficient showing of irreparable injury to plaintiff and denied the motion. However, the court granted leave to plaintiff to reapply at such time as irreparable injury can be shown.

Before ENGEL, *District Judge.*

OPINION AND ORDER

Plaintiff General Foods Corporation has filed its complaint seeking to enjoin the Federal Trade Commission from proceeding further against it in the administrative action entitled "In the Matter of KELLOGG COMPANY, a corporation, GENERAL MILLS, INC., a corporation, GENERAL FOODS CORPORATION, a corporation; and THE QUAKER OATS COMPANY, a corporation" Docket 8883, now pending before the Federal Trade Commission. Plaintiff claims in this action that the procedures utilized by the Commission violate its right to due process of law.

On January 2, 1973, the court issued an order to the defendant Commission to show cause why a preliminary injunction should not issue pending trial on the merits of the action. The show cause order was noticed for February 16, but adjourned by the court to February 22, 1973 at which time hearing thereon was had.

Since the issuance of the original order, the defendant has filed herein its motion to dismiss these proceedings pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Hearing on the latter motion was had in conjunction with the application for injunctive relief. The motion to dismiss is taken under advisement on the basis of the record and briefs now before the court.

With regard to the application for preliminary injunctive relief, the court on consideration of the record before it, determines that there is an insufficient showing of irreparable injury to the plaintiff to warrant the granting of such relief at this time.

The immediate concern of the plaintiff is that without such preliminary injunctive relief, complaint counsel in the Trade Commission action may be authorized or directed by the adimnistrative law judge therein to deliver over to the other respondents certain evidence which General Foods has delivered to complaint counsel during the pretrial proceedings in that case.

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*Not otherwise reported. See also, p. 768 herein.

Defendant has filed herein a duly certified copy of an order entered by the administrative law judge concerning the confidential treatment of certain documents. This order prohibits complaint counsel from making any disclosure of such documents at least until certain procedures therein are followed, which procedures will in any event afford counsel for plaintiff here ample time to re-apply to this court for relief as to any specific document or evidence which may be sought to be disclosed under that order. On the basis of the record presently before the court, the allegations as to such irreparable harm are general and conclusory in nature and the court is unable to ascertain what documents or what information specifically may be involved, the disclosure of which is claimed to cause irreparable injury. Therefore, the application for preliminary injunctive relief is denied with leave granted, however, to re-apply at such time as such irreparable injury can be specifically shown.

It is so ordered.

SKYLARK ORIGINALS, INC., ET AL. v. F.T.C.*

No. 72-1370. F.T.C. Docket 8771.

(United States Court of Appeals, Third Circuit, February 27, 1973)

On petition for review of F.T.C. cease-and-desist order, Court (per ALDISERT, J.), entered a Judgment Order denying plaintiffs' petition. On April 4, 1973, Court granted Commission's Motion to Correct Judgment, thereby specifically denying plaintiffs' petition for review and enforcing the Commission's order to cease-and-desist in its entirety.

F.T.C. v. WILLIAM J. BRAMMAN, JR., (MISSOURI PORTLAND CEMENT COMPANY) and RALPH BOTSFORD (BOTSFORD READY-MIX COMPANY)**

Civ. A. Nos. 19,681-4, 19,682-4. F.T.C. Docket 8785.

(United States District Court, Western District of Missouri, Western Division, March 2, 1973)

Court held that it was arbitrary for F.T.C. to insist that subpoenaed parties give up their right to limited protective orders covering subpoenaed materials because they had sought full *Mississippi* safeguards from Commission. Since F.T.C.'s reasons for denial of *Mississippi* treatment were sufficiently articulated and the materials were such that the F.T.C. would have ordinarily granted a protective order, Court granted limited protective orders covering local and nationwide Portland cement shipment data and ownership information, ready-mix sales, purchasing, price, and cost data and ownership information.

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*Reported in 474 F.2d 1340. For case before the Commission, see 80 F.T.C. 337.

**Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 74,431, at 93,928 (1973-1 Trade Cases). For case before the Commission, see *Ash Grove Cement Co.*, 85 F.T.C. 1123. See also p. 250 herein.

James P. Timony, Office of Gen. Counsel, F.T.C., Washington, D.C., for petitioners.

Ray S. Bolze, of *Howrey, Simon, Baker & Murchison*, Washington, D.C., for respondents.

Before HUNTER, *District Judge*.

FINDINGS, OPINION AND ORDER

HUNTER, *Judge:* In these two consolidated actions, the petitioner, Federal Trade Commission, an administrative agency of the United States, seeks the aid of this Court pursuant to Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, to require respondents, William J. Bramman, Jr., vice president and secretary, Missouri Portland Cement Company, and Ralph Botsford, president of Botsford Ready Mix Company, to appear before a hearing examiner of the Federal Trade Commission and there to testify and produce records and documents in accordance with subpoenas duces tecum issued by petitioner in an adjudicative proceeding before the Commission titled *In the Matter of Ash Grove Cement Company*, Docket #8785, in which Ash Grove is charged with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act.

The Commission has the duty under Section 11 of the Clayton Act, 15 U.S.C. § 21, to enforce the provisions of Section 7 of that Act, as amended, 15 U.S.C. § 18, and is directed by Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, to prohibit unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. It is empowered by Section 3 of the Federal Trade Commission Act, 15 U.S.C. § 43 to prosecute any inquiry necessary to its duties in any part of the United States, and by Section 9 of the Act, 15 U.S.C. § 49, to require by subpoena the attendance and testimony of witnesses and the production of documentary evidence at any designated place of hearing.

BACKGROUND OF THE LITIGATION

The instant action emerges out of the administrative proceeding against Ash Grove Cement Company in which the Commission, by its complaint issued on July 8, 1969, has challenged under Section 7 of the Clayton Act, 15 U.S.C. § 18, the acquisition by a cement manufacturer, Ash Grove, of three cement consumers in the Kansas City market.

In defense of that proceeding, Ash Grove, has obtained subpoenas against 27 companies including Missouri Portland Cement Company and its wholly-owned subsidiary, Botsford Ready Mix Company. Of the 27 companies, only Missouri Portland and Botsford have resisted the subpoenas.[1]

Respondents do not question the relevancy, materiality or reasonableness of the specifications contained in the subpoenas, but they do claim they are entitled to a *Mississippi River* type of protective order and treatment as to all material they return in response to the subpoenas. They base this claim on their assertion that the data called for is highly sensitive, nonpublic business data of the type and circumstance that will cause injury if it falls into the hands of the competitors.

The Federal Trade Commission vigorously resists giving such a type of protective order, urging that to do so "would effectively halt, or greatly impede enforcement of Section 7 of the Clayton Act."

HISTORY OF THE SUBPOENAS

Following the issuance of the Commission's complaint in the proceeding styled "*In the Matter of Ash Grove Cement Company*". Docket No. 8785, a duly appointed and qualified hearing examiner was designated to take testimony and receive evidence in that proceeding and to perform all other duties authorized by law. In connection with that proceeding and at the request of counsel for Ash Grove, the hearing examiner on August 5, 1970, exercising the powers vested in him by statute and the Commission's published rules, issued a subpoena duces tecum requiring respondents at the instance of Ash Grove to appear, testify and produce specified records before the hearing examiner at a prehearing conference at the offices of the Federal Trade Commission in Washington, D.C. on August 21, 1970.

Botsford and Missouri Portland appeared and agreed to comply with certain specifications of the subpoenas, but filed a motion to quash, or, in the alternative, for *Mississippi River* treatment of the other specifications, which they alleged called for highly sensitive and confidential information.

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[1] The specifications of the subpoenas were approximately identical for each of the two classes of subpoenaed parties, cement companies and ready mix companies. Four of these companies were granted, at their request, protective orders which were short of *Mississippi River* treatment and are apparently currently satisfied. See, *U.S.* v. *Aluminum Company of America*, 193 F. Supp. 249 (N.D.N.Y. 1960).

On October 15, 1970, the hearing examiner denied in both alternatives the motion to quash the subpoena or to accord *Mississippi River* treatment to the movants' disclosures. Botsford and Missouri Portland appealed from the order of the examiner to the Commission, and on November 19, 1970, the Commission issued an order remanding the matter to the examiner for further consideration. In an opinion accompanying that order, the Commission explained that the examiner in determining that it was unnecessary to apply the rule of the *Mississippi River* case had failed to follow the decision in *Federal Trade Commission* v. *Crowther*, 430 F. 2d 510 (D.C. Cir. 1970).

The *Crowther* case held, as explained by the Commission, that where a subpoena specification sought similar information, that before refusing to apply the *Mississippi River* principle, the hearing examiner should identify and articulate his reasons for such refusal.

The Commission stated that the hearing examiner had not clearly and explicitly set forth the circumstances present which rendered *Mississippi River* treatment unnecessary, and remanded for this purpose.

By an order filed December 7, 1970, the hearing examiner required that *Mississippi River* treatment be accorded to Specification 6 of the Botsford subpoena and to Specification 2 of the Missouri Portland subpoena, both pertaining apparently to "quasi merger" information—that is, information about financial relationships between those two companies and their customers. The examiner denied such treatment to the other specifications of the subpoenas.

Missouri Portland, Botsford, and Ash Grove appealed the examiner's order of December 7, 1970, to the Commission. The Commission in an order dated March 2, 1971, denied the appeals.

Following the denial of these appeals, the hearing examiner, by order dated March 22, 1971, set a prehearing conference for April 2, 1971, to select an accounting firm for purposes of *Mississippi River* treatment of the information requested by those specifications to which such treatment had been accorded.[2] In his order the hearing examiner noted that any further submission as to the necessity for and the suitability of *Mississippi River* treatment of other specifications of the subpoena would be considered at such conference.

At the prehearing conference of April 2, 1971, Botsford and Missouri Portland refused to produce any documents. Specifically, Missouri Portland refused to produce documents in response to Subpoena Specifications 4, 5, 6, 7, and 8 on the ground that *Mississippi River* treatment should be extended to each of those specifications, in addition to Specification 2.

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[2] Specifically, Botsford Specification No. 6 and Missouri Portland Specification No. 2.

Botsford refused to produce any documents in response to Subpoena Specifications 2, 3, 4, 6, 7, 9 and 10 on the same ground as Missouri Portland had refused.

On April 7, 1971, Ash Grove filed a motion with the examiner stating that Missouri Portland and Botsford had failed to comply with their respective subpoenas and requested that their noncompliance be certified to the Commission for enforcement proceedings pursuant to Section 9 of the Federal Trade Commission Act.

By order dated April 21, 1971, the hearing examiner denied as to Botsford, *Mississippi River* treatment to Specifications 2, 3, 4, 5, 7, 9 and 10, and to Missouri Portland, Specifications 4, 5, 6, 7 and 8 of their respective subpoenas. The examiner certified the matter to the Commission with the recommendation that enforcement of the subpoena be sought. The Commission with the consent of the Attorney General of the United States, then commenced with the instant enforcement proceeding.

The case came on for trial in the District Court on February 11, 1972. At the trial, respondents agreed to produce all material called for in Specifications 5(a), 5(b), and 6 of the Missouri Portland subpoena and Specifications 9 and 10 of the Botsford subpoena, all without confidential treatment.

QUESTION TO BE DECIDED

The only defense raised by respondents to the enforcement of the subpoena duces tecum is that the information called for is so highly confidential and injurious if obtained by competitors that only *Mississippi River* treatment will adequately protect respondents from injurious disclosure.[3] Inherently at the heart of this asserted defense is that petitioner, the Federal Trade Commission, has failed to sufficiently articulate its ground and reasons for withholding *Mississippi River* treatment to certain of the alleged confidential business data called for in the subpoenas and that, hence, its order must be deemed to be arbitrary and capricious.[4]

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[3] It is well settled that there is no absolute privilege for confidential information, and such information may be revealed if the public interest, proper dispatch of business or the ends of justice require it. See, *F. C. C. v. Schreiber,* 381 U.S. 279, 299 (1965); *F. T. C. v. Tuttle* 244 F. 2d 605, 609 (2 Cir. 1957), *cert. den.* 354 U. S. 925; 4 Moore, *Federal Practice,* § 26.22(3) (2nd Ed. 1970).

[4] Respondents are not blameless. They merely nakedly asserted without use of affidavit or testimony that they would be competitively injured. Respondents' concern is that they are not parties to the administrative proceeding, yet are being asked to disclose what they think is per se sensitive information. Cf. *F. C. C. v. Schreiber,* 381 U. S. 279, 295–296, 298–299 (1965); *U. S. v. American Optical Co.* 39 F. R. D. 580, 586 (N. D. Cal. 1966). There is no doubt but that the Commission is entitled to obtain and use all this data. See, cases cited above in this footnote. The only question involved is whether the Commission arbitrarily deviated from one of its settled norms concerning the type of protective order.

APPLICABLE LAW

It is settled law that a regulatory agency is not bound to deal with all cases at all times as it has dealt with some that seem comparable. *Federal Communications Commission* v. *W. O. K. O.*, 329 U.S. 223, 67 S. Ct. 213, 19 L. Ed. 204 (1946). Further, the doctrine of stare decisis is not as rigidly applied in the field of administrative law as in other legal fields. Even so, it is the duty of the Courts to review for possible arbitrary or capricious conduct and particularly where the Commission has not adequately explained its departure from prior norms and has not sufficiently explained the legal basis of its decision. See Administrative Procedure Act, 5 U. S. C., Section 706; *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652–653, 74 S. Ct. 826, 831, 98 L. Ed. 1015 (1954).

And as set out in *Federal Trade Commission* v. *Crowther* 430 F. 2d 510 (1970), l.c. 514: "The question immediately before us is not whether the Commission could properly abandon the *Mississippi* formula so lately devised and utilized by it, in a set of circumstances closely comparable to the one at hand, but whether the Commission has sufficiently identified and articulated its reasons for doing so." [5]

EXAMINER AND COMMISSION ACTION AFTER COMMENCEMENT OF THE DISTRICT COURT SUIT

Although the instant action commenced on September 3, 1971, respondents on September 29, 1971, went back to the Commission and filed with the hearing examiner a motion for a limited protective order to some of the specifications of the subpoenas. The hearing examiner, on October 12, 1971, in an order titled "Order Granting In Part and Denying In Part Motion For Protective Order" accorded respondents, as to some of the still outstanding specifications, a somewhat typical protective order tailored to the circumstances involved but less than *Mississippi River* treatment. (This report is attached to this opinion.) However, on October 13, 1971, the Commission vacated the October 12, 1971, hearing examiner's report on the basis that it was made after the Commission had filed the instant suit in this Court and, hence, would interfere with and delay this, the District Court proceeding. Respondents, through their briefs, have informed this Court that they are and have been for some time willing to provide certain data, without *Mississippi River* treatment as they earlier desired, "but with some protection." Respondents say "We still are not seeking *Mississippi River* as to these select specifications and will provide the data if a simple protective order is entered—which the examiner has already done prior to reversal by the Commission. As to the highly sensitive data, we continue to demand *Mississippi River* treatment." The referred to data which respondents are willing to produce on the basis of a "simple protective order" is (1) Missouri Portland Re 4 and 7 of its subpoena; and (2) Botsford Re 3, 9 and 10 and that part of 2 covering sales information of its subpoena.

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[5] The *Crowther* decision also stated, l.c. 516: "What remains essentially unexplained is why the Mississippi approach, with its certain protection against individual attribution, is now thought by the Commission to be inadequate or contrary to the public interest. We do not intimate that the Commission could under no circumstances properly arrive at such a conclusion in the course of a balancing process, but it is not enough to explain the Commission's changed feeling by merely asserting that it has struck a new balance. Rationality in administrative adjudication requires something more than that."

FINDINGS AND RULINGS RE THE QUESTIONED SUBPOENA SPECIFICATIONS

Re: Missouri Portland

Specification 4(a) of the Missouri Portland subpoena requests for the years 1967 and 1968, shipment in barrels from each cement plant to consumers located in the Kansas City area. Specification 4(a) is one of the specifications which Missouri Portland has advised in its briefs to this Court that it will be satisfied with "a simple protective order" and that it is no longer insisting on *Mississippi River* treatment as to this particular specification.

It is evident from the record before this Court that the data called for is data concerning years which at no prior time has been provided to the FTC or otherwise made public. It is a sensitive type data from the standpoint of it falling into the hands of competitors of Missouri Portland. Missouri Portland deems it to be current, and hence erroneously deemed noncurrent data by the Commission. Cf., *United States* v. *Lever Bros. Co.*, 193 F. Supp. 254, 257 (S.D.N.Y. 1961).

It is clear that the Commission refused when the matter was before it to consider any lesser type of protective order than *Mississippi River* treatment on the basis that the Commission believed that this was the only type of order which respondent Missouri Portland was insisting upon; and that, hence, Missouri Portland was not entitled to have any lesser type of protective order considered by the examiner or the Commission. Otherwise stated, the Commission took the view that Missouri Portland was entitled to "all or none", and, as it did not find a basis for granting *Mississippi River* treatment, it refused to consider the granting of any other type of protective order.

It is also reasonably clear from the record before this Court that in view of the sensitive nature of this fairly recent data the Commission, if it had considered on the merits a lesser type of protective order than *Mississippi River* treatment, would have given Specification 4(a) the kind of protective order actually given it by the hearing examiner in his order of October 12, 1971. (A copy of that order is attached to this opinion.)

From the entire record this Court finds that respondent Missouri Portland is entitled to that type of order, and the Commission and examiner are directed to enter such an order.[6]

While the Commission in its brief in this Court urges that respondents' failed to raise this issue (a request for lesser than *Mississippi River* treatment) before it, they are precluded from judicial review of that question, citing such cases as *Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411, 413, 414 (1958) and *American Life and Accident Insurance Company* v. *Federal Trade Commission*, 225 F.2d 289 (8th Circuit, 1958) *cert. denied* 358 U.S. 875, it is implicit in all parties' treatment of the question that at least tacitly and impliedly respondents were urging for the most protection they believed they were entitled to under the law and their urging necessarily encompassed, if they were entitled to less under the law, a lesser protective order than *Mississippi River* treatment. To hold respondents to an "all or none" status is unrealistic and arbitrary.

Specification 4(b) of the Missouri Portland subpoena asks for the years 1967 and 1968 for each plant which shipped Portland cement into the Kansas City area, total shipments in barrels of Portland cement into each State of the United States. Again, the Commission urges since this kind of data for such earlier years has been supplied on other occasions to the Federal Trade Commission without assertion of confidentiality it is entitled to none for the years 1967 and 1968. Respondents again urge that although they may on some occasions in the past have given the Commission some "old" data, that is not "to be construed they consider all such data no matter how recent, as being of a public nature." As with Specification 4(a) Missouri Portland's most recent position with this Court is that they will be satisfied with a simple protective order of the type which the examiner entered in his order of October 12, 1971.

From the record before it, this Court finds that the data requested in 4(b) is confidential type data of a sensitive nature and in accordance with the usual practice of the Commission but for the Commission's arbitrary position that Missouri Portland had forfeited its right to any lesser consideration by insisting on *Mississippi River* treatment would have granted a protective order of the type granted by the examiner on October 12, 1971.

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[6] To refuse on the basis that a respondent by insisting on *Mississippi River* treatment forfeits or waives any consideration of a lesser type of protection is patently arbitrary. It is noteworthy that in its remand order of November 19, 1970, by the Commission to the hearing examiner the Commission directed as follows: "If the examiner believes that the circumstances of this case are distinguishable from the circumstances in *Mississippi River*, but that Missouri Portland and Botsford should, nevertheless, receive some form of limited protection, then he should issue an appropriate protective order, one that may be 'restrictive' upon respondents' access than the Missouri River form of protection."

This Court further finds that Missouri Portland with regard to Specification 4(b) of its subpoena is entitled to that type of a protective order and the Commission and examiner are directed to issue one.

As earlier noted, with respect to Specifications 5(a), 5(b), and Specification 6 of the Missouri Portland subpoena, Missouri Portland has agreed to provide the data without any form of confidential treatment.

Specification 7 of the Missouri Portland subpoena, calls, for the years 1964 through 1966, the total barrels of Portland cement into each State of the United States for any plant shipping into the Kansas City area. Missouri Portland no longer insists upon *Mississippi River* treatment of the data requested by Specification 7. Again, it states that it will be satisfied if a simple protective order is entered.

From the record before it, this Court finds that although this type of data of some prior years has received some publicity in the past, the particular data now sought under Specification 7 is sufficiently current and of a type to be considered as sensitive and entitled to consideration of confidentiality. But for the Commission's arbitrary refusal to consider any lesser type of protective order than *Mississippi River* treatment simply because that was the type of order being urged, it is reasonably clear that the material called for because of its sensitive nature would have been given a protective order of the kind granted by the examiner in his October 12, 1971 order to Missouri Portland subpoena Specifications Number 7. The Court further finds that Missouri Portland is entitled to the issuance of that type of order and directs the Commission and its examiner to issue it.

Specification 8 of the Missouri Portland subpoena requests for the period 1961 through June 30, 1970, for ownership information (a) either of Missouri Portland by another company, (b) or by Missouri Portland of another company, (c) or by a person or firm which not only owns more than 10 percent of the stock or assets of Missouri Portland, but also owns more than 10 percent of the stock or assets of another company. While the evidence at the trial indicates that where the reporting requirements of the Federal Government of the merger notification programs were applicable, Missouri Portland has supplied such program requirement data, it is clear that the present request exceeds such merger notification reporting requirements. A review of the articulated basis of the examiner and Commission for the refusal of *Mississippi River* treatment confidentiality to the material requested in Specification 8 of the Missouri Portland subpoena convinces that such articulation, while no model, does meet the minimum standards described in *Federal Trade Commission* v. *Crowther*, *supra.* Although respondent Missouri Portland is still urging that it is entitled to *Mississippi River* treatment as to this specification, it is the Court's finding that denial of it by the Commission and its examiner is neither arbitrary nor insufficiently articulated. However, it is also clear that but for the Commission's arbitrary refusal to consider any lesser type of confidential treatment than *Mississippi River* it would have granted this requested data the same type of protective order that the examiner set out in his October 12, 1971, order titled "Order Granting In Part and Denying In Part Motion for Protective Order," for Specifications Numbers 4 and 7 of the Missouri Portland subpoena.

It is the Court's finding that under the circumstances Missouri Portland is entitled to that type of protective order with regard to the material requested in Specification 8 of its subpoena and the Commission and examiner are directed to make such an order.

Re: Botsford

Specification 2 of the Botsford subpoena requests for the years 1961 through 1968 the net profit and amount, in dollars, of ready-mix concrete sold. Botsford in its brief has advised this Court that with regard to its sales information only, it will be satisfied if a simple protective order is entered.

Evidence at the trial on behalf of petitioner indicates that for the years 1964 through 1968 Specification 2 type material has already received prior publicity. The trial examiner and the Commission refused to give *Mississippi River* treatment to the Specification 2 material and also under the "all or none" arbitrary approach, refused to consider giving any lesser confidential treatment to this material. Upon review of the articulated reasons of the examiner, in effect adopted by the Commission, this Court is satisfied that, again, although no model, the articulation is sufficient to meet the minimum standards of *Crowther.* However, it is evident from the record before this Court that the data is of the type that ordinarily receives confidential handling by the Commission, and that but for its arbitrary refusal to consider any less than the demanded *Mississippi River* treatment, it would have received that type of a protective order given to this type of information by the examiner in his October 12, 1971, order. The Commission and examiner are hereby directed to enter such a protective order as to all material requested in Botsford's subpoena Specification 2.

Specification 3 of the Botsford subpoena calls for the amount of Portland cement in barrels purchased by Botsford during the years

1967 and 1968 by each supplier. With reference to this specification Botsford has advised that it will be satisfied if a simple protective order is entered.

From the record before this Court, it is this Court's finding that although much of this type of data concerning some earlier years has been provided by Botsford to the Federal Trade Commission, the material is of a sensitive type that ordinarily would receive some confidential type treatment. Again but for the Commission's "all or none" arbitrary position, it would have considered a lesser type, and it is this Court's finding that upon the record before it, that the Commission would have under such circumstances granted a protective order of the type which the examiner gave to this material in his October 12, 1971 order. The Commission and examiner are directed to enter that type of order regarding Specification 3.

Specification 4 of the Botsford subpoena requests for the years 1961 through 1968 for the annual delivered price of a cubic yard of ready-mix concrete. The specification instructs that this data be ascertained by dividing the total number of cubic yards of ready-mix concrete sold in a particular year into the total amount of money received from the sale of ready-mix concrete in that year, less all discounts. The record before this Court demonstrates that this type of data, or data from which this data could possibly be ascertained, for some past years, has been supplied to the Federal Trade Commission in connection with other matters. However, some of the years requested are new and obviously involve sensitive type data. The examiner's and Commission's grounds and reasons distinguishing this requested data from that which was in several other cases given *Mississippi River* treatment is deemed to be sufficient. See, *Federal Trade Commission* v. *Crowther*, *supra*. However, but for the earlier discussed arbitrary refusal of the Commission and examiner to consider any lesser type of protective order, it is the Court's finding that this data would undoubtedly have received the same type protective order, tailored to the circumstances, as the examiner granted to other material such as Botsford's subpoena Specifications Numbers 2 and 3 in his October 12, 1971 order. Upon the record this Court deems it established that Botsford is entitled to the described type of protective order and the Commission and examiner are directed to issue one regarding Specification 4.

Specification 5 of the Botsford subpoena calls for the period 1961 through June 30, 1971, for ownership information (a) either of Botsford by another company, (b) or by Botsford of another company, (c) or by a corporation, partnership or natural person which owns more than ten percent of the stock or assets of Botsford, and also more than 10 percent of the stock or assets of any other company.

As discussed earlier in this opinion in connection with the same type of request of Missouri Portland, although the evidence indicates that some ownership information concerning Botsford has been given to the Federal Trade Commission on earlier occasions, that information apparently related at most only to the information called for in Specification 5(a) and 5(b) and not to 5(c). Additionally, it is not as current nor as broad as the information presently sought. It was data made available to the Securities and Exchange Commission re special reports calling essentially for information on mergers and acquisitions in the ready-mix and concrete product and aggregate product area, and did not cover other matters such as internal expansions.

The examiner and Commission in denying *Mississippi River* treatment have endeavored to distinguish this and the other requested data from that type that they have on occasion in the past accorded to others. Particularly do they stress that in such past circumstances *Mississippi River* treatment was granted only in "quasi-merger" situations.

While the requested data is similar to "quasi merger" data, it is broader, and obviously would be difficult to use in the pending proceeding if overly granted confidential treatment. Certainly it would be very difficult to show or prepare against a showing of the size and nature of the market in question in the administrative proceeding. This Court is convinced in the light of the reasoning of the examiner and the Commission that, as they found, *Mississippi River* treatment is not needed for adequate protection against competitors. Again, while no model, this Court deems the grounds and reasons given by the Commission and the examiner for their denial of *Mississippi River* treatment to it to be sufficiently articulated. However, it is obviously sensitive type data, and for the reasons expressed throughout this opinion concerning the Commission's arbitrary stand that respondents by demanding *Mississippi River* treatment waive any right to a consideration of a lesser type of treatment, it would have received a protective order of the type granted by the examiner in his October 12, 1971 order concerning Specifications 2 and 3 of the Botsford subpoena.

The Court deems that respondents are entitled to that type of a confidential order and directs the Commission and examiner to grant it regarding Specification 5.

Specification 7(a) of the Botsford subpoena requests for the years 1961 through 1968, the average annual cost of a cubic yard of delivered ready-mix concrete. The specification instructs that this data be ascertained by dividing the total cost of all materials, services, and overhead, excluding administrative overhead related to the manufacturer, delivery and sale of ready-mix concrete by Botsford in a given year, by the total number of cubic yards of ready-mix concrete sold by Botsford in that year. As related earlier in this opinion with regard to a similar type request concerning Missouri Portland, in some past years portions of the elements of the requested data has been supplied by Botsford to the Federal Trade Commission and has been given some publicity. Even so, the 7(a) request is broader than and covers periods beyond those earlier ones and does require the providing of sensitive material which Botsford does not want to be needlessly spread to its competitors. On the record before it this Court finds that the hearing examiner and the Commission sufficiently set out their grounds and reasons for refusing *Mississippi River* treatment to the 7(a) specification request, albeit, not in a model form. However, as stated in connection with the similar request concerning Missouri Portland, this Court finds from the record that but for the arbitrary refusal of the Commission and examiner to consider any lesser type of order, that Botsford would have been granted one of the same type and nature, specifically tailored to this particular data, as given to other admittedly confidential data by the examiner in his October 12, 1971 order, such as that given Botsford subpoena Specifications Numbers 2 and 3. The Commission and the examiner are directed to grant such an order regarding the 7(a) request.

Botsford subpoena Specification 7(b) calls for the years 1961 through 1968 for the annual delivered price, per barrel, of Portland cement for each supplier. The specification instructs that this data be ascertained by dividing the total amount of money paid by Botsford for Portland cement, less any discount received in connection with the purchase of such Portland cement, by the total number of barrels of Portland cement purchased by the company in any given year. Petitioner claims the evidence on its behalf indicated that this data to a substantial extent had been supplied by Botsford to the Commission for the years 1961–1966, both inclusive, and has been given some publicity in two earlier administrative hearings. However, Botsford's evidence elicited on cross-examination demonstrated that "you have half of the picture in the public record, namely, Botsford's purchase by supplier of Portland cement in barrels for the years 1961 through 1966. The financial part you do not have."

Again, on the entire record this Court finds that the hearing examiner and Commissioner adequately stated grounds for denying *Mississippi River* treatment, albeit, again certainly no model. The statement is sufficient under the teachings of *Crowther*, *supra*. However, it was arbitrary to refuse to consider any lesser type of protective order and based on the record made it is clear that but for such arbitrary action, respondents would have received and are now entitled to receive the same type of protective order as given by the examiner in his October 12, 1971 order concerning other admittedly sensitive, nonpublic materials such as to give to Botsford subpoena Specification Numbers 2 and 3. The Commission and examiner are directed to issue that type of order.

With respect to Specifications 9 and 10 of the Botsford subpoena, Botsford has agreed to provide that data without any form of confidential treatment.

ORDER

As soon as the Commission has accomplished the issuing of the confidentiality orders directed in this opinion, respondents and each of them are directed to meet with the hearing examiner for the purpose of amending the subpoenas to show a new date and time and, of course, a place for the production of the named specification books, papers and documents in compliance with the subpoenas.

This Court retains jurisdiction of this cause for the purpose of issuance of any further orders or the taking of any further action necessary to the carrying out of the orders contained in this opinion and the production of the books, papers and documents required to be produced by the subpoenas duces tecum in the light of this opinion, and for enforcement of the subopenas.

It Is So Ordered.

UNITED STATES v. SWINGLINE, INC.*

No. 71-C-1236. F.T.C. Docket 8759.

(United States District Court, Eastern District of New York,
March 8, 1973)

On motions for summary judgment in civil penalty proceeding, the court has discretion on whether to grant a motion for partial summary judgment under the provisions of the Federal Rules of Civil Procedure; makes a finding that determination of liability would not likely result in agreement on amount of penalty; and denies both sides summary judgment. Failure of an antimerger respondent to present an eligible company and proposed contract to the F.T.C. by the date specified in the divestiture order did not entitle the government to a partial summary judgment on civil penalty liability.

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶74,435, at 93,958 (1973 Trade Cases). For further ruling by the district court, see p. 827 herein. For case before the Commission, see 76 F.T.C. 407.

Robert A. Morse, U.S. Atty., by *Henry A. Brachtl*, Asst. U.S. Atty., of counsel, for plaintiff.

Chadbourne, Parke, Whiteside & Wolff, by *Daniel O'Neill*, of counsel, for defendant.

Before JUDD, *District Judge.*

MEMORANDUM AND ORDER

JUDD, J.: Two motions have been argued before the court. The United States asks partial summary judgment, to determine that defendant is liable for penalties for violation of a final order of the Federal Trade Commission. 15 U.S.C. §§ 21(1), 45(1). Defendant has cross-moved for summary judgment in its favor.

An order of the Federal Trade Commission dated October 9, 1969 directed defendant to divest itself of certain assets previously acquired from Spotnails, Inc. and Speedfast, Inc. relating to the production, distribution, and sale of heavy duty portable industrial pneumatic nailers and staplers. The order also required defendant to present to the Federal Trade Commission by December 16, 1970 a financially sound and eligible company and a contract between defendant and the eligible company, meeting certain specified conditions and subject to the approval of the Commission. Defendant did not in fact present such an eligible company and contract to the Commission until September 3, 1971.

This action was brought to enforce statutory penalties in the sum of not more than $5,000 per day for defendant's delay in complying with the Commission order.

In opposition to plaintiff's motion for summary judgment on liability, and in support of its own motion, defendant has submitted a series of affidavits and five volumes of documents which it asserts show its good faith effort to comply with the Commission order, the impossibility of complying with it within the specified time, and certain other defenses.

The government did not have adequate time after the notice of cross-motion was served on February 26, 1973 to determine the extent to which the defendant's documentary material and affidavits are subject to factual dispute, but it asserts that they are irrelevant to the issue of violation of the F.T.C. order.

Even if the government's motion for partial summary judgment were granted, the court would still have to consider all this material at a trial of the issues relating to the amount of penalty.

Trial of the case is not remote, but has been scheduled for April 16, 1973.

While a party may move under F. R. Civ. P. 56(a) for summary judgment "upon all or any part" of his claim, the court has discretion whether to grant a motion for partial summary judgment under the provisions of Rule 56(c). See *Williams* v. *Howard Johnson's Inc.*, 323 F.2d 102, 104 (4th Cir. 1963). F. R. Civ. P. 56(c) states in part:

> A summary judgment, interlocutory in character, *may* be rendered on the issue of liability alone although there is genuine issue as to the amount of damages. (Emphasis supplied).

That a court has discretion in dealing with a summary judgment motion has seemingly been recognized by the Supreme Court. *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256–57, 68 S. Ct. 1031, 1034 (1948). Courts have exercised this discretion in cases where partial summary judgment would not expedite a final decision on the whole case. *Kollsman Instrument* v. *Astek Instrument Corp.*, 225 F. Supp. 534 (S.D. N.Y. 1964); *Bernardo* v. *Bethlehem Steel Co.*, 169 F. Supp. 914, 917 (S. D. N. Y. 1959); *United States* v. *Naus*, 11 F. R. D. 189 (W. D. Mo. 1951). In *Naus*, the court held that there was no useful purpose in granting summary judgment as to liability for alleged violations of federal rent regulations, when the liability and account of penalties could be determined in a single hearing

This case is similar to the *Naus* case. Determination that defendant is liable would not be likely to result in agreement on the amount of penalty. A determination that defendant is not liable cannot be made without consideration of the same mass of evidence. Defendant's motion for summary judgment may present issues of fact. While defendant has expressed willingness to have the case decided on its documentary presentation, this offer is not binding on the government and would not justify the granting of summary judgment, dismissing the complaint, even if defendant's views of the law are correct.

Accordingly, the court in its discretion determines that this is not a case where it would be appropriate to render summary judgment on the issue of liability alone.

On three matters there is no issue of fact: (1) the making of the Federal Trade Commission order of October 9, 1969, as set forth in paragraph 1 of the government's Statement Pursuant to Rule 9(g) of the General Rules of this court; (2) the date when the order became final as set forth in paragraph 2 of the government's Statement Pursuant to Rule 9(g); and (3) the fact that defendant Swingline, Inc. did not present an eligible company and a proposed contract to the Commission until September 3, 1971.

It is Ordered that, except for the determination of undisputed facts set forth above, both motions for summary judgment be denied, and that the schedule fixed at the pretrial conference on November 29, 1972 remain in effect as follows:

(a) Lists of any witnesses from whom either party desires oral testimony, of any documents not already submitted on the motions, and trial memoranda relating to the amount of penalty, to be exchanged and filed on April 2, 1973;

(b) A pretrial conference to be held in chambers at 4:30 p.m. on April 9, 1973 to expedite the presentation of the issues; and

(c) Trial to proceed on April 16, 1973.

STANDARD EDUCATORS, INC., ET AL. v. FEDERAL TRADE COMMISSION*

No. 72–1164 F.T.C. Docket 8807

(United States Court of Appeals, District of Columbia Circuit, March 9, 1973)

1. EVIDENCE SUPPORTED F.T.C. FINDING THAT INDIVIDUAL DEFENDANT KNEW OF AND APPROVED MANY OF FALSE AND DECEPTIVE PRACTICES OF CORPORATION IN CONNECTION WITH DOOR-TO-DOOR SALES OF ENCYCLOPEDIAS.

   Evidence supported finding of Federal Trade Commission that individual defendant, who organized corporation, served as president and treasurer and owned 51% of its stock, knew of and approved many of false and deceptive practices of the corporation in connection with door-to-door sales of encyclopedias.

2. F.T.C. PROPERLY DRAWS ON ITS EXPERTISE IN DRAWING INFERENCES ABOUT KNOWLEDGE OF DECEPTIVE PRACTICES OF CORPORATE OFFICERS.

   In drawing inferences about knowledge of corporate officers of deceptive practices of corporation, Federal Trade Commission properly draws upon its expertise.

3. BURDEN OF EXCULPATION RESTS ON CHIEF EXECUTIVE AND PRIMARY SHAREHOLDER OF CLOSELY HELD CORPORATION WHOSE STOCK-IN-TRADE IS OVERREACHING AND DECEPTION IN VIOLATION OF F.T.C. ACT.

   A heavy burden of exculpation rests on chief executive and primary shareholder of closely held corporation whose stock-in-trade is overreaching and deception in violation of Federal Trade Commission Act.

(Syllabus, with substituted captions, taken from 475 F.2d 401)

Court held that evidence supported findings of Federal Trade Commission that individual defendant knew of and approved many of the

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*Reported in 475 F. 2d 401 (1973). For case before Commission, see 79 F.T.C. 858; *cert. denied,* Oct. 9, 1973, 414 U.S. 828, 94 S. Ct. 54.

false and deceptive practices of the corporation in connection with door-to-door sales of encyclopedias.

Ronald J. Wilson, Washington, D.C., for petitioners.

Nicholas S. Reynolds, Atty., Federal Trade Commission, with whom *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, Federal Trade Commission, was on the brief, for respondent.

Before WRIGHT and WILKEY, *Circuit Judges*, and RICHEY,** *District Judge*.

PER CURIAM:

[402] [1] This case is here on a petition to review an order of the Federal Trade Commission. The Commission directed its order against James A. Melley, Sr. in his individual capacity, as well as against the company, because it found that Melley knew of and approved many of the false and deceptive practices. Testimony before a hearing examiner showed that Melley was the organizer of the company, served as its president and treasurer, and owned 51 per cent of its stock. In the company's infancy he did much of the selling himself, and although at the time in question Melley no longer engaged in any selling himself, he still, in the words of the trial examiner, "spends his time in the office supervising the over-all operations * * *." In addition, he devised the form contract used by the company's salesmen, a contract whose provisions were an integral part of the deceptive scheme. All of these factors, combined with the uncontradicted proof of widespread instances of deceptive practices by company salesmen, support the Commission's finding that Melley knew of and approved the deceptive practices. *See Fred Meyer, Inc.* v. *F.T.C.*, 9 Cir., 359 F.2d 351, 368 (1966).

The Commission introduced testimonial evidence as to 12 typical sales, dating from February 1965 to May 1968, taking place at sites as widespread as Oahu, Hawaii, Colorado Springs, Colorado, Groton, Connecticut, Portsmouth, New Hampshire, and Havre de Grace, Maryland.[1] The same oral misrepresentations were made in every one of these cases, and in each the pattern of deception was facilitated by the contract written by Mr. Melley. The Commission does not engage in speculation when it rejects the conclusion that these similarities occurred purely by coincidence and instead infers that they were the result of direction from above.

**Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1970).

[1] We might add, in response to the dissent's unwarranted characterization of these instances as "scattered misrepresentations," that petitioners' own counsel sought to limit the number of customer-witnesses that could be called by the Commission in order "to reduce the case to manageable and realistic proportions" and to avoid burdening petitioners.

[2] In drawing inferences about the knowledge of corporate officers in cases such as this, the Commission properly draws upon its expertise. And where it does so, our guiding principle in reviewing the Commission's findings of fact is Mr. Justice Black's statement for a unanimous Court in *F.T.C.* v. *Standard Education Society*,[2] 302 U.S. 112, 117, 58 S.Ct. 113, 116, 82 L.Ed. 141 (1937): (footnote omitted)

> The courts do not have a right to ignore the plain mandate of the statute which makes the findings of the Commission conclusive as to the facts if supported by testimony. The courts cannot pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission. * * *

[403] [3] In this case, the conclusion that Melley knew of and authorized the deceptive practices was amply supported by evidence of record. A heavy burden of exculpation rests on the chief executive and primary shareholder of a closely held corporation whose stock-in-trade is overreaching and deception.

The other issues raised by petitioners are without merit, and were dealt with at length in the Commission's careful, well reasoned opinion. Accordingly, the order of the Commission is

Affirmed.

WILKEY, *Circuit Judge* (dissenting):

The illegal practices alleged in this case were false and deceptive statements made by individual salesmen of Standard Educators, Inc., in connection with door-to-door sales of encyclopedias. I agree with the majority that substantial evidence supports the FTC's findings that such statements were made. I agree that the corporation, acting through its salesmen, violated the Federal Trade Commission Act.[1]

I cannot agree with the majority's affirmance of the Commission's decision to direct its cease and desist order against James A. Melley, Sr., in his individual capacity. The FTC and the majority repeatedly stress the existence of admitted violations by salesmen. That simply gets them nowhere on the issue of Mr. Melley's personal involvement, although it does, of course, support the FTC's decision against the corporation, with which I agree. As regards Mr. Melley, I find the

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[2] It is interesting to note that, although the Standard Education Society is apparently not related to Standard Educators, Inc., the record does indicate that when he incorporated Standard Educators, Inc. Mr. Melley made arrangements with Standard Education Society to purchase its line of encyclopedias for resale to the public. Standard Education Society also provides the broadsides used by Standard Educators' salesmen in their sales presentations. In addition, the false and deceptive practices of Standard Educators, Inc. parallel in many respects the false and deceptive practices condemned in *Standard Education Society*, including: representing that encyclopedias are given away free or sold at a specially reduced price to selected persons in return for use of the purchaser's name for advertising; representing that the recipient pays only for purchase of a 10-year annual yearbook extension service; and representing that the recipient was getting a special combination offer not generally available.

[1] 15 U.S.C. § 45 (1964).

Commission's opinion neither "careful" nor "well reasoned." To the contrary, it is unsupported and cavalier.

As the Commission itself notes in its opinion here, "[t]he rationale for subjecting respondents in their individual capacities to Commission orders is to assure that such orders will be fully effective in preventing the unlawful activities." [2] This rationale necessarily implies that some connection must be established between the individual respondent and the alleged unlawful practices. If a proven connection were unnecessary, the Commission could conceivably proceed to order each and every U.S. citizen or resident to cease all imaginable illegal practices within the FTC jurisdiction. The very nature as a "cease and desist" order implies that the named individual was at least indirectly involved in the past, or is likely to participate in the future, in the activities which the Commission wants stopped. In short, naming individual respondents in a case like this "is tantamount to a finding on the evidence that they have personally violated, or can be expected to violate * * * " the relevant statute. *Flotill Products, Inc.* v. *FTC*.[3]

Although the degree of personal involvement in the alleged violations which justifies individual direction of a cease and desist order has been variously articulated, mere ownership and control of an offending corporation, whose employees have committed the charged violations, is not enough.[4] Mr. Melley was in fact the majority shareholder, President, Treasurer, and Chairman of the Board of Standard Educators. However, a more specific and substantial connection *with the violations* must be (but was not) shown to justify the order issued against him here. Rather than establishing such a connection, the FTC's opinion, as it relates to Melley individually, ignores a highly experienced hearing examiner's findings, goes far beyond proper inference, engages in cynical and unwarranted speculation, and finds no support in the record.[5]

[404] This is not a case in which a likelihood of future violations has been shown, for example, by evidence that the corporation involved was formed for the purpose of evading FTC orders. Compare *FTC* v. *Standard Education Society et al.*[6] Hardly a "fly by night" operation, Standard Educators, Inc., enjoyed a stable corporate existence since its founding in 1957. There is absolutely no evidence in the record to support a finding that Mr. Melley would attempt to play the "shell game."[7]

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[2] Appendix (hereafter "App.") at p. 200.

[3] 358 F.2d 224, 233 (9th Cir. 1966).

[4] See *Flotill Products, Inc.* v. *FTC* where reliance, in naming individuals in the order there, "on no other fact than that the three individuals owned and controlled the corporation" was accurately described as "rather cavalier." 358 F.2d 224, 233.

[5] The hearing examiner specifically noted that "Complaint counsel did not point to any evidence—*and there is none in the record*—that Mr. Melley committed any illegal act in his individual capacity, or that Mr. Melley is likely to violate the act in the future in his individual capacity, or that he will attempt to evade any order which may be issued against the corporate respondent." App. at pp. 181–182 (emphasis added).

[6] 302 U.S. 112, 58 S.Ct. 113, 82 L.Ed. 141 (1937).

This is not a case in which the deceptive practices were so intertwined with company policy that the responsible corporate officers could be fairly deemed to have known of and approved the violations. Compare *FTC* v. *Standard Education Society et al.*[8] and *Benrus Watch Company* v. *FTC.*[9] To the contrary, the Commission proved only scattered misrepresentations perpetrated by individual salesmen.[10] The only evidence of central corporate policy came from Melley himself and was apparently credited by the hearing examiner. Mr. Melley testified that the company had a strong policy against misrepresentations and fired salesmen who were found to have engaged in deceptive practices.[11]

This is not a case in which widespread knowledge of the offenses in the community justified an inference that the corporate officers closely involved must also know of and approve the violations. Compare *Fred Meyer, Inc., et al.* v. *FTC.*[12] Mr. Melley did admit that he knew the company was receiving a "very minimum" number of customer complaints, "maybe one a month."[13] For a **[405]** company doing over $2,000,000 in sales to individual customers (in 1969), that level of customer dissatisfaction was hardly high enough to support an inference of knowledge of pervasive deceptive practices. Since Melley went on to explain how he sought to discipline salesmen and satisfy the complaining customers, an inference of approval of these abuses is even more far-fetched.

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[7] The hearing examiner specifically noted that "[t]here is no evidence of record to indicate that the corporate entity is a sham or that Mr. Melley organized the corporation in an attempt to evade any order which may be issued . . . ." App. at p. 183.

[8] The offense charged there involved a "well-matured" "general sales plan" "outlined in letters going directly from the companies." 302 U.S. 112, 115–117, 58 S.Ct. 113, 115, 82 L.Ed. 141 (1937).

[9] 352 F.2d 313 (8th Cir. 1965). The violation charged concerned preticketing of merchandise. That practice was of the sort necessarily planned and supervised as a matter of company policy, and could hardly have originated with a frolic and detour by individual non-policymaking employees. Therefore, the fact that the officers involved "formulated, directed and controlled the policies and practices of the corporate respondents" was enough to justify individual direction of the cease and desist order, 352 F.2d 313, 324. See also *Pati-Port, Inc.* v. *FTC,* 313 F.2d 103 (4th Cir. 1963), where the individuals named had, on request from a subordinate, specifically approved the illegal practices.

[10] Testimony was introduced concerning twelve sales at scattered sites during a period from February 1965 to May 1968. A dispersed pattern of abuse might well merely suggest that dishonest salesmen get around and pick up the tricks of their trade from each other. Even if central control is inferable, *who* sent directives from above would still not have been shown. Indeed, their widely scattered character could increase the chances that company headquarters would not learn of violations.

[11] Mr. Melley testified that if salesmen "are caught in misrepresentation, they are fired." App. at p. 404.

[12] 359 F.2d 351 (9th Cir. 1966), *cert. denied,* 386 U.S. 908, 87 S.Ct. 851, 17 L.Ed. 2d 782 (1967). In that case, the court noted that "despite Meyer's denials of knowledge of the operations of his business, the Commission was justified in concluding that 'if "a majority of Portland's 120,000 families" were apprised of the details of these [deceptive] programs, we think it is a fair inference that the Chairman of the Board also knew about them.'" 359 F.2d 351, 368.

[13] App. at p. 380.

Even assuming that the illegal practices could or should have been known to those directing the company on a day-to-day basis, this is not a case in which personal knowledge could be fairly attributed to the individual officer actually named. Compare *Coro. Inc.* v. *FTC*.[14] While Melley was deeply involved in the corporation's early beginnings, he had almost completely withdrawn from routine supervision of its affairs at the time when the violations charged here occurred. The only evidence concerning his actual degree of involvement indicates that, while some important matters were occasionally brought to his attention, he didn't "seem to have too many duties any more," [15] didn't "watch sales that closely," [16] no longer hired or trained salesmen,[17] and in fact was so removed from the business that he did not even really know how many salesmen were actually employed.[18]

This is not a case in which documents distributed by the company, and used by salesmen, were themselves found to be deceptive. Compare *Consumer Sales Corp.* v. *FTC* [19] and *Steelco Stainless Steel* v. *FTC*.[20] There is absolutely no finding, nor could there be a reasonable one, that the contract used was on its face in any way misleading. This last point is highly significant because, when stripped of merely conclusory language, the Commission's opinion finding personal involvement appears to be based solely on the fact that Mr. Melley helped to draft the sales contract.

Although not finding the contract itself deceptive, the FTC and the majority here describe that document as "an integral part" of the deceptive sales practices challenged in the complaint.[21] The Commission concludes that it is "unlikely" that the form used could have been "supplied for any other *purpose*" than that of enabling and authorizing salesmen to "sell encyclopedias in the deceptive manner charged." [22]

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[14] 338 F.2d 149 (1st Cir. 1964). "In the absence of evidence of personal involvement in Coro's [the company's] unlawful conduct," a showing of "overall corporate responsibility" was held *not* enough to support direction of the cease and desist order against an individual who was the largest corporate shareholder, President, and Chairman of the Board.

[15] App. at p. 362.

[16] App. at p. 351.

[17] App. at p. 198.

[18] App. at p. 351.

[19] 198 F.2d 404 (2nd Cir. 1952). In this case, deceptive order forms furnished by the company supported an inference that the corporate officers "actively encouraged and participated in making the said false representations." 198 F.2d 404, 407.

[20] 187 F.2d 693 (7th Cir. 1951). Since the literature provided by the company, in this case, was held to be deceptive in its own right, the corporate officers could not escape responsibility just because even more misleading statements were made by salesmen.

[21] App. at p. 198.

[22] App. at p. 199 (emphasis added).

No direct evidence supports such a view. Indeed, Melley testified that the operative reason for the selection of the actual contract format was a perhaps lazy, but otherwise blameless, decision to copy the clauses used by the competition.[23]

The Commission's findings rest on the inference that a deceptive use was intended to be made of concededly nonde**[406]**ceptive language. If it were the case that the language of the contract had no other reasonable and commercially proper use, such a gossamer inference just might withstand scrutiny. However, all of the contract clauses singled out by the Commission do have legitimate and nondeceptive functions.

The FTC suggests that the spaces provided for filling in military service information were designed to facilitate salesmen's claims that, as a member of the military, the customer was getting a special price. Yet, at another place in the very same opinion, the Commission mentions the more obvious, legitimate, and I submit the actual, purpose for collecting this data: the customer location "problem * * * created by * * * [the] business policy of directing sales to military personnel."[24] Since that group is extremely mobile, detailed and accurate military service information was essential to keep track of people who had installment obligations to fulfill.

The FTC notes that the contract mentions a charge of $3.95 "for delivery" of an extension service and binder. Their contention is that this language was intended to buttress the salesmen's fiendishly deceptive claim that the additional cost was merely for "postage and handling charges." Given the fact that $3.95 was indeed the total price, I find it difficult to share the Commission's grave concern about the misleading effect of this oral representation. Even if I did share that concern, I would still be persuaded that a contract drafted with intent to support the "postage and handling" characterization would use that precise language rather than the more ambiguous "for delivery" term.

The FTC further argues that this scheme of deception was writ large in the contract's reference to the "National Combination Offer." Whatever the salesmen may have said, falsely, about lower prices for larger purchases, the fact remains that this phrase refers to a perfectly legimitate method by which Standard Educators sold its books. By assigning point values, rather than dollar values, to additional books sold in $50 increments above the basic encyclopedia, the company offered flexibility and benefited from simplified accounting. Since the Commission has not characterized this as an illegal "tie in," how the mere reference to this legitimate marketing system shows the contract authors' purpose to deceive remains a mystery to me.

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[23] App. at p. 365.

[24] App. at p. 217.

Finally, the FTC claims that the contract provision calling for the customer's agreement to give his opinion on the New Standard Encyclopedia demonstrates an intention to bolster the salesmen's suggestion of a special price offered in exchange for an endorsement. Apparently, the Commission completely overlooked the more obvious possible purpose for this contract clause: an actual desire to obtain testimonials for use in advertising the product. The technique of advertising by testimonials has not, so far, been ruled illegal. As with the previously cited inferences, the Commission has chosen the one explanation of the contract drafters' purpose, in preference to the many possible legitimate ones, which leads to a finding of intent to deceive; and it has made its choice for no other reason, from all that appears in the record, than that the desired result of holding Mr. Melley individually responsible could thereby be reached.

What the Commission has done in its analysis of the contract is subtly to shift the burden of proof. For example, with regard to the testimonials, the Commission apparently felt that, once there was a showing that the contract clause actually corresponded to salesmen's misrepresentations, Melley bore the burden of demonstrating a legitimate purpose for the language.[25] This approach no longer requires the complaint counsel to make a **[407]** substantial showing that the prohibited purpose existed. It clearly conflicts with accepted notions of where the burden falls in such a proceeding. In addition, it is most unfair, since the Commission drew its inferences about intent after the hearing at which Melley could have presented rebuttal evidence. Once Mr. Melley's counsel had established that the contract itself was not deceptive, he might well have reasonably concluded that his need to present further evidence on the language used had ended. Given the extremely tenuous nature of the FTC's further inferences from the contract's language to its drafters' purpose, I for one cannot blame Melley's counsel for failing to anticipate and rebut them.

This case comes down, in the end, to questions of Mr. Melley's state of mind—his purpose in drafting the contracts and his knowledge of the detailed practices of salesmen in the field. That question necessarily turns to a large degree on the credibility of Melley's testimony; and the hearing examiner, who had the best opportunity to assess Melley's credibility, believed him.

The Commission obviously wanted very badly to overturn the hearing examiner's ruling. It took an unlikely end run via inferences that contract language, innocent on its face and serving other legitimate purposes, was *intended* to be used for deception merely because it was *actually* so used by some salesmen. That sort of analysis would justify an inference that a company officer who authorized door-to-door sales must have intended to foster misrepresentation because that method of sale may provide the personal contact necessary for an unscrupulous and talented salesman to convince the customer that he is getting a special price because he lives at that address, came to the door within one minute, or has a nice face. Everything that facilitates a sale *could* be labelled "an integral part" of the *salesman's* deceptive scheme; but when a possible proper use appears, and absent additional evidence, the intent of the supplier that it be used deceptively should not be so lightly inferred.

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[25] Presumably, Melley might have met this novel burden by showing that an ad campaign based on testimonials was in fact conducted. However, even if the contract clause had been inserted with a bona fide intent to collect endorsements, there are many possible reasons why an ad campaign might not in fact have resulted. In that event, the difficulties of showing a proper purpose merely highlight the need for scrupulous care whenever guilty intent is presumed and the accused must prove the negative.

Though this court normally gives deference to administrative agency decisions, if supported by testimony, I am not aware of any "expertise" in the Federal Trade Commission which permits it to find an individual responsible for deceptive conduct, and to issue a cease and desist order against that individual, when no evidence in the record makes the inference it draws any more likely than an inference clearing him of personal responsibility. That this court need not respect a greater aptitude in the FTC for drawing deductive logical conclusions is amply demonstrated by the outrageous manner in which the Commission has constructed its "chain" of "reasoning" in this case.

It seems to me that affirmance here either changes the law by holding corporate officers individually liable to cease and desist orders with regard to acts with which they had no connection, save their "mere ownership and control," *or* it gives the FTC a mandate to exercise no less than mystical powers. The Commission may, under the sort of reasoning approved here, act not on the basis of the record created by its complaint counsel but on sheer instinct. Heretofore such a modus operandi has been more common in the sensational press than in quasi-judicial proceedings.

Since Melley has not been shown *ever personally* to have participated in *any* deceptive practice, he is not even being **[408]** given the dubious benefits of the "bad man" theory. This record would not even support a high-handed attempt to enjoin, and therefore brand as a likely offender, one with a proven "predilection" to violate the law.

Rather, it appears that the FTC and the majority have carved a new niche in the law for "guilt by office" and "guilt by association." Mr. Melley is saddled with a "heavy burden of *exculpation*" even though no *inculpating* evidence (beyond mere ownership and control—which is *not* enough) has been introduced! The majority seems to find that "we know your type" is acceptable logic [26]—at least when applied to a corporation executive rather than a common criminal.

I recognize that there are in fact different standards of proof in criminal trials and civil cease-and-desist order proceedings. But the lower standard in this kind of case surely cannot be so low that it amounts to *no* standard of proof or indeed, as here, actually shifts the burden once complaint counsel has rested on a wink or a leer.

Nor can the absence of criminal penalties support an argument that Melley is not harmed by being individually named in the cease and desist order. The upright man need not fear the *direct* impact of an injunction commanding him to remain honest. But the very existence of the order tells the whole world, unless it too is enjoined, that he alone has been found likely to transgress. By its unfounded order, the FTC has filched Melley's reputation—a crime more serious than the one alleged, for it enriches the Commission not and makes Melley poor indeed.

I respectfully dissent.

F.T.C. v. APPROXIMATELY 1499 DOZEN FLAMMABLE SHEER NYLON SCARVES, MORE OR LESS*

Civ. A. No. 70 Civ. 4968. F.T.C. File 99-101.

(United States District Court, Southern District of New York, March 13, 1973)

In a seizure action under the Flammable Fabrics Act, upon consent of the parties, court permitted claimant to take delivery of the scarves on payment of court costs and other expenses of the seizure action and, further, to treat or process the scarves so as to render them lawful for introduction into commerce or, in lieu thereof, to return the scarves to the foreign supplier from whom they were purchased.

Before PIERCE, *District Judge.*

ORDER

Upon consent of the parties, it is by this Court on this 13th day of March 1973, hereby

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[26] This approach is highlighted by the elaborate but irrelevant exposition by the majority, in footnote 2, attempting to link this case to Standard Education Society. Mr. Melley's former legitimate business dealing with that firm, of course, have no probative value. The similarity of the conduct of salesmen in both cases may testify to the endurance of the confidence game—but it simply cannot show Mr. Melley's personal involvement in their violations. Recognizing this, the majority is reduced to listing these facts as merely "interesting to note"—exactly the sort of improper "raised eyebrow" technique in which the commission was engaged.

*Not otherwise reported.

Ordered, That all sheer nylon scarves which have been seized in this action, said scarves being further described as Styles 1454 and GX2828, manufactured by Sankyo Seiko Co., Ltd., Yokohama, Japan, and shipped by said Company to Berkshire Handerchief Co., Inc., under Invoices Nos. 10129, 10149, 10152 and 10171 dated July 29, 1970, July 30, 1970, August 7, 1970, August 30, 1970, respectively, shall be delivered to the claimant upon payment by claimant of court costs and fees and storage and other proper expenses of this action and claimant shall not dispose of said scarves until they are adequately treated or processed so as to render them lawful for introduction into commerce. In lieu of so treating or processing said scarves, claimant may dispose of them by returning them to the foreign supplier from whom they were purchased. If claimant returns said scarves to the foreign supplier from whom they were purchased, the shipping containers shall be labeled clearly and conspicuously with the legend: "For export only to [name of supplier]—Dangerously Flammable Wearing Apparel—Not to be returned to the United States or its Possessions" and claimant shall further submit a copy of the actual shipping label to Plaintiff, Federal Trade Commission, when available. If claimant elects not to take delivery of said scarves under the conditions hereinabove provided, the scarves shall be disposed of by destruction by the Court, and claimant shall pay court costs and fees and storage and other proper expenses of this action.

JEWEL COMPANIES, ETC., ET AL. v. FEDERAL TRADE COMMISSION*

No. 72-1382. F.T.C. Dockets 8786-8790

(United States Court of Appeals, Seventh Circuit, March 15, 1973)

1. REQUIRED FOUNDATION FOR ADMINISTRATIVE PROCEEDINGS WAS SUPPLIED OR REPAIRED WHERE F.T.C. UNANIMOUSLY REAFFIRMED ITS DECISION TO ISSUE ADMINISTRATIVE COMPLAINTS AND FOUND ISSUANCE TO BE IN PUBLIC INTEREST.

[1323] Where Federal Trade Commission unanimously reaffirmed its decision to issue administrative complaints, which alleged violations of Robinson-Patman Act and which originally had been issued on a three to two vote, and found issuance to be in the public interest after plaintiffs, against which complaints had been issued, filed suit for declaratory judgment that the complaints were void on ground that one Commissioner had improperly interpreted his statutory obligation in originally voting for issuance of complaints, required foundation for administrative proceedings

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*Reported in 479 F.2d 1323 (1973). For cases before the Commission, see 81 F.T.C. 201, 83 F.T.C. 1213. See also p. 245 herein.

was supplied or repaired even if absent or defective earlier and plaintiffs' action became moot thereby depriving district court of subject matter jurisdiction.

2. **COMMISSION'S POWER TO ISSUE SUPERSEDING COMPLAINTS NOT DIMINISHED EVEN IF ORIGINAL COMPLAINT INVALID.**

Even if original administrative complaints issued on three to two vote of Federal Trade Commission were invalid because vote of one commissioner in favor of issuance was defective, Commission's power to issue superseding complaints or to reconsider issuance of the challenged complaints was not diminished.

(Syllabus, with substituted captions, taken from 479 F. 2d 1323)

On appeal, Court held that where Commission unanimously reaffirmed its decision to issue complaints specifying that issuance was in public interest, the required foundation for proceeding was supplied and, therefore, plaintiffs' suit became moot and district court lacked subject matter jurisdiction.

Judgment of District Court modified so as to dismiss for mootnesss.

Joseph F. Ryan, Boston, Mass., *Alex Akerman, Jr.*, Washington, D.C., *Theodore A. Groenke*, Chicago, Ill., for plaintiffs-appellants.

Harold D. Rhynedance, Jr., F.T.C., Washington, D.C., *Alvin L. Berman*, *Robert E. Duncan*, Attys., F.T.C., Washington, D.C., *James R. Thompson*, U.S. Atty., *William T. Huyck*, Chicago, Ill., *Alan S. Rosenthal*, Dept. of Justice, Washington, D.C., for defendant-appellee.

Before CASTLE, *Senior Circuit Judge*, and FAIRCHILD and SPRECHER, *Circuit Judges.*

ORDER

[1324] PER CURIAM.

On July 10, 1969, the Federal Trade Commission issued five administrative compliants against the present plaintiffs-appellants. The complaints were issued by a 3–2 vote of the Commission and alleged a violation of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. Thereafter, plaintiffs-appellants filed suit in district court seeking a declaration that the administrative complaints were void and an injunction restraining the Commission from conducting administrative proceedings pursuant to the complaints. The Commission moved to dismiss the complaint for failure to exhaust existing administrative and judicial remedies. In denying this motion, the district court certified the order for appeal pursuant to 28 U.S.C. § 1292(b).

This court granted leave to appeal and ultimately determined that the district court did have jurisdiction to consider plaintiffs' allegations as set forth in Count II of their complaint. Count II in essence alleged that one of the commissioners, Commissioner MacIntyre, had improperly interpreted his statutory obligation as a commissioner in voting for issuance of the complaint. Therefore, recognizing that "[w]ithout Commissioner MacIntyre's vote the complaint could not have issued since two commissioners dissented", the cause was remanded for proceedings "not inconsistent" with this court's opinion. See *Jewel Companies, Inc.* v. *F.T.C.*, 432 F. 2d 1155, 1159 (7th Cir. 1970). [8 S. & D. 1241]

Following remand, the Commission on December 28, 1970, moved to hold in abeyance and stay for 90 days the pending court proceeding so as to permit "the Commission to reconsider its decision to issue the administrative complaints involved in the case". The brief which accompanied the motion stated that the Commission sought a chance to review its action not only because of the decision of this court, but also because of a change in the membership of the Commission. (At the time the motion was filed, the two dissenting commissioners had been succeeded by two new commissioners.)

Plaintiffs did not oppose this motion, but did, on January 6, 1971, file a motion for summary judgment. In their brief accompanying the motion, plaintiffs argued that no factual issues remained because this court had determined that Commissioner MacIntyre had construed his obligation as permitting no exercise of discretion in the public interest. They therefore urged the district court to hold that administrative discretion may be exercised in deciding whether to issue complaints and that Commissioner MacIntyre's allegedly erroneous interpretation of his statutory obligation entitled them to a permanent injunction against the administrative proceedings.

On January 21, 1971, the district court entered an order providing that the Commission would have until May 15, 1971, to file a response to plaintiffs' motion for summary judgment and that, during the pendency of plaintiffs' motion, the Commission could reconsider its decision to issue the administrative complaints, provided that plaintiffs were afforded the opportunity to be heard in connection with the reconsideration.

On February 5, 1971, the Commission notified plaintiffs of its determination to reconsider its decision to issue the five administrative complaints and indicated that plaintiffs could file briefs on this question. Thereafter, plaintiffs pressed their position regarding the appropriateness of issuance of the complaints both by filing extensive briefs and by participating in oral arguments before the Commission.

On April 12, 1971, the Commission, with all five members participating, ruled [**1325**] unanimously that issuance of the challenged administrative complaints was in the public interest and reaffirmed its decision to issue the complaints. Accompanying the order was a separate statement by Commissioner MacIntyre where in he indicated that at the time the complaints were originally issued he had considered the public interest and was convinced that issuance was in the public interest.

On May 24, 1971, the Commission filed with the district court a motion to dismiss the complaint on the ground that this action had become moot, various exhibits to the motion including the Commission's order and separate statement of Commissioner MacIntyre, and a memorandum brief in support of its motion and in opposition to plaintiffs' motion for summary judgment. Thereafter, plaintiffs filed a brief in further support of their motion for summary judgment and in opposition to the Commission's motion to dismiss. Finally, the Commission filed a reply to plaintiffs' brief.

On March 17, 1972, the district court entered a judgment from which the instant appeal was taken. While recognizing that the Commission had not yet filed an answer, the court concluded no further pleadings were required before the "ultimate relief" which both parties had sought in their respective motions could be granted. After reviewing the history of this litigation, with particular regard to the Commission's order and separate statement of Commissioner MacIntyre, the district court held: (1) that this action had not become moot, despite the Commission's unanimous reaffirmance of its decision to issue the complaints; (2) that discretion must be exercised by the Commission when it contemplates issuance of administrative complaints; and (3) that "Commissioner MacIntyre had made it as clear as he can that, originally and at the time of reaffirmance, he exercised discretion in voting to issue the complaints". Accordingly, the court ordered the entry of judgment in favor of the Commission on Count II, since in its view there was "no genuine issue of fact".

[1] We conclude, however, that as soon as the Commission, after proceedings in which the plaintiffs participated, unanimously reaffirmed its decision to issue the complaints with a specific finding that issuance was in the public interest, the required foundation for the administrative proceeding was supplied or repaired, even if absent or defective earlier, and Commissioner MacIntyre's original, and allegedly defective, vote was no longer of significance. Thus, the instant action had become moot, thereby depriving the district court of subject matter jurisdiction. *Flast* v. *Cohen*, 392 U.S. 83, 94-95, 88 S.Ct. 1942, 20 L.Ed. 2d 947 (1968). Accordingly, the district court should have dismissed the action on that ground.

[2] Even if the district court had found that Commissioner MacIntyre did not properly interpret his statutory obligation at the time the complaints were originally issued, this would not have entitled plaintiffs to a permanent injunction against all further proceed-

ings concerning the practices which are the subject of the challenged complaints. At best, plaintiffs would only have been entitled to a declaration of the invalidity of the challenged complaints—the Commission's power to issue superseding complaints, or perhaps, as was done here, reconsider issuance of the challenged complaints, could not have been diminished. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20, 73 S.Ct. 85, 97 L.Ed. 15, 20 (1952); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55, 68 S.Ct. 822, 92 L.Ed. 1196, 1208–1209 (1948); *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 200–201, 67 S.Ct. 1575, 91 L.Ed. 1995, 2001 (1947).

The clerk of this court is directed to enter judgment modifying the judgment appealed from so as to dismiss Count II for mootness, and affirming the judgment as so modified. Costs on appeal are allowed to appellee.

HOLIDAY MAGIC, INC., ET AL. v. F.T.C.*

Civ. A. No. 1878–72. F.T.C. Docket 8834

(United States District Court for the District of Columbia,
March 16, 1973)

In Freedom of Information Act proceeding, court held that the non-public files in the Franchise Trade Regulation Rule and administrative proceedings against plaintiffs were investigatory files compiled for law enforcement purposes, and accordingly, all files were exempt from production under the 552(b)(7) exemption of the Freedom of Information Act.

Before CORCORAN, *District Judge.*

MEMORANDUM AND ORDER

This cause is before the Court on the motion of the defendant, Federal Trade Commission (FTC) for judgment on the pleadings pursuant to Rule 12(c) Federal Rules of Civil Procedure (FRCP) or in the alternative for summary judgment pursuant to Rule 56 FRCP. Because it is supported by affidavits and other matter extraneous to the pleadings the Court will consider it as a motion for summary judgment and concludes that the motion must be granted.

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*Not otherwise reported. For case before the Commission, see 84 F.T.C. 748; *modified*, 85 F.T.C. 90.

I

This action was brought by the plantiff Holiday Magic, Inc. seeking injunctive relief against the FTC for the withholding of information Holiday asserts must be disclosed pursuant to the Freedom of Information Act, 5 U.S.C. 552. Holiday alleges that it needs the information to challenge the FTC in an upcoming rule making proceeding[1] its position being that the FTC has pre-judged the question before it. Additionally, an administrative proceeding has been brought against Holiday under the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 2(a) of the Clayton Act as amended by the Robinson Patman Act, 15 U.S.C. 13(a), and is still pending before an administrative law judge. The administrative proceeding is entitled, *In the Matter of Holiday Magic, Inc.*, Docket No. 8834. (hereinafter, Administrative Proceeding)

At this time, all the documents requested are either in public files and available to the plaintiffs or are to be found in two "non-public" files which the FTC refuses to disclose because they are deemed by FTC to be investigative files created for law enforcement proceedings and exempt from disclosure under 5 U.S.C. 552(b)(7). Alternatively, the FTC argues that certain documents found throughout the files are individually exempt from the broad mandate of the Freedom of Information Act because of other exceptions—primarily (b)(3), ("confidential") and (b)(5) ("intra-agency memoranda").

The Court will deal first with the question of whether these files are "investigative." It is clear that ongoing agency adjudicative proceedings are being conducted by the FTC against the plaintiff Holiday. Accordingly, files assembled for this purpose fall squarely within the ambit of Section (b)(7), *Bristol Meyers Co.* v. *Federal Trade Commission*, 138 U.S.App.D.C. 22, 424, F.2d 935 (1970), and are exempt from the broad mandate of the Freedom of Information Act, *Getman* v. *NLRB*, 146 U.S.App.D.C. 209, 450 F.2d 670 (1971), "except to the extent available by law to a party other than an agency." 5 U.S.C. 552(b)(7).

The Court has examined sworn affidavits of FTC personnel and has as well conducted an *in camera* inspection of detailed indices of these files. It is satisfied with the *bona fides* of the characterization of them as "investigatory."[2] Therefore, subject to the limitation discussed below they are exempt from the requirements of the Act, *Frankel* v. *Securities and Exchange Commission*, 460 F.2d 813 (2d Cir. 1972).

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[1] Need is not strictly germane to the plaintiff's right to the information since the rights guaranteed by the Act run to any member of the public. In the context of this discussion, however, the allegation is significant.

This leaves the difficult question of the "availability" of these documents, *i.e.* to what extent are they "discoverable?" It has been held that Congress intended to limit persons in the position of Holiday to the discovery available to persons charged with violations of federal criminal law. *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591, 593 (D.P.R. 1967). The fact that these documents are being sought to aid the plaintiff in its efforts in the proposed rulemaking proceedings rather than in the Administrative Proceeding is of no moment for the (b)(7) exemption "prevents a litigant from using the statute to achieve indirectly 'any earlier or greater access to investigatory files than he would have directly * * *'." *Bristol Meyers Co.* v. *FTC*, *supra*, 939 quoting from H.R. Rep. No. 1497 89th Congress 2d Sess. 5 Note 5 at 11.

The statute governing discovery in criminal actions, 18 U.S.C. Sec. 3500, (the Jencks Act) relates only to "statements," in the hands of the government made by government witnesses. Even here the statute expressly limits the criminal defendant's rights to inspection after the witness has testified on direct examination.

The plaintiff Holiday has made no showing of connection between the documents it seems and "statements" made by witnesses in the Administrative Proceeding, nor does the Court discern any such relationship. For this reason the Court concludes that the defendant's motion for summary judgment must be granted.

In light of the foregoing discussion, the Court finds it unnecessary to consider the applicability of other exemptions from the Freedom of Information Act to individual documents found within the files sought.

Accordingly, it is this 16th day of March, 1973.

ORDERED that the motion of the defendant FTC for summary judgment be granted.

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[2] The Court was satisfied on the basis of the affidavits and indices that the character of the documents was not inimicable to their being placed in an investigative file prepared for the conduct of the Administrative Proceeding. In limiting its examination to these documents the Court was guided by the language of Environmental Protection Agency v. Mink, 410 U.S. 73 (January 22, 1973) No. 71-909, slip opin. at 19, 20. While the Court does not dispute the wisdom of requiring more than a simple statement that a file is "investigatory" before granting a (b)(7) exemption. *Cowles Publications* v. *Department of Justice*, 325 F. Supp. 726 (N.D. Cal. 1971), it was satisfied by its *in camera* examination of the indices of these files here that the exemption is justified.

F.T.C. v. NORMAN J. FOUCHA, et al.*

Civ. A. No. 72–1060 S. F.T.C. Docket 8865

(United States District Court, Northern District of Alabama, Southern Division, March 16, 1973**)

1. ATTORNEY GENERAL MAY DELEGATE AUTHORITY TO APPROVE ISSUANCE OF ORDER DIRECTING WITNESS TO GIVE EVIDENCE THAT, BUT FOR IMMUNITY STATUTE, WOULD BE UNDER PROTECTION OF FIFTH AMENDMENT.

   [21] Attorney General is not required to personally approve issuance of order directing a witness in an administrative hearing to give evidence that, but for immunity statute, would be protected by the Fifth Amendment; the Attorney General may delegate such authority.

2. ACTING ASSISTANT ATTORNEY GENERAL WAS NOT PRECLUDED FROM ISSUING ORDER DIRECTING WITNESS TO GIVE EVIDENCE THAT, BUT FOR IMMUNITY STATUTE, WOULD BE PROTECTED BY THE FIFTH AMENDMENT, BECAUSE ATTORNEY GENERAL'S DELEGATION ORDER RECITED THAT ASSISTANT ATTORNEY GENERAL WAS AUTHORIZED TO ISSUE SAID ORDER. IN ABSENCE OF LANGUAGE TO THE CONTRARY, PRIOR DELEGATION ORDER REMAINED IN EFFECT FOR PURPOSES OF APPROVAL PROCESS.

   Fact that Attorney General's delegation order recited that the Assistant Attorney General was authorized to is**[22]**sue order directing a witness in administrative hearing to give evidence that, but for immunity statute, would be protected by Fifth Amendment, did not preclude Acting Assistant Attorney General from issuing such order; in absence of clear language to the contrary, prior delegation order directing a ranking deputy to perform functions of the Assistant on a vacancy in that office remained in effect for purposes of the approval process.

3. FACT F.T.C. REQUEST FOR APPROVAL OF ORDER DIRECTING WITNESSES TO APPEAR AT ADMINISTRATIVE HEARINGS TO GIVE EVIDENCE WAS TRANSMITTED TO ATTENTION OF CRIMINAL DIVISION OF ATTORNEY GENERAL'S OFFICE, RATHER THAN ANTITRUST DIVISION, WAS IMMATERIAL TO VALIDITY OF ORDER.

   Fact that Federal Trade Commission request for approval of order directing witnesses to appear at administrative hearings to give evidence that, but for immunity statute, would be protected by Fifth Amendment, was transmitted to attention of criminal division of Attorney General's office, rather than to an antitrust division, to which only an information copy was sent, or that purported concurrence of Assistant Attorney General, Criminal Division, was given prospectively, was immaterial to validity of order, notwithstanding that such procedures may have been in violation of Attorney General's delegation orders.

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*Reported in 356 F. Supp. 21 (1973). For case before the Commission, see 84 F.T.C. 21, American Aluminum Corporation, et al.

**By order dated March 28, 1973, the court granted a limited stay of this order pending an appeal to the United States Court of Appeals for the Fifth Circuit. On July 9, 1973, the appellate court granted the government's motion to dismiss the appeal with the consent of respondents.

4. **PREJUDICE MUST BE SHOWN OR APPARENT FOR ACTIONS TAKEN CONTRARY TO REGULATIONS TO BE INVALIDATED FOR REASON THAT REGULATIONS ONCE ADOPTED ARE BINDING ON THE ADOPTING GOVERNMENTAL AGENCY.**

   Regulations once adopted are binding on the adopting governmental agency; for actions taken contrary to the regulations to be invalidated for that reason, some prejudice must be shown or apparent.

5. **FAILURE OF ASSISTANT ATTORNEY GENERAL IN CHARGE OF CRIMINAL DIVISION OR HIS DEPUTY TO PERSONALLY CONCUR IN APPROVAL BY ACTING ASSISTANT ATTORNEY GENERAL OF ANTITRUST DIVISION TO ISSUANCE OF ORDER DIRECTING WITNESSES IN ADMINISTRATIVE HEARINGS BEFORE F.T.C. TO GIVE EVIDENCE, WHICH CONCURRENCE WAS REQUIRED BY ATTORNEY GENERAL'S DELEGATION ORDERS, DID NOT REQUIRE ORDERS TO BE INVALIDATED IN ABSENCE OF SHOWING OF PREJUDICE; PRINCIPAL RESPONSIBILITY FOR APPROVAL WAS GIVEN BY ATTORNEY GENERAL TO ASSISTANT ATTORNEY GENERAL IN CHARGE OF THE DIVISION HAVING COGNIZANCE OVER SUBJECT MATTER AND CONCURRENCE RULE OF CRIMINAL DIVISION WAS MERELY A HOUSEKEEPING FUNCTION.**

   Even if Assistant Attorney General in charge of criminal division or his deputy failed to personally concur in approval by Acting Assistant Attorney General of antitrust division to issuance of order directing witnesses in administrative hearings before Federal Trade Commission to give evidence that, but for immunity statute, would be protected by the Fifth Amendment, which concurrence was required by Attorney General's delegation orders, orders were not required to be invalidated in absence of showing of prejudice; principal responsibility for approval lay in hands of Attorney General to the AAG in charge of division having cognizance over the subject matter and criminal division's concurrence rule was merely a housekeeping function to facilitate orderly and coordinate operation of the Department of Justice under statute.

(Syllabus, with substituted captions, taken from 356 F. Supp. 21 (1973))

Court held (1) Attorney General is not required to personally approve issuance of order compelling witnesses to give evidence that, but for Immunity Statute, would be protected by the Fifth Amendment; (2) Attorney General's delegation of authority to AAG included a ranking deputy performing functions of Assistant on vacancy in that office; and (3) any failure of Assistant Attorney General in charge of Criminal Division or his acting deputy to personally concur in approval given by the Assistant Attorney General in charge of division having cognizance over the subject matter did not invalidate orders, in absence of showing of prejudice. Order issued.

Wayman G. Sherrer, U.S. Atty., *Sara D. Hamilton*, Asst. U.S. Atty., Birmingham, Ala., *Gregory B. Novendon*, Atty., Dept. of Justice, *Ronald M. Dietrich*, Gen. Counsel, *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, *Nicholas S. Reynolds*, Atty., F.T.C., Washington, D.C., for plaintiff.

Gary P. Smith, Birmingham, Ala., *Joseph J. Lyman*, Washington, D.C., for defendants.

MEMORANDUM OF OPINION AND ORDER

POINTER, *District Judge.*

This case raises the question of who, by what procedure, can give the "approval of the Attorney General" to the issuance of an order directing a witness in an administrative hearing to give evidence that, but for 18 U.S.C.A. § 6001 et seq., would be protected by the Fifth Amendment.

This action was brought by the FTC under 15 U.S.C.A. § 49 for an order compelling four recalcitrant witnesses to obey an order issued under 18 U.S.C.A. § 6004. In the initial sparring, the Commission took the position that this proceeding was but a summary procedure, dispensing with the Federal Rules of Civil Procedure. The court, however, ruled that it was to be an adversary proceeding, *United States* v. *Powell*, 379 U.S. 48, 58, 85 S.Ct. 248, 13 L.Ed.2d 112 **[23]** (1964), and further held that the Federal Rules do apply, with the petition and show cause order being treated as a complaint. See *United States* v. *Pritchard*, 438 F.2d 969 (5th Cir. 1971), citing Federal Rule 81(a). At the hearing on the show cause order, the court determined that few factual matters were in dispute, and requested the parties to conduct informal discovery to determine if the potential factual disputes could be resolved.

The statute in question, 18 U.S.C.A. § 6004, allows an agency to issue such an order "with the approval of the Attorney General." Here the FTC relies upon a letter of approval signed by Walker B. Comegys, the Acting Assistant Attorney General in charge of the Antitrust Division of the Department of Justice. It points to the following delegation orders issued by the Attorney General under the authority of 28 U.S.C. § 510:

> "The Assistant Attorney General [in charge of the Anti-trust Division is] authorized to exercise the power and authority vested in the Attorney General by § 6004 of title 18, United States Code, to approve the issuance by an agency of the United States of an order compelling testimony or the production of information by a witness in a proceeding the agency * * *; *provided, however,* that approval shall be granted only with the concurrence of the Assistant Attorney General in charge of the Criminal Division. 28 CFR § 0.175(c), 35 F.R. 19397, Dec. 23, 1970.
>
> The Assistant Attorney General in charge of the Criminal Division and the Assistant Attorney [General in charge of the Antitrust Division] are authorized to redelegate the authority delegated by [§ 0.175] to their respective Deputy Assistant Attorney Generals to be exercised solely during the absence of such As-

sistant Attorney Generals from the City of Washington. 28 CFR § 0.178(a), 35 F.R. 19397, Dec. 23, 1970.

> In the event of a vacancy in the office of head of [the Antitrust Division], the ranking deputy (or his equivalent) in such unit who is available shall perform the functions and duties of and act as such head, unless the Attorney General shall direct otherwise. 28 CFR § 0.132(d), 34 F.R. 20388, Dec. 31, 1969.

It is admitted that Mr. Comegys was the Deputy Assistant Attorney General in charge of the Antitrust Division and that on the resignation of the Assistant Attorney General for the division he had become its Acting Assistant Attorney General.

What is in controversy is whether anyone other than the Attorney General himself can give the approval specified in 18 U.S.C.A. § 6004. Stated another way, are the delegation orders in 28 CFR § 0.175(c), 0.178(a) permissible under that statute? The answer to these questions involves a comparison of the language of § 6004—"approval of the Attorney General"—with that contained in another section of the same act, § 6003—"approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General."

Three explanations can be given for the difference in language. First, the difference may have been inadvertent, indicating no conscious differentiation by Congress in the two sections. Second, Congress may have intended that only the Attorney General personally could give approval under § 6004, while other high level members of his office could have authority to give approval under § 6003. Third, Congress may have intended that only specified high level members of his office could have authority to give approval under § 6003, while leaving the Attorney General with respect to § 6004 with a broader power of delegation under existing 28 U.S.C. § 510.

The legislative history sheds little light on the intent of Congress. How**[24]**ever, House Report No. 91-1549 in its section analysis of § 6004 states:

> It is assumed that the Attorney General will take such * * * steps as are necessary to insure that *his office* is familiar with the immunity-granting procedures of each agency, in order that issuance of such orders might be expedited and no orders will be issued without authorization. (Emphasis added.)

This suggests that persons other than the Attorney General himself were expected to play a function in the approval process. And, indeed, if issuance of such orders was to be expedited, it is doubtful that Congress intended that only the Attorney General personally could give approvals under § 6004.

[1] I conclude that the third explanation should be adopted—that Congress, by failing to specify in § 6004 (as it had in § 6003) additional persons in the Attorney General's office who could grant ap-

provals, intended to give the Attorney General the broader range of authority to delegate existing under 28 U.S.C. § 510. It is of significance that the predecessor of this legislation, 18 U.S.C. § 2514, had contained the words "approval of the Attorney General" and that, in practice later endorsed by the courts, this had permitted delegation under 28 U.S.C. § 510. *December 1968 Grand Jury* v. *United States*, 420 F. 2d 1201 (7th Cir. 1970); *United States* v. *DiMauro*, 441 F. 2d 428 (8th Cir. 1971). On the other hand, use of additional words such as found in § 6003 has been held to indicate a limitation upon the power to delegate. See *United States* v. *Robinson*, 468 F. 2d 189 (5th Cir. # 71-1058, Jan. 12, 1972); *cf. United States* v. *Pisacano*, 459 F. 2d 259 (2nd Cir. 1972). That Congress has not forgotten about the general power of delegation existing under 28 U.S.C. § 510, see the explicit language in the Civil Rights Act of 1968, 18 U.S.C.A. § 245(a)(1).

Support for this conclusion can be found by noting another difference in §§ 6003 and 6004. In § 6003, the key value judgment (*i.e.*, necessary to the public interest) is to be made solely by personnel of the Department of Justice. In § 6004, that judgment is essentially the responsibility of another agency of government, with the Department of Justice playing a secondary role. It would be somewhat incongruous if only the Attorney General personally could perform the "secondary" role under § 6004, while permitting his subordinates to perform the functions under § 6003 for which the Department of Justice must bear the sole responsibility to the public.

[2] The defendants next argue that Comegys, the *Acting* AAG, had not been delegated authority under § 6004. This is but a matter of interpretation of the published delegation orders. I find nothing in Order 445-70, as published in 35 F.R. 19397, December 23, 1970, to indicate that the Attorney General intended thereby to revoke for such purposes the provisions of 28 CFR § 0.132(d) which direct—not merely empower—a ranking deputy such as Comegys to perform the functions of the Assistant Attorney General upon a vacancy in that office. In the absence of clear language to the contrary, I conclude that 28 CFR § 0.132(d) remains in effect for purposes of the approval process covered in Order 445-70—particularly since the logical extension of the defendants' contention would result in an hiatus of dire consequences should, for example, there be a vacancy in the office of the Attorney General himself. It should further be noted that 28 CFR § 0.178(a) reflects the willingness of the Attorney General to have a ranking Deputy perform the functions of the AAG during his temporary absence.

The defendants finally argue that there was—or may have been (for which formal discovery is needed)—a failure to obtain the concurrence of the Assistant Attorney General in charge of the Criminal Division, as required by the last clause of 28 CFR § 0.175(b). Several reasons are urged by defendants, **[25]** each aimed at a purported failure in the Attorney General's office to follow its own procedures.

[3] They point out that the FTC's request for approval was transmitted to the attention of the Criminal Division of the Attorney General's office (rather than to the Antitrust Division, to which only an informational copy was sent). They also note that the purported concurrence of the AAG, Criminal Division, was given prospectively, and apparently before request from the AAG, Antitrust Division. The court concludes that these matters are immaterial—to establish an internal "clearing house", it was quite appropriate to designate the Criminal Division; and that "concurrence" under 28 CFR § 0.175(b) can be given in the following form, albeit prospective and anticipatory:

> I defer to your judgment as to the advisability of approving the request for authority to issue an order to compel the testimony of this person [named above] pursuant to 18 U.S.C. 6004, and, if you decide the approval of the request is warranted, will concur in your approval pursuant to 28 C.F.R. 0.175.

The memoranda of concurrence, in the form above indicated, were given to Comegys by an internal communication showing it to be from Henry E. Petersen, Assistant Attorney General, Criminal Division. Unsigned, it does bear the initials "HEP" opposite his name. Defendants assert that their informal discussions with personnel of the Attorney General's office undertaken at the Court's instruction following the show cause hearing casts doubt on whether Petersen (or his ranking deputy) initialed the memoranda or otherwise gave the purported concurrence any personal attention. According to the defendants they have been unable to elicit this information by informal means, and they therefore seek formal discovery. The FTC, represented in this case by personnel of the Department of Justice,* argues that the personal concurrence of Petersen or his deputy was not required, or was an irregularity without significance—at least by implication giving some support to the defendants' view of the facts. The affidavits submitted are conspicuous in failing to indicate the extent, if any, of participation by Petersen or his deputy in the purported concurrence. There appears to be some substance to the defendant's assertion—and not a mere conjecture as to an irregularity. *Cf. United States* v. *Rucker*, 435 F. 2d 950 (8th Cir. 1971).

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*By order of March 28, 1973, the court amended the statement that the Commission was "represented in this case by personnel of the Department of Justice" to read "represented in this case be personnel of both the Department of Justice and the Federal Trade Commission."

I conclude that the failure of Petersen or his deputy to have personally concurred in the Comegys' approval would—if established—be contrary to the directive of the Attorney General as published in Order 445–70. While, under 28 U.S.C. § 510, he could have delegated such authority to lower ranked personnel, he chose not to do so, as is obvious from a reading of 28 CFR § 0.178(a), which relates not merely to the other divisions of the Department, but also to the Criminal Division.

But before a decision in this case be further prolonged for discovery or trial on a potential factual dispute, it is appropriate to decide as to the materiality of that dispute—here, whether the defendants could take advantage of the procedural irregularity if so proved. See *Venn* v. *United States*, 400 F. 2d 207 (5th Cir. 1968), footnote 12 at page 208; *cf. United States* v. *Pritchard*, 438 F. 2d 969 (5th Cir. 1971).

[4] Regulations once adopted are binding upon the adopting governmental agency. *Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); *Service* v. *Dulles*, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957). But for actions taken contrary to regulations to be invalidated for that reason, some prejudice must be shown or apparent. See, for example, *Pacific Molasses Co.* v. *FTC*, 356 F.2d 386 (5th Cir. 1966).

In the present case it is neither shown nor apparent that defendants have suffered any prejudice by reason of the as**[26]**sumed failure of Petersen or his deputy to have personally participated in the concurrence given for the Criminal Division. The regulations indicate that principal responsibility for approval was being given by the Attorney General to the AAG in charge of the division having cognizance over the subject matter (*i.e.*, here the Antitrust Division). The assignment therein to the Criminal Division of a "concurrence" role is in part explained by a letter of January 29, 1971, from the Deputy Attorney General as follows:

> The Criminal Division has been designated by the Attorney General to act as a central "clearing house" and a records repository. Accordingly, requests for authorization to issue immunity orders should be directed to the Immunity Unit of the Criminal Division, which in turn, will direct agency requests to the proper Division having cognizance of the Act under which the agency proceeding is being conducted.

Moreover, in the concurrence letter prepared for Petersen, the limited extent of the role played by the Criminal Division (as seen by itself) is indicated: "We have searched our files for information with respect to the following person for whom immunity clearance has been requested: [naming the person]."

Department of Justice personnel, arguing for the FTC,* urge—and, I conclude, convincingly—as follows:

> The purpose and function of the Criminal Division in concurring in the approval and authorization by the Antitrust Division of the issuance of the instant immunity orders is a housekeeping function to facilitate the orderly and coordinated operation of the Department of Justice under 18 U.S.C. § 6001 et seq. That function is intended merely to provide, as a matter of intradepartmental comity, an opportunity for the Criminal Division to determine whether a grant of immunity might embarrass an on-going investigation or a current or prospective criminal matter with the Criminal Division. The concurrence is, therefore, merely a statement that the Criminal Division has no objection to the proposed immunization, but assumes no responsibility of overview.

[5] Assuming *arguendo* that proof could be discovered showing the lack of personal attention by Petersen or his deputy, I nevertheless conclude that this would be a deviation from a regulation designed for the benefit of the government, of a "housekeeping" nature, and from which the defendants would not have suffered prejudice. See *Centex Const'n Co.* v. *United States*, 162 Ct.Cl. 211, 221 (1963); *Starzec* v. *United States*, 145 Ct.Cl. 25, 31 (1959).

There being no material issues of fact requiring discovery or resolution by trial, the FTC is entitled to an appropriate order compelling the testimony of the defendants.

Therefore, upon the findings and conclusions and for the reasons indicated, it is ordered, adjudged and decreed that Norman J. Foucha, Bobby G. Smith, Robert L. Campbell and Jean Smith be, and they hereby are, directed to appear before a duly appointed administrative law judge of the Federal Trade Commission at a time and place to be designated on behalf of the Federal Trade Commission, and then and there to testify in accordance with the subpoenas *ad testificandum* issued by the Commission on March 8, 1972.

It is further ordered that the costs of this proceeding be taxed against the defendants named in the foregoing paragraph.

JOHN SPECTOR v. F.T.C., ET AL.‡

Civ. A. No. 72–490–GT. F.T.C. File 99–141

(United States District Court, Southern District of California, March 19, 1973)

In action seeking declaratory relief that the FTC Act was not applicable to plaintiff and that application of Act would violate plaintiff's constitutional right to freedom of speech and press and would violate his right of equal protection of the laws and due process, court held that it lacked subject matter jurisdiction because plaintiff failed to exhaust his administrative remedies.

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*By order of March 28, 1973, the court amended the phrase "Department of Justice personnel, arguing for the Federal Trade Commission," to read "Commission and Department of Justice Personnel, arguing for the Federal Trade Commission."

‡Not otherwise reported. *Affirmed*, Oct. 9, 1973 (CA9).

Before THOMPSON, Jr., *District Judge.*

ORDER

In this action the plaintiff seeks declaratory relief requesting this Court to declare that the "Federal Trade Commission Act does not apply to plaintiff and that the application of said Act to plaintiff would be in violation of his constitutional rights of freedom of speech and press and would violate his right of equal protection of the laws and due process of law," and in the alternative, that "in the event the Court holds that said Act does apply," plaintiff seeks a declaration "that plaintiff is not in violation of such Act" and "that plaintiff may use the advertisement attached to the Complaint as exhibit 'A' within inter-state [sic] commerce."

The defendant moved this Court to dismiss the action in its entirety, or in the alternative, for summary judgment in its favor pursuant to Rule 56 of F.R.Civ.P.

The matter having been submitted for decision by the Court on the written memoranda of the respective parties hereto, having waived oral argument, and the Court having been fully advised in the matter,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The motion of the defendant to dismiss the action for failure to state a claim upon which relief can be granted is granted for the reasons stated in the defendant's memoranda of contentions of law and fact, namely that this Court lacks jurisdiction over the subject matter as there exists no actual controversy as required by the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Federal Trade Commission has not challenged the legality of the plaintiff's advertising under Sections 5 or 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52. Further, the plaintiff has not exhausted his administrative remedies before attempting to resort to judicial review thereof; *Public Service Commission of Utah* v. *Wycoff Co., Inc.*, 344 U.S. 237 (1952), and *Whitney National Bank* v. *New Orleans Bank and Trust Co.*, 379 U.S. 411, 420–21 (1965); accordingly,

2. This action is dismissed in its entirety, with prejudice.

F.T.C. v. PEPSICO, INC.*

No. 803, Docket 73-1381. F.T.C. Docket 8903

(United States Court of Appeals, Second Circuit, April 3, 1973)

1. FIRST TEST TO BE APPLIED BY APPELLATE COURT IN DETERMINING WHETHER TO PRELIMINARILY ENJOIN CONSUMMATION OF MERGER, WAS WHETHER OR NOT F.T.C. HAD ESTABLISHED REASONABLE PROBABILITY THAT ACQUIRING CORPORATION WAS IN VIOLATION OF CLAYTON ACT.

   [24] In determining whether to preliminarily enjoin consummation of merger, first test to be applied by Court of Appeals was whether or not Federal Trade Commission had established reasonable probability that acquiring corporation was in violation of antiacquisition provision of Clayton Act.

2. IN VIEW OF CONCENTRATION OF SOFT DRINK INDUSTRY, THERE WAS REASONABLE PROBABILITY OF VIOLATION OF THE CLAYTON ACT; AND ACCORDINGLY, FIRST TEST FOR ISSUANCE OF PRELIMINARY INJUNCTION AGAINST CONSUMMATION WAS MET.

   In view of concentration of soft drink industry, where four companies controlled 70.6% of market, and difficulty of entry because of necessity of bottling facilities and huge advertising outlays, there was reasonable probability of violation of antiinjunction provision of Clayton Act if merger were consummated between acquiring company which was principally engaged in soft drink business and stood second in national market, and acquired company, which was principally engaged in manufacture and distribution of beer but which owned subsidiary which controlled .3% of soft drink market; accordingly, first test for issuance of preliminary injunction against consummation was met.

3. IN HIGHLY CONCENTRATED MARKET, EVEN SLIGHT AGGREGATIONS ARE VIEWED WITH SUSPICION.

   Even slight aggregations are viewed with suspicion in highly concentrated market.

4. QUESTION OF WHETHER DIVESTITURE SUBSEQUENT TO VIOLATIVE MERGER SHOULD BE TOTAL OR PARTIAL DEPENDS ON FACTS IN EACH CASE.

   Question of whether divestiture subsequent to merger in violation of antiacquisition provision of Clayton Act should be total or partial depends on facts in each case.

5. EQUITIES MUST BE BALANCED WHEN SUPPLICANT SEEKS INJUNCTIVE RELIEF.

   When supplicant seeks injunctive relief, equities must be balanced.

6. INTENTIONS OF ACQUIRING COMPANY MAY BE CONSIDERED IN DETERMINING WHETHER CONSUMMATION OF MERGER SHOULD BE ENJOINED.

   Intentions of acquiring company are not to be considered in determining whether antiacquisition provision of Clayton Act has been violated, but may be considered in determining whether consummation of merger should be preliminarily enjoined.

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*Reported in 477 F 2d 24 (1973). For case before the Commission, see 83 F.T.C. 1298.

7. WHERE ACQUIRING CORPORATION AGREED TO HOLD SEPARATE SOFT DRINK OPERATIONS OF ACQUIRED CORPORATION, IT WAS INAPPROPRIATE TO PRELIMINARY ENJOIN MERGER.

Where acquiring corporation which was principally engaged in soft drink business agreed to hold separate soft [25] drink operations of acquired corporation, which corporation was principally engaged in manufacture and distribution of beer but which owned soft drink subsidiary, it was inappropriate to preliminarily enjoin merger; provided, however, that proposed escape clause giving acquiring corporation unilateral option of terminating merger agreement on 30 days' notice be eliminated, and that management of acquiring corporation agree not to divest acquired corporation of its beer business or assets or any part thereof pending resolution of expedited action before Federal Trade Commission.

(Syllabus, with substituted captions, taken from 477 F.2d 24)

Court held where acquiring corporation agreed to hold separate soft drink operations of acquired corporation, it was inappropriate to preliminarily enjoin merger. Injunction denied.

Gerald Harwood, Atty., Washington, D.C. (*James T. Halverson*, Acting Gen. Counsel, *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, *Vincent Tricarico*, Atty., F.T.C., Washington, D.C., of counsel), for petitioner.

Edward F. Howrey, Washington, D.C., (*Howrey, Simon, Baker & Murchison*, Washington, D.C., *Mudge, Rose, Guthrie, Alexander & Mitchell*, New York City, *John J. Kirby, Jr.*, *Milton Black*, *James G. Frangos*, *Thomas R. Esposito*, New York City, *Richard T. Colman* and *G. Joseph King*, Washington, D.C., of counsel), for respondent.

Before HAYS, MULLIGAN and OAKES, *Circuit Judges.*

MULLIGAN, *Circuit Judge:*

[25] This is an original action by the Federal Trade Commission (Commission) for a preliminary injunction and other relief pursuant to the All Writs Act (28 U.S.C. § 1651(a)). The Supreme Court has held in *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966), that the Courts of Appeals have jurisdiction to issue preliminary injunctions to prevent the consummation of mergers upon a showing that effective remedial orders would otherwise be virtually impossible, thus rendering a final divestiture decree after a Commission determination, futile. The stated purpose of the petition here is to preserve the *status quo pendente lite* of Rheingold Corporation (Rheingold) in aid of this Court's jurisdiction under Section 11(c) of the Clayton Act (15 U.S.C. § 21(c)) and Section 5(c) of the Federal Trade Commission Act (15 U.S.C. § 45(c)), to review final orders of the Federal Trade Commission. The Commission urges that the acquisition by PepsiCo, Inc. (PepsiCo) of 83% of the stock of Rheingold will eventually be determined to violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The Commission further takes the position that its ability to enter an effective order will "probably" by gravely impaired unless Rheingold's separate existence is maintained and the independence of its present management preserved.

I

PepsiCo is primarily engaged in the manufacture and distribution of beverage concentrates and syrups and the production and distribution of soft drinks (soft drink business). PepsiCo is a diversified company and is engaged in other services and sales not here pertinent. The soft drink business of PepsiCo essentially consists of manufacturing soft drink concentrates, bottled either by PepsiCo or its franchised independent bottlers. Its products are merchandised under the trade names Pepsi-Cola, Diet Pepsi-Cola, Patio, Teem and Mountain Dew. In 1971, PepsiCo had net sales of $1.3 billion and a net income after taxes of about $63 million. In that year it was the second largest seller of soft drink concentrates nationwide, occupying 16.3% of the market. The Coca Cola Company heads the soft drink industry with an estimated 42% share of the market in 1971.

Rheingold is primarily engaged in the manufacture and distribution of beer which accounts for about 70% of its sales. It also manufactures and distributes soft drink concentrates and syrup **[26]** and produces and merchandises soft drinks. Its soft drink business constitutes about 30% of its sales but accounts for 75% of its profits. Rheingold is a franchised independent bottler for PepsiCo in southern California, Puerto Rico, Mexico, and Florida. In 1971 Rheingold had net sales of about $230 million, making a net profit after taxes of about $4 million. Rheingold acquired the Grapette Company, a soft drink concentrate manufacturer, in August, 1970, changing its name to Flavette. Flavette then purchased two small soft drink companies, Dr. Wells and Mason & Mason. Flavette, excluding Mason & Mason's root beer, also utilized independent franchised bottlers and serves a geographic area containing some 50 million people. Since 1970 Flavette has franchised some 81 independent bottlers.

The soft drink concentrate business is presently highly concentrated and growing, with total sales increasing from $353 million in 1967 to $450 million in 1971. Coca Cola and PepsiCo combined to control some 58.3% of the business. The top four companies in 1971, account for 70.6% of the industry. The Federal Trade Commission takes the position that the soft drink business is not easily entered. Soft drinks are made from concentrates which are typically sold and distributed by franchised bottlers who are responsible for the promotion of the business in the franchised territory and who normally own the facilities for bottling and canning the concentrate. New entrants face the barrier of competing against well-established brands which are prolifically advertised. It is estimated that an annual expenditure of $50 million for advertising expenses over a 5 to 8 year period is necessary to establish a new product on a nationwide scale. The Commission also argues that obtaining adequate bottling and canning facilities plus the acquisition of technical know-how present barriers for prospective entrants into the business.

PepsiCo first published its offer to purchase 1,600,000 shares of common stock of Rheingold on October 25, 1972. This offer was later amended to purchase all shares in excess of 1,600,000 if they were tendered before the close of business on November 16, 1972. On November 15, the Federal Trade Commission commenced complaint proceedings, urging that the acquisition violated Section 7 of the Clayton Act (15 U.S.C. § 18)[1] as well as Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).[2] The Commission did not seek at this point to enjoin the tender offer PepsiCo and the Commission then entered into the negotiation of a hold-separate agreement. The Commission agreed in the interim not to file any action requiring PepsiCo to hold Rheingold assets separate until December 4, 1972 and PepsiCo agreed not to assume or exercise actual control over Rheingold if its tender offer proved successful. The offer was successful and PepsiCo now owns 83% of the shares of Rheingold which it acquired for a cash investment of some $57 million. On December 1, 1972, the Commission withdrew its complaint for the purpose of entering into a consent order. PepsiCo made an offer on January 15, 1973 subsequently modified on January 30, 1973, but the proposal was rejected by a 3–2 vote of the Commission. The matter was returned to the adjudicatory process on **[27]** February 7, 1973 and PepsiCo notified the Commission on March 2, 1973 that it was terminating the hold-separate agreement of November 16, 1972.

II

[1] As a result of the 5–4 holding of the Supreme Court in *FTC* v. *Dean Foods Co.*, *supra*, we are placed in the unenviable position of predicting whether there has been a violation of the antitrust laws in-

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[1] Section 7, 15 U.S.C. § 18 provides in relevant part:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

[2] Section 5(a)(1), 15 U.S.C. § 45(a)(1) provides:

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

volved without the benefit of any agency determination or a record which would provide the detailed economic and corporate data normally available in comparable litigation. It is established, however, that the first test which we must apply is whether or not the Commission has established a "reasonable probability" that the respondent is in violation of the statute. *FTC* v. *OKC Corp.*, 1970 CCH Trade Cas. ¶ 73,288 (5th Cir., July 8, 1970); see *United States* v. *Ingersoll-Rand Co.*, 320 F.2d 509, 523–524 (3d Cir. 1963); *United States* v. *IT&T*, 306 F. Supp. 766, 774 (D. Conn. 1969), *appeal dismissed*, 404 U.S. 801, 92 S.Ct. 20, 30 L.Ed. 2d 34 (1971); *United States* v. *Atlantic Richfield Co.*, 297 F. Supp. 1061, 1067 (S.D. N.Y. 1969); *cf. Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962).

[2, 3] In our view, the Federal Trade Commission has sustained its burden with respect to this aspect of the case. This is basically a horizontal merger[3] since PepsiCo in acquiring Rheingold has purchased a subsidiary (Flavette) competing with PepsiCo in the soft drink business. Flavette's share of the national soft drink non-cola market is about 1% and about .3% if cola drinks are included.[4] Anti-trust concern here is prompted by the undoubted fact that PepsiCo stands Number 2 in the national soft drink market where four companies control 70.6% of the business. The Supreme Court in a series of cases *United States* v. *Continental Can Co.*, 378 U.S. 441, 461–462, 84 S.Ct. 1738, 12 L.Ed. 2d 953 (1964); *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 279, 84 S.Ct. 1283, 12 L.Ed. 2d 314 (1964); *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 365 n. 42, 83 S.Ct. 1715, 10 L.Ed. 2d 915 (1963), and our own Court recently in *Stanley Works* v. *FTC*, 469 F. 2d 498, 507–508 (1972), have held that even slight aggregations are viewed with suspicion in a highly concentrated market.[5] In *Stanley Works*, four leading companies domi-

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[3] Since Rheingold is also a franchised bottler of PepsiCo there are vertical dimensions here as well. PepsiCo states that pursuant to a 1968 consent order negotiated with the Commission, Docket No. 8606, PepsiCo is permitted to purchase its own franchised bottlers even though they are engaged in the concentrate business. In view of our disposition on this matter, the point is not material.

[4] At this stage of the proceedings there is no indication of any particular geographic market (section of the counrty) in which PepsiCo and Rheingold through Flavette are actually competing. Moreover, the "line of commerce" or product market may eventually be narrowed in litigation. The complaint of the FTC in its definitional paragraph defines soft drinks and concentrates to include all non-alcoholic carbonated beverages. Whether cola drinks are sufficiently non-interchangeable in terms of price, quality and use so as to constitute a separate relevant product market, is a question which has not been determined or even briefed, yet both parties make reference to a non-cola market. On the basis of the complaint, we can only assume that the geographic market is nationwide, that the product market is all carbonated soft drinks and that Flavette's share is .3%.

[5] We are not unaware that the Merger Guidelines of the United States Department of Justice define a highly concentrated market as one in which the shares of the four largest firms amount to approximately 75% or more. However, this action has been

nated only 50% of the market. The acquisition by a company, which controlled 1% of the market, of a competitor with **[28]** a market share of 22 to 24% was found to be in violation of Section 7 of the Clayton Act and not *de minimis*.

There are two other factors which weigh the balance here in the Commission's favor. The number of bottlers has steadily declined from 5,400 in 1948 to 2,300 in 1971 as the result of combinations. Moreover between 1958 and 1972 PepsiCo has acquired ten bottlers which were previously its independent franchisees.

We have examined the opinons of the Supreme Court since the 1950 amendment to Section 7 of the Clayton Act and recall as a practical consideration Mr. Justice Stewart's comment in his dissenting opinion in *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 301, 86 S.Ct. 1478, 1495, 16 L.Ed.2d 555 (1966): "The sole consistency that I can find [in the Supreme Court cases] is that in litigation under § 7, the Government always wins." We appreciate that the Commission here need not establish any actual anti-competitive effects but only an incipiency. The reasonable probability of establishing probable as distinguished from actual competitive injury, is in our view predictable here in light of the concentration of the industry and the difficulty of new entry which requires bottling facilities and huge advertising outlays.[6]

III

The Commission seeks a preliminary injunction which will effectively prevent PepsiCo from exercising and assuming control over Rheingold until the issuance of a final order in the administrative proceeding. The exercise of this control, in the view of the Commission, is incompatible with the preservation of Rheingold as an entity having the capabilities and resources for becoming an important competitor through Flavette in the production and sale of soft drink concentrates. The agency urges that PepsiCo will be primarily interested in the sale of its own cola concentrates and to the extent that it is interested in selling non-cola drinks it will be faced with a conflict between pushing its own PATIO line and the Flavette brands. Moreover, the Commission is concerned that PepsiCo will dispose of the beer business of Rheingold and that this would deprive Flavette of the benefit of

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initiated by the Federal Trade Commission, not the Department of Justice. It is further noted that the top four companies which controlled 66.3% of the business in 1965 controlled 70.6% of the industry in 1971.

[6] The particular significance of Section 5 of the Federal Trade Commission Act as a basis for relief here is not apparent either from an examination of the complaint or the brief of the Commission before us. It may eventually articulate its views. See *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972). In the meantime we assume that the violation of Section 7 of the Clayton Act also constitutes a violation of Section 5. *Stanley Works* v. *FTC, supra*, 469 F.2d at 499 n. 2.

Rheingold's total resources in its efforts to establish itself as a "toehold" competitor in the soft drink concentrate industry. While granting that Flavette's business is a small part of Rheingold's overall operation, the Commission believes that its competitive potential rests upon Rheingold's full resources and therefore a divestiture limited to disposing of the offending lines of commerce alone could not provide effective relief. Admitting that PepsiCo will be harmed at this stage of the proceeding if it is required to refrain from exercising control of Rheingold, the Commission has advised that it will set up an expedited time schedule ensuring that all administrative proceedings, including the Commission's final decision, will be concluded by September 10, 1973. It therefore urges this Court to enjoin PepsiCo from taking any steps to assume or exercise control of Rheingold, from taking any other action which will change or influence the present directors or management of Rheingold, diminish its operations, change its corporate structure or dispose of any of its assets.

[4] Under *FTC* v. *Dean Foods Co., supra*, the Supreme Court has held that an injunction can issue only if the Commission can show that "an effective remedial order, once the merger was im**[29]**plemented, would otherwise be *virtually impossible*, thus rendering the enforcement of any final decree of divestiture futile." 384 U.S. at 605, 86 S.Ct. at 1743 (emphasis added).[7] While the Commission has persuaded us that there is a reasonable probability that the merger here will violate Section 7 of the Clayton Act, we are totally unpersuaded that a remedial divestiture order will ultimately be "virtually impossible" of achievement. The Commission is proceeding on the premise that divestiture of the entire Rheingold company will be the only effective remedy. On the contrary we see no reason why such drastic relief at least at this stage, should be presumed appropriate. Assuming that the Commission is successful in its adjudicatory proceeding, whether the divestiture should be total or partial must depend upon the facts in each case.[8] It is clear here that the only offending assets are the subsidiary businesses of Flavette and Mason & Mason which represent a minor though profitable segment of Rheingold's business.

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[7] The Commission's brief seems to argue that all it must establish is that an ultimate effective order will *probably* be effectively impaired unless Rheingold's separate existence and incumbent management is preserved. The Supreme Court has placed a much greater burden on the Commission. It must establish no probability here but "virtual impossibility." In view of the extraordinary nature of the remedy proposed, the burden is justifiably imposed.

[8] While complete divestiture is "simple, relatively easy to administer, and sure" (*United States* v. *E. I du Pont de Nemours & Co.*, 366 U.S. 316, 331, 81 S.Ct. 1243, 1252, 6 L.Ed.2d 318 (1961)), it is not necessarily the most appropriate means for restoring competition. A primary concern is whether the offending line of commerce, if disassociated from the merged entities, can survive as a viable, independent entity. See, *e. g.*, *OKC Corp.* v. *FTC*, 455 F.2d 1159 (10th Cir. 1972) (partial divestiture inappropriate since the offending line of commerce could not survive independently). See also Comment, Divesti-

The Commission's major if not sole argument that total divestiture is necessary, is that Flavette will need the total resources of Rheingold plus the expressed determination of its incumbent management to break into the soft drink industry. The record before us gives scant support, if any, to the proposition that the present Rheingold management has that capacity. Rheingold's share in the beer market is declining. It lost money in 1972 on its beer operation and projects a loss of between $2 million and $7 million in 1973. No final budget plan has been developed in fact for the 1973 brewery operation. We have examined affidavits before us which indicate that Rheingold's cash position is precarious. Rheingold's earnings per share have declined from $1.84 in 1970 to $1.25 in 1971 and are estimated at $.45 per share in 1972. In December, 1972, Rheingold announced the omission of its regular quarterly cash dividend. Rheingold has emphasized its beer business and Flavette is not prospering. Flavette has incurred losses of more than a half million dollars from the time of its acquisition by Rheingold in the fall of 1970 to December 31, 1972. Its share in the total soft drink concentrate market has declined from 5% in 1968 to .3% in 1971.

The Commission in oral argument suggested that the present management of Rheingold was contemplating the acquisition of another regional beer manufacturer, Piels, as a possible means of increasing its business. It is somewhat anomalous that the Commission should cite an obvious horizontal merger, which it admittedly has not studied, as a basis for preserving Rheingold. The Commission also cites as persuasive the statement of Rheingold's Chairman on the **[30]** Flavette acquisition that combination of selling beer and soft drinks "provides Rheingold with a good deal of clout in the supermarkets." The antitrust significance of this sort of "clout" also seems to have escaped the agency which is charged with the enforcement of Section 3 as well as section 7 of the Clayton Act.

[5] We must balance the equities when a supplicant seeks injunctive relief [9] and we find that PepsiCo has invested $57 million in acquiring an 83% interest in a company, including substantially all of the stock of a management which the Commission insists remain at the helm. PepsiCo is opposed to a Piels acquisition as imprudent and detrimental to the interests of PepsiCo as well as the minority stockholders of Rheingold. We of course cannot predict whose business judgment is sounder but the Commission is in no better position. It did not seek to enjoin the acquisition of the shares by PepsiCo and in view of the *fait accompli* of 83% control and the staggering investment made,

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ture of Illegally Held Assets: Observations on its Scope, Objective, and Limitations, 64 Mich.L.Rev. 1574, 1587–1588 (1966). Many other factors, however, are relevant and must be considered. *United States* v. *Reid Roller Bit Co.*, 274 F. Supp. 573, 584–592 (W.D.Okl. 1967) (partial divestiture appropriate).

[9] *United States* v. *Ingersoll-Rand Co.*, *supra*, 320 F.2d at 525; *United States* v. *Atlantic Richfield Co.*, *supra*, 297 F. Supp. at 1073–74.

we are not persuaded that we should deprive PepsiCo of its corporate managerial responsibilities particularly when incumbent management has divested itself of its stock interests.

[6] While it is elementary that PepsiCo's intentions in acquiring Rheingold are not to be considered in determining whether a Section 7 Clayton Act violation occurred, it is helpful to examine them now in light of the extraordinary relief which is sought. PepsiCo very probably has no interest in the beer business and in fact urges that its acquisition was motivated by Rheingold's diversion of the income from the soft drink bottling business to salvage its beer business, to the detriment of its PepsiCo franchises in Puerto Rico, Mexico City and California. PepsiCo argues that Rheingold was not properly expanding and exploiting certain territorial markets which could be profitable to PepsiCo. PepsiCo further urges that it will make capital investments and operational changes which will maximize the earnings potential not only of Rheingold but Flavette. PepsiCo states flatly that third parties have already indicated an interest in purchasing Flavette. We therefore do not find that Flavette's viability as a competitor in the soft dring business will be at all assured by the perpetuation of Rheingold as it is presently constituted and managed. Nor are we persuaded that the separation of Flavette if it is eventually ordered, will be virtually impossible of achievement.

While we are fully aware of the fact that there may well be a difference between promise and performance, any doubt in our mind is dissipated by PepsiCo's willingness to enter into a hold-separate agreement to preserve and protect the Rheingold concentrate and domestic soft drink bottling assets so that the Commission and this Court, in the event that a violation of Section 7 shall be found, will be able to order effective divestiture relief. To this end PepsiCo has advised that the Flavette subsidiaries and the Mason & Mason root beer concentrate operations will be operated as a separate identifiable business entity, that the presently utilized trademarks and trade names will be preserved and protected by that entity and will be continued to be used by it to identify the products involved. In the event of a divestiture order, the business entity will have assets, facilities and equipment and a sales and distribution system equal to that which it had before the acquisition of PepsiCo. Even if divestiture of the franchised bottling operation in the United States is ordered, PepsiCo has agreed that assets, facilities and equipment, sales and distribution systems will be equal to or better than before the PepsiCo acquisition. Moreover, PepsiCo has announced its agreement to **[31]** continue to sell

Flavette through Rheingold bottlers and to guarantee that Flavette sales will increase at least the industry rate during the pendency of the complaint. Realistically in view of the necessity of Rheingold to deal with labor problems, the banking industry and the business community during this crucial period, it would appear to us to be totally inequitable to prevent PepsiCo from now guiding and operating this company when long range decisions vitally affecting its stockholders must be made. At the same time we see no great hardship in requiring PepsiCo to continue the Rheingold beer operation and to maintain its assets until such time as the expedited administrative proceedings are terminated.

[7] In the light of all the circumstances, we conclude that no preliminary injunction should issue here on the condition that the proposed hold-separate agreement be promptly entered into by the parties. We add two further conditions:

First, that the proposed escape clause giving PepsiCo the unilateral option of terminating the agreement on 30 days' prior written notice to the Commission be eliminated.

Second, that the new management agree not to divest Rheingold of its beer business or assets or any part thereof pending the resolution of the expedited action promised by the FTC for its administrative proceedings. The Commission and PepsiCo are directed to enter into such an agreement and the temporary restraining order of this Court will be thereupon dissolved.

Jurisdiction is retained for the purpose of enabling any of the parties to this proceeding to apply to this Court for such orders and directions as may be necessary for the construction or carrying out of this order, for the modification of any provisions thereof, and for the enforcement of and compliance therewith and punishment for violations thereof.

F.T.C. v. ROBERT E. SHELDON, BEVERLEE SHELDON, A/K/A BEVERLEE CHOATE, AND TERRY LEE ARMAS, III, D/B/A REJUVENATION CENTER LTD.*

Civ. A. No. SA-73-CA-83. F.T.C. File No. 99-148.

(United States District Court for the Western District of Texas, San Antonio Division, April 17, 1973)

Upon consent of the parties, court issues temporary injunction enjoining respondents pending the completion of administrative proceedings from making several representations with regard to their facial rejuvenation cosmetic face peel process, and from disseminating specific advertisements being challenged by the F.T.C. and any other advertisements of like import.

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*Not otherwise reported. For case before the Commission, see 83 F.T.C. 676. See also p. 804 herein.

William S. Sessions, U.S. Atty., *Gerald Harwood*, Atty., and *Nicholas S. Reynolds*, Atty., Washington, D.C., for petitioner.

Leroy Morgan Jahn, Atty., for respondents.

Before SUTTLE, *District Judge*.

TEMPORARY INJUNCTION

This matter having come on for hearing before this Court and the Court having considered petitioner's verified application for a temporary injunction and other relief filed pursuant to Section 13(a) of the Federal Trade Commission Act, 15 U.S.C. § 53(a), the attachments thereto, and other papers filed by the parties, this Court finds as follows:

1. Jurisdiction to grant this Temporary Injunction is conferred by Section 13(a) of the Federal Trade Commission Act, 15 U.S.C. § 53 (a). Respondents Robert E. Sheldon, Beverlee Sheldon, also known as Beverlee Choate, and Terry Lee Armas, III, are within the territorial jurisdiction of this Court since they maintain their office and principal place of business at 8151 Broadway, Suite 110, San Antonio, Texas.

2. Respondents disseminate, and cause to be disseminated, advertisements in commerce and through the United States mails. Section 12 of the Federal Trade Commission Act, 15 U.S.C. § 52.

3. Such advertisements are disseminated for the purpose of inducing and are likely to induce, directly or indirectly, the purchase of respondents' cosmetic process.

4. Respondents' cosmetic process is either a drug or a cosmetic or both, as defined in Sections 15 (b) and (c) of the Federal Trade Commisison Act, 15 U.S.C. §§ 55(b) and (c).

5. Petitioner, the Federal Trade Commission, an agency of the United States Government, has reason to believe that certain advertisements distributed either directly or indirectly by respondents in interstate commerce (Exhibits 1, 2, 3, 5, 6 and 7 to Petitioner's application) contain numerous false and misleading statements.

6. Petitioner also has reason to believe that contrary to representations made in respondents' advertising:

a. Respondents' cosmetic process is a procedure involving chemical surgery in the removal of the outer layers of skin.

b. Respondents' cosmetic process involves abrasive chemicals which induce second degree burns to peel the outer layers of skin and which in fact can cause excruciating pain in some cases.

c. Only minor manifestations of aging such as very fine wrinkles in carefully selected patients can be removed by face peeling under optimum medical conditions. Even when conducted by professional medical cosmetic surgeons under closely-controlled clinical conditions and with optimum results, the more youthful appearance will rarely last more than 18 months, at the end of which time the patient will again appear his or her actual chronological age.

d. Those receiving cosmetic face peels cannot reasonably expect that their appearance will be altered by more than a year or two from their actual chronological age, even when optimum results are obtained by professional medical cosmetic surgeons.

e. The cosmetic and respondents' cosmetic process are not safe but involve the inducement of the second degree burns of the skin, a process known as chemo-surgery, which is inherently dangerous unless performed by professional medical cosmetic surgeons under closely-controlled clinical conditions. When not properly administered by such professionals, the cosmetic can cause severe pain, uncontrolled and excessive burning of the skin, infection, disease and scarring.

f. Respondents' cosmetic process involving facial rejuvenation through face peels is not widely accepted by the medical profession. Rather, many professional medical cosmetic surgeons will not conduct face peels because of the possible adverse side effects, and normally the great majority of patients who request face peels from professional medical cosmetic surgeons are refused due to allergies, skin sensitivity and other factors.

g. Respondents are not trained professionals. Beverlee Sheldon is not a registered nurse nor is Robert Sheldon a chemist or licensed pharmacist.

7. Petitioner has issued an administrative complaint under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, charging respondents with violations of Sections 5 and 12 of the Act, 15 U.S.C. §§ 45, 52. Pending the completion of administrative proceedings and until the complaint is dismissed by the Commission or set aside by a court of appeals upon review of administrative proceedings, or the order of the Commission to cease and desist made thereon has become final within the meaning of Section 5 of the Act, 15 U.S.C. § 45, the Commission in the interim has no effective way of protecting the public from the continued dissemination by respondents, directly or in-

directly, of advertisements that the Commission has reason to believe are false and misleading, except by the issuance of this temporary injunction.

Accordingly, a proper showing having been made by Petitioner, it is now by this Court hereby

Ordered, That respondents Robert E. Sheldon, Beverlee Sheldon, also known as Beverlee Choate, and Terry Lee Armas, III, individuals doing business as Rejuvenation Center Ltd., and respondents' agents, representatives and employees, be and the same are hereby temporarily enjoined pending the completion of petitioner's administrative proceedings and until the administrative complaint therein is dismissed by the Commission or set aside by a court of appeals upon review of the administrative proceeding, or the order of the Commission to cease and desist made thereon has become final within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as follows:

A. Respondents are enjoined from representing directly or by implication:

1. That respondents' cosmetic process involving skin peeling or any other similar process does not involve chemical surgery.
2. That respondents' cosmetic process involving skin peeling is painless and involves no use of caustics.
3. That respondents' cosmetic process will permanently remove signs of aging.
4. That respondents' cosmetic process will cause their clients to appear any specific number of years younger than their actual chronological age.
5. That respondents' cosmetic process is a safe procedure free from possible serious side effects or complications.
6. That respondents' cosmetic process is widely accepted by the medical profession as performed by respondents.
7. That respondents are professionals in the field of medicine, or that any of them is a registered nurse, chemist or pharmacist.
8. That prospective clients should not seek medical advice or have skin sensitivity or allergy tests conducted prior to subjection to respondents' cosmetic process.

B. Respondents are enjoined from disseminating or causing to be disseminated the advertisements which are attached to and incorporated in petitioner's Application as Exhibits 1, 2, 3, 5, 6 and 7, or any other advertisements of like import.

C. Respondents are enjoined from advertising, offering for sale, selling or in any manner applying or dispensing their cosmetic process or any other like process unless they make clear and conspicuous disclosures in all advertising and in all oral sales presentations:

1. That respondents' cosmetic process resembles a chemosurgical process in which the outer layers of skin are burned chemically and are later peeled away, and that because of the chemical nature of respondents' cosmetic process there is a probability of discomfort and pain, and risks of infection, disease and permanent scarring.

2. That should the above-described adverse side effects result, respondents are not professionals equipped or trained to provide the necessary medical aid and attention to their clients.

4.* That many professional medical cosmetic surgeons refuse to perform skin peeling procedures on the majority of those requesting the treatment due to the possibility of complications which may arise, and further that even those professional medical cosmetic surgeons who will perform such procedures will do so only under clinical conditions and only after a consultation and review of relevant medical history.

5. That respondents are not licensed to practice medicine or to prescribe or dispense drugs or cosmetics which by law may be prescribed or dispensed only by a doctor or pharmacist.

6. That prospective clients should consult with a physician concerning skin sensitivity or possible allergic reactions prior to subjection to respondents' cosmetic process.

It is further ordered, That respondents:

1. Distribute a copy of this order to each of their agents, representatives, and employees, and obtain written acknowledgement of receipt from such persons.

2. Provide each present and prospective client with a separate disclosure sheet containing the information required in subparagraph C of this order, and prior to applying the cosmetic process require such prospective client after receipt of this disclosure sheet to consult with a duly licensed physician of the client's choice, who is not associated financially with respondents, regarding the nature of the process which resembles a chemo-surgical process, and the possibilities of discomfort, pain, infection, disease, and scarring, and obtain from such prospective clients

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*Number three (3) is missing from the original document received from the court.

and retain a certification signed by said licensed physician, who was consulted as required herein, such certification specifying that said physician has examined the prospective client for general mental and physical health and has tested the prospective client for skin sensitivity, possible allergic reaction, and blood characteristics, and on the basis of such examination and tests has explained to the prospective client that the process resembles a chemosurgical process, and has advised the prospective client of the probabilities of discomfort and pain, and risks of infection, skin disease and scarring.

3. Set forth the disclosures required in subparagraph C of this order separately and conspicuously from the balance of each advertisement or presentation used in connection with the advertising, offering for sale, sale, or distribution of respondents' cosmetic process, and shall devote no less than 15% of each advertisement or presentation to such disclosures; provided, however, that in advertisements which consist of less than 10 column inches in newspapers or periodicals, and in radio or television advertisements with a running time of one minute or less, respondents may substitute the following statement, in lieu of the above requirements:

Warning: This application involves chemical surgery whereby chemicals are applied to various parts of the body and skin is peeled away. Discomfort, pain, and medical problems may occur. Continuing care is necessary. Consult your own physician.

No less than 15% of such advertisements shall be devoted to this disclosure, such disclosure shall be set forth clearly and conspicuously from the balance of each of such advertisements, and if such disclosure is in a newspaper or periodical, it shall be in at least eleven point type.

4. Promptly notify the Federal Trade Commission of the discontinuation of their present business or employment and of their affiliation with a new business or employment in Texas or in any other state or territory. Such notices shall include respondents' current business or employment in which they are engaged as well as a description of their duties and responsibilities.

5. Furnish to the Federal Trade Commission a complete list of the names and addresses of respondents' present and past customers, together with the date or dates on which such customers were subjected to respondents' cosmetic process.

This temporary injunction is issued without bond on the part of the petitioner.

FEDERAL TRADE COMMISSION

v.

MANAGER, RETAIL CREDIT COMPANY, MIAMI BRANCH OFFICE*

Civ. A. No. 1508–72. F.T.C. File No. 99–131

(United States District Court, District of Columbia, April 23, 1973)

1. **Fair Credit Reporting Act Could Not Be Construed as Authorizing F.T.C. To Obtain Consumer Reports Without Following Provisions of Act in Regard to a Court Order or Written Instructions of the Consumer on Basis That Such Construction Was Necessary To Carry Out a Policy of the Act.**

[348] Under the Fair Credit Reporting Act, the Federal Trade Commission is precluded from obtaining a consumer report from a credit-reporting agency other than pursuant to order of a court having jurisdiction to issue such an order, or pursuant to written instructions of the consumer whose file it seeks, and Act could not be construed as authorizing Commission to obtain consumer reports without following provisions of the Act in regard to a court order or written instructions of the consumer on basis that such construction was necessary in order to carry out a policy of the Act.

2. **Except in Response to a Court Order or Pursuant to Written Instructions of Consumer Whose File It Seeks, F.T.C. Is Not Authorized To Obtain Consumer Reports From Persons Other Than Consumer-Reporting Agencies.**

The Federal Trade Commission is not authorized to obtain consumer reports from persons other than consumer-reporting agencies, except in response to a court order or pursuant to written instructions of the consumer whose file it seeks.

3. **F.T.C. Not Required by Either Federal Rules of Civil Procedure or the Fair Credit Reporting Act To Join Affected Consumers in Any Action To Obtain Court Order Requiring Credit-Reporting Agency To Disclose Consumer Report.**

Neither the Federal Rules of Civil Procedure, nor the Fair Credit Reporting Act require the Federal Trade Commission to join affected consumers in any action to obtain a court order pursuant to the Fair Credit Reporting Act requiring a credit-reporting agency to disclose a consumer report.

(Syllabus, with substituted captions, taken from 357 F. Supp. 347)

Court held that F.T.C. is not authorized to obtain consumer reports from a consumer-reporting agency or from persons other than consumer-reporting agencies, except in response to a court order or pursu-

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*Reported in 357 S. Supp. 347 (1973); *rev'd* 515 F. 2d 988 (1975), see p. 1246 herein.

ant to written instructions of the consumer whose file it seeks; and neither the Fair Credit Reporting Act nor the Federal Rules of Civil Procedure require the F.T.C. to join affected consumers in an action to obtain a court order pursuant to Fair Credit Reporting Act.

Harold D. Rhynedance, Jr., James P. Timony, Washington, D.C., for petitioner.

Edward J. Schmuck, Francis M. Gregory, Jr., Richard J. Pierce, Jr., Washington, D.C., for respondent.

CHARLES R. RICHEY, *District Judge:*

MEMORANDUM OPINION

This cause came before the Court for trial without a jury on Petitioner's verified "Petition for an Order Requiring Respondent to Appear and Produce Documentary Evidence in an Investigation Being Conducted by the Federal Trade Commission, and for Declaratory Relief," and on Respondent's Counterclaim for Declaratory Relief and Motion to Dismiss for Failure to Join Indispensable Parties. For the reasons developed below, the Court has determined that the declaratory relief sought by Petitioner should be denied, the declaratory relief sought by Respondent granted in part and Respondent's Motion to Dismiss denied.

I. BACKGROUND

Acting pursuant to the authority granted by section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, and to its resolution dated January 18, 1972, the Federal Trade Commission, Petitioner herein, has been conducting an investigation of the acts and practices of certain consumer reporting agencies, including Respondent Retail Credit Company, to determine whether there is a violation of the provisions of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., and section 5 of the Federal Trade Commission Act, 15 U.S.C. §45.

In connection with the investigation, Petitioner, on April 1, 1972, issued a *subpoena duces tecum* to Respondent Manager, Retail Credit Company, Miami Branch Office, returnable in Washington, D.C., or by mail. The Retail Cred**[349]**it Company is a consumer reporting agency in the business of securing and storing information about consumers and selling such information to business concerns to assist them in making business decisions. The information is used in determining the consumer's fitness for life, health, fire and casualty insurance, or the job applicant's employability, and includes the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. Consumer reporting agencies communicate this information to their business customers by means of consumer reports.

Specifications 7 and 9 of the subpoena issued to Respondent sought the production of its consumer reports. Generally, specification 7 sought the complete files of all consumers who have contacted the Miami Branch Office of Retail Credit Company for disclosure of the information in their files since January 1, 1972, and specification 9 sought the complete files of all individuals investigated by four named credit investiagtors during specified periods of time ranging from six days to one month.

By letter dated May 8, 1972, to the Assistant Director for Consumer Credit and Special Programs, Bureau of Consumer Protection, Federal Trade Commission, the Retail Credit Company, by its counsel, furnished some of the information and documents sought by the subpoena, but refused to comply with specifications 7 and 9, which called for its consumer reports. As stated in the letter, the primary reasons for which Respondent refused to comply with these specifications were that it believed such compliance would violate section 604 of the Fair Credit Reporting Act, 15 U.S.C. § 1681b, and would violate the rights of privacy of the consumers whose reports would be revealed.[1]

In the face of this denial, the Federal Trade Commission filed in this Court its petition seeking both an order requiring Respondent to comply with specifications 7 and 9 of the *subpoena duces tecum*, and a declaratory judgment that consumer reporting agencies are entitled to furnish consumer reports to the Commission irrespective of the requirements of section 604 of the Fair Credit Reporting Act. Respondent then filed a counterclaim seeking a declaratory judgment that the Commission may not receive consumer reports from Respondent other than pursuant to the terms of the Fair Credit Reporting Act, and that any consumers whose reports were sought by the Commission were indispensable parties to this litigation. It further moved to dismiss the action on the grounds that there had been a failure to join as indispensable parties the consumers whose reports were being sought.

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[1] Section 604 of the Fair Credit Reporting Act provides:

"A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

"(1) In response to the order of a court having jurisdiction to issue such an order.

"(2) In accordance with the written instructions of the consumer to whom it relates.

"(3) To a person which it has reasons to believe—

(A) intends to use the informaton in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer."

Following the filing of the petition and counterclaim herein, the Commission secured consumer reports prepared by **[350]** the Retail Credit Company from two insurance company users of Respondent's consumer reports, solely on the basis of the Commission's administrative *subpoena duces tecum*. As a result, Respondent moved for and was granted leave to amend its counterclaim to seek additional declaratory relief that the Commission may not obtain consumer reports prepared by Respondent from *any* person unless pursuant to the requirements of section 604 of the Fair Credit Reporting Act.

II. ISSUES

The following issues are before the Court for decision. First, whether section 621(a) of the Fair Credit Reporting Act, 15 U.S.C. § 1681s(a), authorizes the Federal Trade Commission to obtain consumer reports from consumer reporting agencies without the written permission of the consumer or a court order as required by section 604 of the Fair Credit Reporting Act? Second, whether section 621(a) of the Fair Credit Reporting Act, 15 U.S.C. § 1681s(a), authorizes the Federal Trade Commission to obtain consumer reports from sources other than consumer reporting agencies? Third, whether Rule 19 of the Federal Rules of Civil Procedure and section 604 of the Fair Credit Reporting Act require that this action be dismissed for Petitioner's failure to join the affected consumers as indispensable parties?

III. DISCUSSION

A. *The terms of the Fair Credit Reporting Act Prevent the Federal Trade Commission from Obtaining a Consumer Report from Respondent Other Than Pursuant to an Order of a Court Having Jurisdiction to Issue Such an Order, or Pursuant to the Written Instructions of the Consumer Whose File It Seeks.*

[1] The parties agree that specifications 7 and 9 of Petitioner's *subpoena duces tecum* call for Respondent's "consumer reports."[2] Section 604 of the Fair Credit Reporting Act delineates the circumstances

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[2] Section 603(d) of the Fair Credit Reporting Act, 15 U.S.C. 1681a(d) defines a "consumer report" in relevant part as follows: "The term 'consumer report' means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 604."

under which a consumer reporting agency is authorized to furnish such reports. Only two of the circumstances so delineated are relevant to the instant proceeding. The relevant portions of Section 604 provide:

> A consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> (1) In response to the order of a court having jurisdiction to issue such an order.
>
> (2) In accordance with the written instructions of the consumer to whom it relates.

Respondent contends that this section, particularly when taken in conjunction with section 608 of the Act, 15 U.S.C. § 1681f, prohibits it from furnishing a consumer report in response to the administrative subpoena of *any* Government agency, including Petitioner. Section 608 of the Act provides:

> Notwithstanding the provisions of section 604, a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former address, places of employment, or former places of employment, to a government agency.

The Commission argues that it has the power to subpoena consumer reports **[351]** under the Act, in the absence of a court order or written consent from the consumer, by virtue of section 621(a), 15 U.S.C. § 1681s(a), which provides in pertinent part:

> The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power * * * to require * * * the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title.

The relevant portion of the Federal Trade Commission Act is section 9, 15 U.S.C. § 49, which provides in pertinent part:

> For the purposes of this Act, the commission * * * shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.

The Commission contends, and produced witnesses at trial to show, that without quick access to consumer reports, which are the primary source of information as to whether consumer reporting agencies are complying with the statute, it will not be able as a practical matter to vigorously and expeditiously enforce the Act.

There can be little doubt that the Fair Credit Reporting Act is inconsistent as regards the Commission's authority to obtain consumer reports. On the one hand, the Federal Trade Commission is charged with the duty of enforcing the Act, a duty which necessitates the efficient procurement of consumer reports from consumer reporting agencies which are the subjects of Commission investigations. In discharging its duty, the commission is *generally* authorized to require the production of documents. On the other hand, the Act prohibits a consumer reporting agency from furnishing consumer reports other than in compliance with the requirements set forth in section 604.

Moreover, the policy considerations underlying these provisions of the Act are in conflict as to the goals to be achieved. Inspection of consumer reports by the Federal Trade Commission would be directed primarily at protecting consumers from the failure of consumer reporting agencies to comply with the Act.[3] However, section 604 was undoubtedly directed, in part at least, at preventing investigations by governmental agencies which might seek to use the information obtained from consumer reports to prosecute the consumer.[4]

The Commission urges the Court to adopt a construction of the Fair Credit Reporting Act that would not require the Commission to follow the provisions of section 604, which it contends must be viewed in the context of the whole Act and its object and policy.[5] It argues that to require the Commission to get a court order or written permission of consumers in order to obtain reports from consumer reporting agencies would effectively stop enforcement of the Fair Credit Reporting Act, and that there is a presumption against construing a statute so as to render it ineffective.[6]

[352] There can be little doubt that government agencies in general are held to the provisions of section 604. This is evidenced by section 608 of the Act, quoted above, which allows a consumer reporting agency to furnish a governmental agency with *identifying* information concerning a consumer. But the type and amount of information which may thus be furnished is specifically limited, and the fact that such information may be furnished to government agencies *notwithstanding* section 604 makes it clear that section 604 was intended to apply to government agencies as well as others seeking consumer reports.

Moreover, the legislative history of the Fair Credit Reporting Act indicates that Congress clearly intended that no government agency should receive a consumer report other than pursuant to the provisions of section 604.[7] The Senate Committee Report on S. 823 as passed by the Senate on November 6, 1969, reflects an intent and concern that consumers be secure against unlimited governmental acquisition of personal information about them.[8] The Report explained the interrelationship of section 604 and section 608 as follows:[9]

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[3] The importance of such inspection is heightened by the fact that the consumers themselves cannot get copies of their own reports.

[4] Hearings on Fair Credit Reporting Before the Senate Subcommittee on Financial Institutions, 91st Cong. 1st Sess. at 433 (1969).

[5] See *Richards* v. *United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962), for the general rule of statutory construction.

[6] *United States* v. *Blasius*, 397 F.2d 203, 206 (C.A. 2) *cert. denied*, 393 U.S. 1008, 89 S.Ct. 615, 21 L.Ed.2d 557 (1968); *General Motors Acceptance Corp.* v. *Whisnant*, 387 F.2d 774, 778 (C.A. 5 1968).

> Section 608.—*Disclosure to Governmental Agencies*—
>
> The disclosure of information to governmental agencies is limited to identifying type information * * * unless the governmental agency has obtained a court order or is a bona fide creditor, insurer, employer, or licensor.

It should be noted that no special exception is made for the Federal Trade Commission.

Despite the arguments of the Commission, the Court does not believe that it can or should create an exception to the requirements of section 604 of the Act. Nor does it believe that requiring the Commission and consumer reporting agencies to comply with the requirements of section 604 will have the drastic effects forecast by the Commission. The goals of protecting consumers by (1) enforcing compliance with the Act while (2) preventing unwarranted intrusions into their personal files can both be reached if the Court maintains flexibility in fashioning its order requiring production of the reports. Thus, the Commission may be held to the requirements of section 604 without effectively precluding it from obtaining the reports it seeks. Under these circumstances, the proper mode of statutory construction is that the specific provisions of section 604 will not be overridden by inferences from the more general congressional declarations concerning the Commission's powers and duties of enforcement.[10]

The Court will not adopt the construction urged upon it and create what would amount to special provision for the benefit of the Commission. The **[353]** Commission will be held to the requirements of section 604 of the Act.

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[7] See generally Hearings on Fair Credit Reporting Before the Subcommittee on Consumer Affairs of the Committee on Banking and Currency, 91st Cong. 2d Sess. (1970).

[8] S 823 ultimately was enacted into law with certain amendments agreed to by the Senate and House Conference Committee on H.R. 15073, the Foreign Bank Secrecy Act, to which S 823 had been appended by the Senate. The Conference Committee did not agree to any amendment concerning the revelation of information to Government agencies by consumer reporting agencies.

[9] Report of the Committee on Banking and Currency, Fair Credit Reporting, Sen. Rep. No. 91–517, 91st Cong., 1st Sess. at 6 (1969).

[10] For the rule of statutory construction see, *e.g.*, *Clifford F. MacEvoy Co.* v. *United States for the Use and Benefit of Calvin Tomkins Co.*, 322 U.S. 102, 107, 64 S.Ct. 267, 88 L.Ed. 433 (1944); *D. Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208, 52 S.Ct. 322, 76 L.Ed. 704 (1932); *United States* v. *City of Chester*, 144 F.2d 415, 421 (C.A. 3, 1944); *Sun Ins. Co. of New York* v. *Diversified Engineers, Inc.*, 240 F. Supp. 606, 609 (D.Mont.1965); *Bradford Novelty Co.* v. *Manheim*, 156 F. Supp. 489, 491 (S.D.N.Y.1957).

B. *The Federal Trade Commission Is Not Authorized to Obtain Consumer Reports from Persons Other Than Consumer Reporting Agencies, Except in Response to a Court Order or Pursuant to the Written Instructions of the Consumer Whose File It Seeks.*

[2] The Commission argues that it may obtain consumer reports from users of the reports, such as insurance companies, without a court order or written permission from the consumers involved, because section 604 of the Fair Credit Reporting Act applies only to consumer reporting agencies and not to users of the reports. The problem with this approach is that it would allow the Commission, or any other governmental agency, to obtain through indirection material which it may not obtain from consumer reporting agencies unless the requirements of section 604 are met. The right of the consumer to limit governmental access to personal data in consumer reports to those occasions when the Government agency qualifies under section 604 would thus be frustrated. Clearly it was not the intent of Congress to provide this back door approach to obtaining the desired information. The Court finds, therefore, that section 604 of the Act precludes the Commission from obtaining consumer reports from users or persons other than consumer reporting agencies unless it complies with the requirements of section 604 of the Fair Credit Reporting Act.

C. *Rule 19 of the Federal Rules of Civil Procedure and Section 604 of the Fair Credit Reporting Act Do Not Require the Federal Trade Commission to Join the Affected Consumers in Any Action to Obtain a Court Order Pursuant to Section 604(1) of the Fair Credit Reporting Act.*

[3] Because the Court has found that the Commission is bound to adhere to the requirements of section 604 of the Act, the Court shall treat its Petition in these proceedings as a request for a court order pursuant to section 604(1) of the Act. Viewing the case in this posture, Respondent contends that the action must be dismissed by the Court for the Commission's failure to join the consumers whose reports are sought, such joinder being required under Rule 19 of the Federal Rules of Civil Procedure and section 604 of the Fair Credit Reporting Act.

Rule 19(a) of the Federal Rules of Civil Procedure requires that a person "who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter" shall be joined as a party if:

> (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a prac-

tical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Respondent argues that the consumers must be joined under Rule 19 (a) because their absence will both impair their ability to protect their rights of privacy and will expose an existing party (Respondent) to inconsistent obligations.[11]

The Court notes that Rule 19 emphasizes "the pragmatic consideration of the effects of the alternatives of pro**[354]**ceeding or dismissing" the action in the absence of certain persons before the Court.[12] It has determined that Rule 19(a) does not require joinder of the consumers whose reports are sought in the instant proceeding because "as a practical matter," and in view of the procedures which the court may require in allowing the Commission to obtain the reports, the consumers will be able to protect their interests in their personal privacy without being made parties to the action. Nor can the Court find that any "substantial risk" will be incurred by the Respondent if the consumers are not joined. The possibility that Respondent may become subject to a later suit by consumers for releasing their files pursuant to a court order is remote at best.

The Court further notes that joinder of all the consumers whose files are sought might well paralyze the Commission's enforcement of the law, and therefore frustrate the valid national policy expressed by the Fair Credit Reporting Act. Under these circumstances, it cannot be held that section 604 of the Act requires joinder of all affected consumers.

IV. CONCLUSION

In accordance with the aforegoing, the Court will enter an Order declaring that the Federal Trade Commission may obtain consumer reports from Respondent or any other person in possession of such reports only pursuant to a court order or with the written consent of the consumer. The Commission's Petition shall be treated as a request for a court order pursuant to section 604 of the Fair Credit Reporting Act, and that request shall be granted subject to the procedures set forth in the Order. Generally, those procedures shall require the Commission to notify by publication and mail the persons whose consumer reports are sought. Any person so notified shall have the opportunity to object to the production of his file before the Commission, and the Respondent shall not be required to produce the files of those persons indicating their objection. After proper notification, the reports of those consumers who have not objected shall be promptly forwarded to the Commission. In this manner, the interests of the consumers will be protected without necessitating their joinder in this action. The Motion of Respondent to Dismiss for Failure to Join Indispensable Parties will accordingly be denied.

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[11] Respondent argues that if it produces the contents of a consumer's file pursuant to a court order issued in an action in which the consumer is not a party, it may well become subject to a later suit by the consumer for invasion of privacy, resulting from an asserted violation of the Fair Credit Reporting Act.

[12] *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 116–117, n. 12, 118, 88 S.Ct. 733, 742, 19 L.Ed.2d 936 (1968).

LEILA MOURNING v. FAMILY PUBLICATIONS SERVICE, INC.*

No. 71-829

(Supreme Court of the United States, April 24, 1973)

1. AWARENESS OF CONGRESS THAT SOME CREDITORS WOULD ATTEMPT TO CIRCUMVENT ESTABLISHED CONGRESSIONAL BOUNDARIES IN CREDIT TRANSACTIONS WAS EVIDENCED IN SECTION OF TRUTH IN LENDING ACT DELEGATING BROAD AUTHORITY TO FEDERAL RESERVE BOARD TO PROMULGATE NECESSARY REGULATIONS TO RENDER ACT EFFECTIVE.

[1652] Section of Truth in Lending Act delegating to the Federal Reserve Board broad authority to promulgate necessary regulations to render Act effective evinces awareness of Congress that some creditors would attempt to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish and desire of Congress to insure that Board has adequate power to deal with such attempts at evasion.

2. BROAD AUTHORITY DELEGATED TO FEDERAL RESERVE BOARD EMPOWERS IT TO DEFINE SUCH CLASSIFICATIONS AS ARE REASONABLY NECESSARY TO INSURE OBJECTIVES OF ACT ARE FULFILLED.

By delegating broad authority to Federal Reserve Board to promulgate regulations necessary to render Truth in Lending Act effective, Board is empowered to define such classifications as are reasonably necessary to insure that objectives of Act are fulfilled no matter what adroit or unscrupulous practices are employed by those extending credit to consumers.

3. VALIDITY OF REGULATION PROMULGATED UNDER EMPOWERING PROVISIONS OF STATUTE WILL BE SUSTAINED SO LONG AS IT IS REASONABLY RELATED TO PURPOSE OF ENABLING LEGISLATION.

Where empowering provision of statute simply states that agency may make such rules and regulations as may be necessary to carry out provisions of Act, validity of regulation promulgated thereunder will be sustained so long as it is reasonably related to purposes of enabling legislation.

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*Reported in 411 U.S. 356 (1973), 93 S.Ct. 1652 (1973). Although this case does not directly involve the Federal Trade Commission, it has been included in this publication because of the statutory authority of the F.T.C. to enforce the requirements imposed under the Truth in Lending Act.

4. In Light of Legislative History of Truth in Lending Act, Federal Reserve Board's "Four Installment Rule" Does Not Exceed Statutory Authority.

In light of legislative history of Truth in Lending Act, Federal Reserve [1653] Board in promulgating the four installment rule compelling seller to comply with disclosure requirements of Act to those to whom it extends consumer credit without finance charge if sum owed is payable in more than four installments does not exceed statutory authority and is reasonably related to its objectives of preventing the evasion of reporting requirements of Act by concealing credit charges.

5. Court Should Defer To Informed Experience and Judgment of Agency Where Reasonable Minds Differ as to Which Remedial Measures Should be Chosen.

Where reasonable minds may differ as to which of several remedial measures should be chosen, court should defer to the informed experience and judgment of agency to whom Congress delegated appropriate authority.

6. References in Truth in Lending Act to Transactions in Which a Financial Charge Is in Fact Imposed Do Not Establish Invalidity of Federal Reserve Board's "Four Installment Rule."

None of the sections of Truth in Lending Act which refer specifically to transactions involving finance charges or any other sections of Act indicate congressional attempt to list comprehensively all types of transactions to which Federal Reserve Board regulations might apply, and therefor the references in Act to transactions in which a finance charge is in fact imposed do not establish invalidity of Federal Reserve Board four installment rule requiring disclosure in some cases in which no finance charge exists.

7. Where Deterrent Effect of Rule Implements Act's Objectives, It Is Not Void Because It Requires Disclosures by Creditors Not Charging Credit.

Since deterrent effect of Federal Reserve Board four installment rule implements objectives of Truth in Lending Act, rule is not void because it also requires disclosure by some creditors who do not charge credit and thus need not be deterred.

8. Because a Few Sections of Act Provide for Civil and Criminal Penalties Does Not Mean Every Section of Act Establishing Regulatory Scheme Must be Construed as Penal Provision.

Not every section of an act establishing a broad regulatory scheme must be construed as a penal provision merely because a few sections of the act provide for civil and criminal penalties.

9. To Insure No One Is Convicted Without Previous Clear Disclosure as to Intent of Law Regarding Violation Thereof, Penal Statutes Are Narrowly Construed.

Penal statutes are construed narrowly to insure that no individual is convicted unless a fair warning has been first given to the world in language that the common world will understand of what the law intends to do if a certain line is passed.

10. WHERE DISCLOSURE REQUIREMENT IS VIOLATED BUT NO FINANCE CHARGES ARE INVOLVED, IMPOSITION OF PENALTIES UNDER SECTION OF TRUTH IN LENDING ACT ASSESSING PENALTIES EQUAL TO TWICE THE AMOUNT OF IMPOSED FINANCE CHARGES BUT NOT LESS THAN $100 IS NOT FORBIDDEN.

Section of Truth in Lending Act providing that penalty assessed shall be twice the amount of finance charge imposed for not less than $100 does not forbid the imposition of civil penalty in cases in which no finance charges are involved but where a regulation requiring disclosure is violated.

11. WHERE CIVIL PENALTY PRESCRIBED IS MODEST AND PROHIBITIVE CONDUCT CLEARLY SET OUT, COURT NEED NOT CONSTRUE SECTION AS NARROWLY AS A CRIMINAL STATUTE.

Since civil penalty prescribed in Truth in Lending Act is modest and the prohibitive conduct clearly set out in regulation promulgated under Act, court need not construe the section imposing penalty as narrowly as a criminal statute providing graver penalties such as prison terms.

12. CONGRESS CANNOT BE REQUIRED TO TAILOR CIVIL PENALTY PROVISIONS TO DEAL WITH EACH STEP AGENCY FINDS NECESSARY.

Because objective in delegating rulemaking authority to an agency is to relieve Congress of the impossible burden of drafting code explicitly covering every conceivable future problem, Congress cannot be required to tailor civil penalty provisions so as to deal precisely with each step which agency thereafter finds necessary.

13. VIOLATION OF FOUR INSTALLMENT RULE WHERE FINANCE CHARGE WAS NONEXISTENT OR UNDETERMINED PROPERLY CALLS FOR IMPOSITION OF MINIMUM SANCTION UNDER SECTION 130 OF TRUTH IN LENDING ACT.

Under section of Truth in Lending Act providing that penalty assessed shall be twice the amount of finance charge but not less than $100, the imposition of the minimum sanction for violation of four installment rule was proper in case in which finance charge was nonexistent or undetermined.

14. FOUR INSTALLMENT RULE DOES NOT VIOLATE FIFTH AMENDMENT.

[1654] Federal Reserve Board four installment rule regulation under Truth in Lending Act applying the disclosure requirements of Act to those extending consumer credit without finance charge if sum owed is payable in more than four installments does not violate Fifth Amendment on the ground that it establishes conclusive presumption of determinative facts.

15. STATUTORY SCHEME OF TRUTH IN LENDING ACT IS WITHIN POWER GRANTED TO CONGRESS.

Statutory scheme of Truth in Lending Act is within power granted to Congress under the commerce clause.

16. SPECULATING ABOUT CONGRESSIONAL STATUTES IS NOT A FUNCTION OF THE COURT.

It is not a function of court to speculate as to whether statute is unwise or whether the evil sought to be remedied could have been better regulated in some other manner.

(Syllabus, with substituted captions, taken from 93 S.Ct. 1652)

The Supreme Court held that in light of legislative history of Truth in Lending Act, Federal Reserve Board in promulgating four installment rule does not exceed statutory authority and rule is reasonable related to its objectives of preventing the evasion of reporting requirements of Act by Concealing credit charges; and the regulation is not invalid as creating a conclusive presumption in violation of the Fifth Amendment.

Eric Schnapper, New York City, for petitioner.

A. Raymond Randolph, Jr., Wash., D.C., for United States, as *amicus curiae*, *pro hac vice*, by special leave of Court.

Robert S. Rifkind, Wash. D.C., for respondent.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST concurred, filed an opinion dissenting in part.

MR. JUSTICE POWELL filed a dissenting opinion.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

[**1655**] We granted the writ in this case to resolve whether the Federal Reserve Board exceeded its authority under § 105 of the Truth-in-Lending Act[1] in promulgating that portion of Regulation Z commonly referred to as the "Four Installment Rule."[2]

Respondent is a Delaware corporation which solicits subscriptions to several well known periodicals. In 1969, one of respondent's door-to-door salesmen called on the petitioner, a 73-year-old widow residing in Florida, and sold her a five-year subscription to four magazines. Petitioner agreed to pay $3.95 immediately and to remit a similar amount monthly for 30 months. The contract form she signed contained a clause stating that the subscriptions could not be cancelled and an acceleration provision similar to that found in many installment undertakings, providing that any default in installment payments would render the entire balance due. The contract did not recite the total purchase price of the subscriptions or the amount which remained unpaid after the initial remittance, and made no reference to service or finance charges. The total debt assumed by the petitioner was $122.45; the balance due after the initial payment was $118.50.

Petitioner made the initial payment, began to receive the magazines for which she had contracted, and then defaulted. Respondent declared the entire balance of $118.50 due and threatened legal action. Petitioner brought this suit in United States District Court, alleging that respondent had failed to comply with the disclosure provisions of the Truth-in-Lending Act. She sought recovery of the statutory penalty and reimbursement for the costs of the litigation, including reasonable attorney's fees.

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[1] 15 U.S.C. § 1604.

[2] 12 CFR § 226.2(k) (1972).

In support of her claim, petitioner submitted to the District Court a series of "dunning" letters which she had received from respondent. One letter, dated December 16, 1969 stated:

> "After making the terms of our contract clear to you, we went ahead in good faith and had your subscriptions entered for the entire periods you had agreed to take. The contract you signed is: Not subject to cancellation after acceptance or verification.
>
> Knowing, therefore, the obligations we have incurred in your name, we feel confident that you will continue your magazine subscriptions and make the convenient monthly payments regularly and promptly.[3]

A second letter, received a week later from respondent's agent, declared:

> After an account is three months delinquent it is brought to my attention. I feel that you should realize that you [1656] are receiving our merchandise which we have paid for. *Had you dealt directly with the publishers yourself, you would have had to pay them in advance for the magazines.*
>
> Again, let me remind you that we have ordered these magazines in advance and that you have incurred an obligation to repay us. *This is a credit account, and as such must be repaid by you on a monthly basis,* much the same as if you had purchased any other type of merchandise on a monthly budget plan. [Emphasis supplied; underlined words are emphasized in the original letter].[4]

Respondent admitted sending each of the above letters to petitioner.[5] In addition, respondent submitted one affidavit to the District Court, describing the nature of the contracts which it offered to its clients. The affidavit stated that a customer who ordered magazine subscriptions from respondent was required to pay for all magazines during the first half of the contract term.[6] Thus, according to the affidavit, at all times during the course of contract, a purchaser who has complied with the terms of the contract has paid for more magazines than she has received. Respondent did not, however, submit any affidavit to the court contesting any of the facts stated in its "dunning" letters. On this record, both parties moved for summary judgment, declaring explicitly that no factual question remained undecided.

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[3] App., at 21.

[4] App., at 20.

[5] Petitioner also submitted to the court a letter sent to her legal counsel by respondent's officer manager. The letter stated:

"Whereas, FPS, acts initially [*sic*] as agent for the various publishers; upon acceptance of her contract, FPS thereafter acts solely as financier and coguaranter [*sic*] of service with the various publishers; whereas, FPS, has fully invested in Mrs. Mourning's contract and does not receive refunds in part or full from any, or, all publishers; for said FPS, investment, we therefore, must insist on compliance of your client to the terms of said contract until fullfilment [*sic*] of said terms in the aforementioned contract result [*sic*] in mutual resolve of liability." App., at 14.

Respondent admitted that this letter had been written on its stationery by its employee, but denied that the employee was authorized to send it. Consequently, we do not consider the facts stated in the letter to have been admitted by respondent.

[6] Affidavit of Stanley R. Swanson, Vice President of Family Publications Service, Inc., Aug. 26, 1970, at 2 (District Court Record, at 198, 199). The affidavit also stated that, while customers of respondent were free to pay the entire price of their magazine subscriptions when their contract with respondent was signed, the price charged would be equal to the aggregate of the payments that would have been made had the customer elected to pay in installments. Respondent now admits that this statement was not true. In some cases, customers who agreed to pay the entire contract price immediately were charged less than the aggregate amount of the installment payments.

Section 121 of the Truth-in-Lending Act requires merchants who regularly extend credit, with attendant finance charges,[7] to disclose certain contract information "to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed. * * *"[8] Among other relevant facts, the merchant must, where applicable, list the cash price of the merchandise or service sold, the amount of finance and other charges, and the rate of the charges.[9] Failure to disclose renders the seller liable to the consumer for a penalty of twice the amount of the finance charge, but in no event less than $100 or more than $1,000.[10] The creditor may also be assessed for the costs of the litigation, including reasonable attorney's fees,[11] and in certain circum**[1657]**stances not relevant here, may be the subject of criminal charges.[12]

Section 105 of the Act [13] provides:

> The [Federal Reserve] Board shall prescribe regulations to carry out the purposes of [the Act]. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

Accordingly, the Board has promulgated Regulation Z, which defines the circumstances in which a seller who regularly extends credit must make the disclosures outlined in § 128.[14] The regulation provides that disclosure is necessary whenever credit is offered to a consumer "for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments." [15]

Relying on the rule governing credit transaction of more than four installments, the District Court granted summary judgment for petitioner. The court found that respondent had extended credit to petitioner,[16] which by agreement was payable in more than four installments, but had failed to comply with the disclosure provisions of the Act.

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[7] Section 103(f), 15 U.S.C. § 1602(f). Certain transactions, not here relevant, are exempt under § 104, 15 U.S.C. § 1603.

[8] 15 U.S.C. § 1631.

[9] Section 128, 15 U.S.C. § 1638.

[10] Section 130, 15 U.S.C. § 1640.

[11] *Ibid.*

[12] Section 112, 15 U.S.C. § 1611.

[13] 15 U.S.C. § 1604.

[14] 15 U.S.C. § 1638.

[15] 12 CFR § 226.2(k) (1072).

The Court of Appeals reversed, holding that the Board had exceeded its statutory authority in promulgating the regulation upon which the District Court relied. The regulation was found to conflict with § 121 of the Act [17] since it required that disclosure be made in regard to some credit transactions in which a finance charge had not been imposed. As an alternative ground for its decision, the Court of Appeals held that the regulation created a conclusive presumption that credit payments made in more than four installments included a finance charge. Relying on *Schlesinger* v. *State of Wisconsin*, 270 U.S. 230, 46 S.Ct. 260, 70 L.Ed. 557 (1926), and *Heiner* v. *Donnan*, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772 (1932), the court concluded that such an irrebuttable presumption of fact violated the Due Process Clause of the Fifth Amendment.

I

Passage of the Truth-in-Lending Act in 1968 culminated several years of congressional study and debate as to the propriety and usefulness of imposing mandatory disclosure requirements on those who extend credit to consumers in the American market. By the time of passage, it had become abundantly clear that the use of consumer credit was expanding at an extremely rapid rate. From the end of World War II through 1967, the amount of such credit outstanding had increased from $5.6 billion to $95.9 billion, a rate of growth more than 4½ times as great as that of the economy.[18] Yet, as the congressional hearings revealed, consumers remained remarkably ignorant of the nature of **[1658]** their credit obligations and of the costs of deferring payment.[19] Because of the divergent, and at times fraudulent, practices by which consumers were informed of the terms of the credit extended to them, many consumers were prevented from shopping for the best terms available and, at times, were prompted to assume liabilities they could not meet.[20] Joseph Barr, then Under Secretary of the Treasury, noted in testifying before a Senate subcommittee that such blind economic activity is inconsistent with the efficient functioning of a free economic system such as ours, whose ability to provide desired material at the lowest cost is dependent on the asserted preferences and informed choices of *consumers*.[21]

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[16] Respondent challenges the finding of the District Court that credit was extended to petitioner. In some cases in which a consumer pays in installments for a magazine subscription, credit may not have been extended to the consumer. However, in view of the admissions by respondent which were before the District Court, respondent's failure to controvert those admissions by affidavit, and the litigation posture which respondent has consistently maintained beginning in the District Court, *i.e.*, that no factual matters remained unresolved, we conclude that summary judgment on this issue was properly granted. Fed.Rule Civ.Proc. 56(e).

[17] 15 U.S.C. § 1631.

[18] H.R. Rep. No. 1040, 90th Cong., 1st Sess., 10–11 (1967).

[19] Id., at 13, S. Rep. No. 392, 90th Cong., 1st Sess., 2–3 (1967).

[20] H.R. Rep. No. 1040, *supra*, n. 18, at 13 ; S. Rep. No. 392, *supra*, n. 19, at 1–2.

The Truth-in-Lending Act was designed to remedy the problems which had developed. The House Committee on Banking and Currency reported in regard to the then proposed legislation:

> [B]y requiring all creditors to disclose credit information in a uniform manner, and by requiring all additional mandatory charges imposed by the creditor as an incident to credit be included in the computation of the applicable percentage rate, the American consumer will be given the information he needs to compare the cost of credit and to make the best informed decision on the us eof credit.[22]

This purpose was stated explicitly in § 102 of the legislation enacted:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.[23]

[1,2] The hearings held by Congress reflect the difficulty of the task it sought to accomplish. Whatever legislation was passed had to deal not only with the myriad forms in which credit transactions then occurred, but also with those which would be devised in the future.[24] To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation. Section 105 delegated to the Federal Reserve Board broad authority to promulgate regulations necessary to render the Act effective. The language employed evinces the awareness of Congress that some creditors would attempt to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish. It indicates as well the clear desire of Congress to insure that the Board had adequate power to deal with such attempted evasion. In addition to

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[21] Hearings on H.R. 11601 before the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency, 90th Cong., 1st Sess., 76 (1967).

[22] H.R. Rep. No. 1040, *supra*, n. 18, at 13.

[23] 15 U.S.C. § 1601.

[24] See letter from Paul R. Dixon, Chairman of the Federal Trade Commission, to Senator A. Willis Robertson, Chairman of the Senate Committee on Banking and Currency, Feb. 18, 1964, in Hearings on S. 750 before a Subcommittee on Production and Stabilization of the Senate Committee on Banking and Currency, 88th Cong., 1st and 2d Sess., 1303 (1963–1964).

granting to the Board the authority normally given to administrative agencies to promulgate regulations designed to "carry out the [1659] purposes" of the Act, Congress specifically stated:

> These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper * * * to prevent circumvention or evasion [of the Act], or to facilitate compliance therewith.[25]

The Board was thereby empowered to define such classifications as were reasonably necessary to insure that the objectives of the Act were fulfilled, no matter what adroit or unscrupulous practices were employed by those extending credit to consumers.

One means of circumventing the objectives of the Truth-in-Lending Act, as passed by Congress, was that of "burying" the cost of credit in the price of goods sold. Thus in many credit transactions in which creditors claimed that no finance charge had been imposed, the creditor merely assumed the cost of extending credit as an expense of doing business, to be recouped as part of the price charged in the transaction.[26] Congress was well aware, from its extensive studies, of the possibility that merchants could use such devices to evade the disclosure requirements of the Act. The Committee hearings are replete with suggestions that such manipulation would render the Act a futile gesture in the case of goods normally sold by installment contract.[27] Opponents of the bill contended that the reporting provisions would actually encourage merchants who had formerly segregated their credit costs not to do so. They predicted that the effect of the Act would thus be to reduce the amount of information available to the consumer, a result directly contrary to that which was intended.[28] Proponents of the legislation claimed that the Act would enhance the consumer's ability to make an informed choice even if finance charges were hidden. In response to a claim that credit costs would be incorporated **[1660]** in the price of goods, Senator Douglas, who first proposed the Truth-in-Lending Act, stated:

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[25] 15 U.S.C. § 1604.

[26] For example, two merchants might buy watches at wholesale for $20 which normally sell at retail for $40. Both might sell immediately to a consumer who agreed to pay $1 per week for 52 weeks. In one case, the merchant might claim that the price of the watch was $40 and that the remaining $12 constituted a charge for extending credit to the consumer. From the consumer's point of view, the credit charge represents the cost which he must pay for the privilege of deferring payment of the debt he has incurred. From the creditor's point of view, much simplified, the charge may represent the return which he might have earned had he been able to invest the proceeds from the sale of the watch from the date of the sale until the date of payment. The second merchant might claim that the price of the watch was $52 and that credit was free. The second merchant, like the first, has forgone the profits which he might have achieved by investing the sale proceeds from the day of the sale on. The second merchant may be said to have "buried" this cost in the price of the item sold. By whatever name, the $12 differential between the total payments and the price at which the merchandise could have been acquired is the cost of differing payment.

[27] Hearing on S. 1740 before a Subcommittee of the Senate Committee on Banking and Currency, 87th Cong., 1st Sess., 49, 56–57, 127, 389–390, 447–448, 563, 1155–1156 (1961); Hearings on S. 1740 before a Subcommittee of the Senate Committee on Banking and Currency, 87th Cong., 2d Sess., 16, 45, 265, 267–268, 287, 341–342, 360–361, 365–367, 376, 407, 415 (1962); Senate Hearings on S. 750, 88th Cong., 1st and 2d Sess., *supra*, n. 24, at 13–14 749, 1284–1285; Hearings on S. 5 before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 41–42, 123–134, 377–379, 513, 699 (1967); House Hearings on H. 11601, 90th Cong., 1st Sess., *supra*, n. 21, at 583, 590–591, 802, 825–826.

> I would like to call to your attention, Senator, for purposes of the record, that this bill does not provide for judgment solely on the basis of the * * * annual interest rate or the total finance charges. It also provides that there shall be a statement of the cash price or delivery price of the property or service to be acquired. Both things are to be stated, price and finance charges, and the judgment of the consumer can be on the basis of both of these factors, not merely on one alone; and if a merchant tries to have a low finance charge and bury it in a high cash price or delivered price, then the purchaser can shop on price just as much as on the finance charges.[29]

It was against this legislative background that the Federal Reserve Board promulgated regulations governing enforcement of the Truth-in-Lending Act. In September, 1968, with the aid of an advisory board composed of representatives of diverse retail, lending and consumer groups, the Board compiled and released a draft of proposed regulations.[30] Comments and criticisms from interested parties were invited. After more than 1,800 responses were received and considered by the Board, the regulations were reviewed and published in the Federal Register.[31]

The Four Installment Rule was included in the original published draft of the regulations and was not amended prior to its final adoption.[32] The Board's objective in promulgating the rule was to prevent the Act from fulfilling the prophecy which its opponents had forecast. As J. L. Robertson, vice chairman of the Board of Governors, stated in an advisory letter issue a year later:

> The Board felt that it was imperative to include transactions involving more than four instalments under the Regulations since without this provision the practice of burying the finance charge in the cash price, a practice which already exists in many cases, would have been encouraged by Truth-in-Lending. Obviously this would have been directly contrary to Congressional intent.[33]

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[28] Senate Hearings on S. 1740, 87th Cong., 2d Sess., *supra*, n. 27, at 287; Senate Hearings on S. 750, 88th Cong., 1st and 2d Sess., *supra*, n. 24, at 13–14; House Hearings on H. 11601, 90th Cong., 1st Sess., *supra*, n. 21, at 596.

[29] Senate Hearings on S. 1740, 87th Cong., 1st Sess., *supra*, n. 27, at 447–448. See also Senate Hearings on S. 1740, 87th Cong., 2d Sess., *supra*, n. 27, at 45.

[30] 33 Fed.Reg. 15506–15516 (1968).

[31] 34 Fed.Reg. 2002–2011 (1969).

[32] Compare § 226.2(h), 33 Fed.Reg. 15507 (1968), with § 226.2(k), 34 Fed.Reg. 2002 (1969).

[33] Federal Reserve Board Advisory Letter of March 1970, by J. L. Robertson. See also Federal Reserve Board Advisory Letter of Aug. 26, 1969, by J. L. Robertson.

Furthermore, even as to sales in which it was impossible to determine what, if any, portion of the price recompensed the creditor for deferring payment, the regulation at least required that the consumer be provided with some information which would enable him to make an informed economic choice.[34]

II

[3] The standard to be applied in determining whether the Board exceeded the authority delegated to it under the Truth-in-Lending Act is well established under our prior cases. Where the empowering provision of a statute states simply that the agency may "make * * * such rules and regulations as may be necessary to carry out the provisions of this Act,"[35] we have held that **[1661]** the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation." *Thorpe* v. *Housing Authority of City of Durham*, 393 U.S. 268, 280–281, 89 S.Ct. 518, 525, 21 L.Ed.2d 474 (1968). See also *American Trucking Associations, Inc.* v. *United States*, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1953).

We have also construed enabling provisions similar to § 105 of the Truth-in-Lending Act, in which Congress has stressed the agency's power to counteract attempts to evade the purposes of a statute. In *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921 (1945), we were asked to determine whether the Administrator of the Wage and Hour Division of the Department of Labor was empowered under the Fair Labor Standards Act of 1938[36] to prohibit companies from allowing or requiring their employees to do industrial homework. The Act required the Administrator to approve orders which were designed to raise the minimum wage to 40 cents an hour. While the Act did not specifically mention industrial homework, § 8(f) stated that the Administrator's orders—

> shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.[37]

After hearings, the Administrator determined that homework furnished "a ready means" of evading his orders, and prohibited certain companies subject thereto from employing this means of production. The Court concluded that the Administrator had not exceeded his authority under the Act, noting that a more restrictive interpretation of the enabling provision would have rendered the Act inoperable. Focusing on the mandate provided by § 8(f), the Court stated:

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[34] Statement of J. L. Robertson, Vice Chairman, Board of Governors of the Federal Reserve System, in Hearings before the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency, 91st Cong., 1st Sess., 380–381 (1969).

[35] *E.g.*, § 8 of the United States Housing Act of 1937, as amended, 42 U.S.C. § 1408.

[36] 52 Stat. 1060 *et seq.*

[37] 52 Stat. 1065.

> When command is so explicit and, moreover, is reinforced by necessity in order to make it operative, nothing short of express limitation or abuse of discretion in finding that the necessity exists should undermine the action taken to execute it. When neither such limitation nor such abuse exists, but the necessity is conceded to be well founded in fact, there would seem to be an end of the matter. 324 U.S., at 255, 65 S.Ct. at 612.

[4] In light of our prior holdings and the legislative history of the Truth-in-Lending Act, we cannot agree with the conclusion of the Court of Appeals that the Board exceeded its statutory authority in promulgating the Four Installment Rule. Congress was clearly aware that merchants could evade the reporting requirements of the Act by concealing credit charges. In delegating rule making authority to the Board, Congress emphasized the Board's authority to prevent such evasion. To hold that Congress did not intend the Board to take action against this type of manipulation would require us to believe that, despite this emphasis, Congress intended the obligations established by the Act to be open to evasion by subterfuges of which it was fully aware. As in *Gemsco*, the language of the enabling provision precludes us from accepting so narrow an interpretation of the Board's power.

[5] Given that some remedial measure was authorized, the question remaining is whether the measure chosen is reasonably related to its objectives. We see no reason to doubt the Board's conclusion that the rule will deter creditors from engaging in the conduct which the Board sought to eliminate. The burdens imposed on creditors are not severe, when measured against the evils which are avoided. Furthermore, were it possible or financially feasible to **[1662]** delve into the intricacies of every credit transaction, it is clear that many creditors to whom the rule applies would be found to have charged for deferring payment, while claiming they had not. That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority. *Northwestern Elec. Co.* v. *Federal Power Commission*, 321 U.S. 119, 124, 64 S.Ct. 451, 453, 88 L.Ed. 596 (1944); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224, 63 S.Ct. 997, 1013, 87 L.Ed. 1344 (1943); *American Telephone and Telegraph Co.* v. *United States*, 229 U.S. 232, 236, 57 S.Ct. 170, 172, 81 L.Ed. 142 (1936).

[6] Respondent contends, however, that the Four Installment Rule must be abrogated since it is "inconsistent" with portions of the enabling statute. The purported conflict arises because the statute spe-

cifically mentions disclosure only in regard to transactions in which a finance charge is in fact imposed,[38] although the rule requires disclosure in some cases in which no such charge exists. Respondent argues that, in requiring disclosure as to some transactions, Congress intended to preclude the Board from imposing similar requirements as to any other transactions.

To accept respondent's argument would undermine the flexibility sought in vesting broad rule making authority in an administrative agency. In *American Trucking Associations, Inc.* v. *United States*, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1953), we noted that it was not—

> a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. * * * [N]o great acquaintance with pracitcal affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. [Citations omitted.] Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to posses." 344 U.S., at 309–310, 73 S.Ct. at 314.

Neither the sections of the Truth-in-Lending Act which refer specifically to transactions involving finance charges nor any other sections of the Act indicate that Congress attempted to list comprehensively all types of transactions to which the Board's regulations might apply. To the contrary, § 105's broad grant of rule making authority reflects an intention to rely on those attributes of agency administration recognized in *American Trucking*. We cannot then infer that references in the Act to transactions involving credit charges were intended to limit the deterrent measures which the Board might choose.

[7] Since the deterrent effect of the challenged rule clearly implements the objectives of the Act, respondent's contention is reduced to a claim that the rule is void because it requires disclosure by some creditors who do not charge for credit and thus need not be deterred. The fact that the regulation may affect such individuals does not impair its otherwise valid purpose. A similar contention was made in *Gemsco*, and rejected by the Court. Gemsco claimed that the Administrator was not attempting to enforce the requirements of the statute but was attempting to advance "experimental social legislation" which **[1663]** Congress had not approved. Responding to that argument the Court stated:

> Section 8(f), in directing the Administrator to include "such terms and conditions" as he "finds necessary to carry out the purposes of such orders," did

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[38] Section 103(f), 15 U.S.C. § 1602(f); § 121, 15 U.S.C. § 1631; § 130(a), 15 U.S.C. § 1640(a).

> not forbid him to take the only measures which would be effective, merely because other consequences necessarily would follow. The language neither states expressly nor implies that he is to do only what will achieve the stated ends and nothing more. The statute does not direct the Administrator to make the rate effective by all necessary means except those which may have other social or economic consequences. 324 U.S., at 257, 65 S.Ct. at 613.

There the Court was referring to the regulation of subject matter, not specifically mentioned in the enabling legislation. A similar rule applies when a remedial provision requires some individuals to submit to regulation who do not participate in the conduct the legislation was intended to deter or control. In *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388–389, 47 S.Ct. 114, 118. 71 L.Ed. 303 (1926), the Court held that, in defining a class subject to regulation, "the inclusion of a reasonable margin, to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity." See also *North American Company* v. *Securities and Exchange Commission*, 327 U.S. 686, 66 S.Ct. 785, 90 L.Ed. 945 (1946). Nothing less will meet the demands of our complex economic system. Where, as here, the transactions or conduct which Congress seeks to administer occur in myriad and changing forms, a requirement that a line be drawn which insures that not one blameless individual will be subject to the provisions of an act would unreasonably encumber effective administration and permit many clear violators to escape regulation entirely. That this rationale applies to administrative agencies as well as to legislatures is implicit in both *Gemsco* and *American Trucking Association.* In neither case was every individual engaged in the regulated activity responsible for the specific consequences the agency sought to eliminate.

Respondent argues that such an interpretation of the Truth-in-Lending Act is inconsistent with our holding in *Federal Communications Commission* v. *American Broadcasting Company*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954). In that case, the Court considered whether, in establishing regulations to govern programming, the FCC had properly interpreted a criminal provision prohibiting the broadcasting of lotteries. After noting that a given statute could not be construed one way for purposes of an administrative proceeding and another for criminal prosecution, the Court stated:

> If we should give [the criminal provision] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. 347 U.S. 296, 74 S.Ct. 600.

Since, in drafting its regulation, the Commission had failed to apply the well established rule that penal provisions must be construed narrowly, the Court held the regulation invalid.

[8, 9] Relying on *American Broadcasting*, respondent contends that the Truth-in-Lending Act must be construed narrowly since it contains penal provisions,[39] and that a narrow interpretation requires that the Board's rule be nullified. We cannot agree, however, that every section of an act establishing a broad regulatory scheme must be construed as a "penal" provision, as that term is used in *American Broadcasting*, merely because two sections of the act provide for civil and criminal penalties. Penal statutes are construed narrowly to insure that no individual is convicted unless "a fair warning [has first been] given to the world in language that the common world will understand of what **[1664]** the law intends to do if a certain line is passed." *McBoyle* v. *United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931).[40] Where, as here, the language of the challenged rule is explict, that risk is not present. See *Kraus & Bros., Inc.* v. *United States*, 327 U.S. 614, 621–622, 66 S.Ct. 705, 707–708, 90 L.Ed. 893 (1946).

[10–13] We are also unable to accept respondent's argument that § 130[41] does not allow imposition of a civil penalty in cases where no finance charge is involved but where a regulation requiring disclosure has been violated. Section 130 provides that the penalty assessed shall be twice the amount of the finance charge imposed, but not less than $100. Since the civil penalty prescribed is modest and the prohibited conduct clearly set out in the regulation, we need not construe this section as narrowly as a criminal statute providing graver penalties, such as prison terms. We have noted above that the objective sought in delegating rule making authority to an agency is to relieve Congress of the impossible burden of drafting a code explicitly covering every conceivable future problem. Congress cannot then be required to tailor civil penalty provisions so as to deal precisely with each step which the agency thereafter finds necessary. In light of the emphasis Congress placed on agency rule making and on private and administrative enforcement of the Act, we cannot conclude that Congress intended those who failed to comply with regulations to be subject to no penalty or to criminal penalties alone. As the District Court concluded, imposition of the minimum sanction is proper in cases such as this, where the finance charge is nonexistent or undetermined.

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[39] Section 112, 15 U.S.C. § 1611; § 130, 15 U.S.C. § 1640.

[40] See *Kordel* v. *United States*, 335 U.S. 345, 69 S.Ct. 106, 93 L.Ed. 52 (1948). See also W. LaFave and A. Scott, Criminal Law (1972), at 72.

[41] 15 U.S.C. § 1640. This section refers only to the failure to provide "information required *under this part* to be disclosed. * * *" (Emphasis supplied.) The italicized language was added to the statute to distinguish disclosure required in regard to sales transactions from that required in regard to advertising. H.R. Rep.No.1040, *supra*, n. 18, at 19, 30. The penalty provision applies both to the failure to disclose information specifically required by the statute and to the failure to abide by regulations promulgated by the Board to govern such disclosure.

[14] Finally, the Four Installment Rule does not conflict with the Fifth Amendment under our holdings in *Schlesinger* v. *State of Wisconsin*, 270 U.S. 230, 46 S.Ct. 260, 70 L.Ed. 557 (1926), and *Heiner* v. *Donnan*, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772 (1932). In *Schlesinger* and *Heiner*, we held that certain taxing provisions violated the Due Process Clauses of the Fifth and Fourteenth Amendments because they conclusively presumed the existence of determinative facts. The challenged rule contains no comparable presumption. The rule was intended as a prophylactic measure; it does not presume that all creditors who are within its ambit assess finance charges,[42] but, rather, imposes a disclosure requirement on all members of a defined class in order to discourage evasion by a substantial portion of that class.

The Truth-in-Lending Act reflects a transition in congressional policy from a philosophy of let-the-buyer-beware to one of let-the-seller-disclose. By erecting a barrier between the seller and the prospective purchaser in the form of hard facts, Congress expressly sought "to * * * avoid the uniformed use of credit." 15 U.S.C. § 1601. Some may claim that it is a relatively easy matter to calculate the total payments to which petitioner was committed by her contract with respondent; but at the **[1665]** time of sale, such computations are often not encouraged by the solicitor or performed by the purchaser. Congress has determined that such purchasers are in need of protection; the Four Installment Rule serves to insure that the protective disclosure mechanism chosen by Congress will not be circumvented.

[15, 16] That the approach taken may reflect what respondent views as an undue paternalistic concern for the consumer is beside the point. The statutory scheme is within the power granted to Congress under the Commerce Clause. It is not a function of the courts to speculate as to whether the statute is unwise or whether the evils sought to be remedied could better have been regulated in some other manner.

Reversed and remanded.

Mr. Justice DOUGLAS, with whom Mr. Justice STEWART and Mr. Justice REHNQUIST concur, dissenting in part.

I have concluded that this is not a proper case for summary judgment under Rule 56(c), which provides that summary judgment only may be granted if there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." As I interpret the present record in light of our decisions, see, *e.g.*, *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d

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[42] In regard to some transactions to which the Four Installment Rule applies, merchants need not report the amount and rate of finance charges. Federal Reserve Board Advisory Letter of July 24, 1969, by J. L. Robertson; Federal Reserve Board Letter No. 30, July 8, 1969, by Frederick Solomon.

142; *White Motor Co.* v. *United States*, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738; *United States* v. *Diebold, Inc.*, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176, there remains unresolved a genuine issue of material fact. Although I agree with the majority that Regulation Z is valid and accordingly would reverse the decision of the Court of Appeals, I would remand this case to the District Court for resolution of that material issue.

The disclosure provisions of the Truth-in-Lending Act apply only to an extension of "consumer credit." 15 U.S.C. § 1631. Thus, in order to assert successfully a claim under the Act for the statutory penalty and reimbursement for the costs of the action, see *id.*, § 1640, petitioner *inter alia* must satisfy her burden of proving that respondent extended consumer credit within the meaning of the Act. Section 103(e) of the Act, 15 U.S.C. § 1602(e), defines "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." In her complaint, petitioner merely alleges that respondent "extends Consumer Credit as defined in Regulation Z, 12 C.F.R. 226.2(K) * * *." Respondent denies in its answer that its contract with petitioner involved a "credit transaction." In one paragraph respondent avers: "Under the contract executed by the customer and Defendant, the customer agrees to pay a stated amount per month for half of the life of the contract and Defendant agrees to supply the magazines for the full term of the contract. At all times the customer has prepaid for the magazines to be delivered. Under its arrangement with most of the publishers, Defendant reimburses the publisher periodically during the full term of the subscription." In another paragraph it avers: "At no point during the life of the contract has Defendant paid money to a third person or supplied goods or services to the customer for which reimbursement is expected from the customer in the future."

On the basis solely of these allegations, one would conclude that the contract between the petitioner and the respondent did not constitute a credit transaction. If respondent merely collected $3.95 per month from each customer and sent the receipts periodically to the publisher,[1] less the respondent's commission, respondent never would have made any advances for the customer, and the customer would owe nothing to the respondent for the loan of money **[1666]** or, in the words of the Act, as a "finance charge." On the other hand, if respondent advanced all or part of the subscription price to the publishers, respondent would be advancing "credit" for the benefit of the customer.[2] The legislative history indicates that "the disclosure requirement would not apply to transactions which are not commonly thought of as credit transactions * * * ."[3] As Professor Corbin has stated: "A transaction may be an instalment contract without being a credit transaction at all. Both parties may agree to perform in instalments without promising to render any performance in advance of full payment of the price of each instalment so rendered."[4] The Act, in defining "credit," refers to the deferred payment of a "debt." A debt, however, is more than a binding contractual obligation to pay a sum of money in the future upon the performance of certain conditions by the other party to the contract. It is an unconditional obligation to pay.[5] Thus, in my view, a proper resolution of the issue whether respondent extended credit to petitioner depends, at least in part, on the contractual relationships between the respondent and the publishers. The contracts between respondent and the publishers are not in the present record.[6]

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[1] There are suggestions in the record that respondent is a wholly owned subsidiary of Time, Inc. Respondent, however, sold not only Life, a Time, Inc., publication, but magazines of other publishers.

The pleadings, of course, are not the only papers to be considered by the District Court in determining whether one party or the other is entitled to summary judgment. Under Rule 56(c) the court must consider "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any * * * ." During the collection period, respondent had sent petitioner a dunning letter reminding her "that we have ordered these magazines in advance and that you have incurred an obligation to repay us. *This is a credit*

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[2] In a free enterprise system, one must presume that there is a "finance charge" for the advance of credit. It would nonetheless be a "finance charge" although it were wholly undisclosed or not separately stated in an account rendered to the customer.

[3] S.Rep.No.392, 90th Cong., 1st Sess. 14; H.R.Rep.No.1040, 90th Cong., 1st Sess., 25.

[4] 3A A. Corbin, Contracts § 687 (1960). A published opinion of the Federal Reserve Board recognizes that installment payment plans may not involve an extension of credit when charges for services rendered do not exceed prior payments. FRB Opinion Letter No. 262 (1970).

[5] 3A A. Corbin, Contracts § 691 (1960).

[6] My Brother POWELL asserts that, given the undisputed fact that petitioner agreed to pay in advance, respondent as a matter of law could not have extended credit. *Post,* at —. We do not, however, know what the financial relationships in this *tri-partite* arrangement are. For example, it may be that respondent advances the full five-year subscription price to the publisher on the subscriber's behalf when the contract between the subscriber and respondent is executed. If that is so, the subscriber may receive an *unconditional* right to receive magazines from the publisher over the five-year period, whether or not he meets his contractual obligations with respondent. Under these circumstances, respondent will be acting as a financier, enabling the suberiber to take advantage of the publisher's five-year subscription offer, but yet to defer payment on the subscription price. Any "profit" respondent receives will be largely attributable to its services as a financier. I do not see that such a financial arrangement differs substantially from the case where a subscriber borrows the full subcription price from a bank and pays the publisher directly, obligating himself to repay the bank in equal installments, with interest, over two and one-half years. As my Brother POWELL argues, the subscriber under those circumstances will be advancing credit to the publisher because he has paid for all magazines in advance, but it cannot be doubted that at the same time the bank has advanced credit to the subscriber.

account, and as such must be repaid by you on a monthly basis, much the same as if you had purchased any other type of merchandise on a monthly budget plan." Respondent formally admitted that it had sent this letter to petitioner. Accordingly, it was properly **[1667]** considered by the District Judge.[7] But, I do not view this "admission" as conclusive or sufficient proof that respondent had extended credit within the meaning of the Act at the time the contract between petitioner and respondent was entered into.[8] First, this is not an admission in terms that credit was extended within the meaning of the Act. Second, since respondent at the time the letter was sent was three months in arrears, it may be that respondent had advanced money on her account only after she failed to meet her contractual obligation. It is settled under our decisions that material lodged by the moving party "must be viewed in the light most favorable to the opposing party." *Adickes* v. *Kress & Co.*, *supra*, 398 U.S. at 157, 158–159, 90 S.Ct. at 1608; *United States* v. *Diebold*, *Inc.*, *supra*, 369 U.S. at 655, 82 S.Ct. at 994.

Petitioner is not deprived of the benefit of this principle of interpretation merely because it did not file an affidavit controverting the contents of the letter. Rule 56(e) provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." The Advisory Committee note on the amendment which added this provision to the Rule, however, stated that "[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." We cited this comment with approval in *Adickes* v. *Kress & Co.*, *supra*, 398 U.S. at 160, 90 S.Ct. at 1609. The moving party, in this case petitioner,[9] must meet her burden of showing the absence of a genuine issue as to any material fact. *Id.*, at 157, 90 S.Ct. at 1608. I cannot conclude that she met that burden. The District Judge was not possessed of sufficient information to resolve properly the issue whether credit had been extended. Under these circumstances, he should not have granted summary judgment. *Cf. White Motor Co.* v. *United States*, *supra*, 372 U.S. at 263, 83 S.Ct. at 702.

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[7] Respondent mailed another letter to petitioner which stated:

"Whereas, FPS, act initialy [*sic*] as agent for the various publishers; upon acceptance of her contract, FPS thereafter acts solely as financier, and co-guarantor of service with the various publishers; whereas, FPS, has fully invested in Mrs. Mourning's contract and does not receive refund in part or full from any, or, all publishers; for said FPS, investment, we therefore, must insist on compliance of your client to the terms of said contract * * *." Although respondent admitted that the letter appeared on its stationery and was written by an employee, it denied that the employee was authorized to send the letter. Accordingly, since there was an issue of fact whether the letter was authorized and thus a binding admission, the letter could not be considered properly on petitioner's motion for summary judgment. Cf. 3 Barron & Holtzoff, Federal Practice and Procedure § 1231, at 75 (1971 Supp.).

[8] We need not resolve here whether, if the contract was not originally a credit transaction, petitioner's own breach could have converted it retroactively into a credit transaction within the meaning of the Act.

Mr. Justice POWELL, dissenting.

I would affirm the judgment of the Court of Appeals on the ground that there was no extension of consumer credit within the meaning of the Truth in Lending Act.[1] The majority takes **[1668]** the position that the credit issue is a question of fact properly resolved against respondent on petitioner's motion for summary judgment below. I cannot agree. In my view, the undisputed facts establish as a matter of law that the transaction between petitioner and respondent did not involve an extension of consumer credit. For the same reason, while I am in agreement with much of Mr. Justice DOUGLAS' dissenting opinion, I see no reason to remand the case for the taking of evidence.

I

Clearly the Act applies only to transactions involving the extension of credit. The congressional declaration of purpose is explicit:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. 15 U.S.C. § 1601.

The phrase "extension of consumer credit" is not defined in the Act. Nor does the Act's definition of "credit" provide any enlightenment.[2] However, a transaction is commonly understood to involve credit when one party receives value in exchange for his unconditional promise to pay the other party for such value in the future. The mere fact that a party obligates himself in a contract to pay for goods or services in installments over a period of time does not render the contract a credit transaction:

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[9] Both parties moved for summary judgment. That does not relieve the District Judge of his responsibility to consider each motion separately in light of the theories advanced by each party and to proceed to trial if he concludes that there is a genuine issue of material fact to be resolved. See 6 Moore, Federal Practice ¶ 56.13.

[1] Having this view of the case, I find it unnecessary to address the other two issues, namely: (i) whether the Federal Reserve Board exceeded its authority in adopting Regulation Z, which extends the coverage of the Act to transactions in which no finance charge can be identified; and (ii) whether the civil penalty provision of 15 U.S.C. § 1640(a) may validly be imposed in a case where, by concession of the parties on cross motions for summary judgment, the transaction does not involve a finance charge.

[2] "The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." 15 U.S.C. § 1602(e). The Act provides no gloss on the terms "debtor" and "debt," and the definition of "creditor" is limiting rather than explanatory. ("The term 'creditor' refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required. * * *" 15 U.S.C. § 1602(f).)

> A transaction may be an installment contract without being a credit transaction at all. Both parties may agree to perform in installments without promising to render any performance in advance of full payment of the price of each installment so rendered. 3A A. Corbin § 687 (1960).

The transaction before the Court may well have been a credit transaction, but it was *not respondent* that extended the credit. Petitioner obligated herself to pay in advance for the magazines she was to receive. The contract required petitioner to pay equal installments over a 30-month period, but respondent was obligated only to provide magazines over 60 months. In effect petitioner paid every month for two months' worth of magazines. Until the last magazine had been delivered, petitioner would have paid for more magazines than she received. Thus, the contract called for the extension of credit by petitioner to respondent. For this reason it was not an "extension of consumer credit" within the meaning of the Act. See 15 U.S.C. § 1602(h).

The Federal Reserve Board, upon whose authority to interpret the Act the majority so heavily relies in sustaining Regulation Z, has indicated that a necessary element in a consumer credit transaction is the consumer's obligation to pay *after* he has received the bargained for goods or services. In a published Opinion Letter dealing with the practice of assessing obstetrical services in periodic installments, the Board stated that "[a]s long as there are no finance charges assessed, *and at no point do the* **[1669]** *charges for the services rendered exceed the payments to the extent that it would require more than 4 of the periodic installments to repay the obligation*, then the plan would not fall within the provisions of Regulation Z."[3] (Emphasis supplied.) This statement implicitly recognizes that credit is extended only when the value of goods or services provided exceeds the payments made.[4]

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[3] FRB Opinion Letter No. 262 (1970); 4 CCH Consumer Credit Guide § 30,516.

[4] Legislative history bolsters the view that Congress assumed "credit" meant the receipt of goods or services in advance of paying for them. In earlier versions of the Act the definition of credit included "* * * any contract of sale of property or services, either for present or future delivery, under which part or all of the price is payable subsequent to the making of such sale or contract; * * * any contract or arrangement for the hire, bailment, or leasing of property. * * *" S. 1740, 87th Cong., 1st Sess.; S. 5, 90th Cong., 1st Sess. (as introduced January 11, 1967). During the Senate hearings, a question was raised as to whether any finance charge would be attributable to certain included transactions, particularly ordinary bailment and lease arrangements. Hearings on S. 5 before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 663 (1967) (Statement of J. L. Robertson, Vice Chairman, Board of Governors of the Federal Reserve System). This criticism was heeded and the final version of the bill substituted the language now found in the Act (15 U.S.C. § 1602(e)) with the following explanation: "The original S. 5 language was deleted because it was somewhat cumbersome and sweeping and

Implicit in the positions both of Mr. Justice Douglas and of the majority is the assumption that, even admitting petitioner was to pay for each magazine before receiving it, under some factual circumstances respondent might nevertheless have extended credit.[5] Thus, Mr. Justice Douglas states that "if respondent advanced all or part of the subscription price to the publishers, respondent would be advancing 'credit' for the benefit of the customer." The majority is less clear on this point, stating only that "[i]n some cases in which a consumer pays in installments for a magazine subscription, credit may not have been extended to the consumer." N. 16, *supra*. The implication, however, is that in some such transactions, though the consumer pays for the magazines in advance, he may be the recipient of credit. I am unable to agree that under any set of circumstances, given the undisputed fact that petitioner agreed to pay in advance for each magazine, respondent might have extended credit. Petitioner **[1670]** did not obtain a loan from respondent which she would be unconditionally obligated to repay. She entered into a contract imposing continuing, mutually dependent obligations on both parties.[6] Whether respondent advanced any part of the subscription price to magazine publishers is quite immaterial to a determination of the legal effect of the only transaction involved in this case: whether there was extension of consumer credit *by respondent to petitioner*. The only contract at issue is that between the parties; how and upon what terms respondent may have arranged to obtain the magazines for delivery to petitioner in fulfillment of its contractual obligations is of no concern to petitioner. Nor can any

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referred to various types of lease situations which might not be true extensions of credit." S.Rep.No.392, 90th Cong., 1st Sess., 12 (1967). In fact a lease, like the "paid during service" magazine contracts offered by respondent, often imposes a noncancellable obligation on the lessee or consumer to pay in a series of installments. Yet the lessor does not extend credit because the lessee ordinarily pays in advance for each period during which he enjoys the use of the property. Petitioner, by the same reasoning, was no more the recipient of credit than is the ordinary lessee or bailee. It would be inconsistent with this legislative history to read "extension of credit" to include every noncancellable installment obligation.

[5] The District Court found that there was no issue as to any material fact in this case. The Court of Appeals did not disturb this finding. Whether one agrees with this finding as does the majority or disagrees for reasons stated by Mr. Justice DOUGLAS, the District Court's conclusion that the uncontroverted facts establish a consumer credit transaction is clearly a conclusion of law and therefore is entitled to no presumption of correctness. Nor do respondent's dunning letters to petitioner describing her obligation as a credit account create any such presumption. Again, such statements only express a legal conclusion and do not establish the existence of a consumer credit transaction within the meaning of the Act.

[6] If respondent failed to deliver the magazines as agreed prior to completion of the specified payments, petitioner would have no further obligation to pay:

"A contract for the sale of goods may be an installment contract with respect to the goods sold as with respect to payments of the price. The non-delivery of an installment or delivery of a nonconforming installment when required by the contract is a breach for which an action can be maintained at once. There is no doubt that the buyer is privileged to withhold payment of the price of the undelivered installment or of a nonconforming installment that is rightfully rejected. * * * [T]he buyer does not have to extend such credit [beyond that which was agreed upon] to the seller by making payments without receiving the agreed goods." 3A A. Corbin, Contracts § 691, at 264 (1960). See Fla.Stat. §§ 672.2–612, 672.2–711, 672.2–717 (1969), F.S.A.

such arrangement by respondent with a third party change the nature of the transaction between the parties to this litigation.[7]

The controlling facts therefore are not in dispute, having been admitted by the cross motions for summary judgment, and I can perceive of no way in which they can be construed as an extension of consumer credit by respondent to petitioner. A remand, unnecessarily burdening the parties and the court below, would serve no useful purpose. As a matter of law respondent did not extend credit within the meaning of the Truth in Lending Act. I would affirm the judgment below.

NATIONAL ASSOCIATION OF WOMEN'S AND CHILDREN'S APPAREL SALESMEN, INC., a/k/a NAWCAS GUILD, ETC., ET AL. v. F.T.C.*

No. 71–1880. F.T.C. Docket 8691.

(United States Court of Appeals, Fifth Circuit, May 21, 1973)

1. F.T.C. Entitled To Rely on N.L.R.B.'s Determination That Association of Apparel Salesmen Was Not "Labor Organization."

[140] Federal Trade Commission was entitled to rely on determination of National Labor Relations Board in collateral proceeding that association of apparel salesmen was not "labor organization" exempt from antitrust laws, in proceeding to require association to refrain from committing unfair trade practices.

2. Only Insofar as Union Pursues Legitimate Subjects of Collective Bargaining Will Antitrust Laws Yield to Labor Unions.

Antitrust laws yield for labor organizations only insofar as union pursues legitimate subjects of collective bargaining.

3. If Labor Organization Cannot Function as Collective Bargaining Agent of Employees of Particular Employer, It May Not Transgress Employer's Rights to Unrestrained Competition With Impunity.

If labor organization cannot under any set of circumstances function as collective bargaining agent of employees of particular employer, organization may not transgress employer's rights to unrestrained competition with impunity.

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[7] Indeed, petitioner's complaint avers that the installment contract for the purchase and sale of the magazines is "the only instrument executed and existing between the parties," and that respondent thereby "extend[ed] consumer credit as defined in Regulation Z. * * *" There is no allegation as to extension of credit by the publishers or by any third person. Second Amended Complaint, App. 3, 4.

*Reported in 479 F.2d 139 (1973). For case before Commission, see 77 F.T.C. 988, 78 F.T.C. 446. *Cert. denied:* Nov. 5, 1973, 414 U.S. 1004, 94 S.Ct. 360.

4. N.L.R.B. IS VESTED EXCLUSIVELY WITH AUTHORITY TO DETERMINE REPRESENTATIONAL MATTERS UNDER THE N.L.R. ACT.

Authority to determine representational matters under National Labor Relations Act is vested exclusively with N.L.R.B.

5. UNTIL SUCH TIME AS COURT MAY OVERTURN N.L.R.B. ELECTION PROCEDURES, ACTION IS UNASSAILABLE.

Although N.L.R.B. election procedures may occasionally be overturned by court reviewing unfair labor practice proceeding, until such time board action is unassailable.

6. WHERE ORGANIZATION HAS PROPRIETARY INTEREST IN MEANS, IN AND FOR THEMSELVES, IT IS DISQUALIFIED FROM FUNCTIONING AS LABOR ORGANIZATION UNDER PROTECTIVE CLOAK.

Organization purporting to represent interests of group of employees may disregard potential impact of antitrust laws on their chosen means if ends to be accomplished are appropriate bargaining subjects for labor union, but where organization has proprietary interest in means, in and for themselves, it is disqualified from functioning as labor organization under protective cloak.

(Syllabus, with substituted captions, taken from 479 F. 2d 139)

On petition for review, court held that Federal Trade Commission was entitled to rely on determination of National Labor Relations Board in collateral proceeding that association of apparel salesmen was not "labor organization" exempt from antitrust laws, in proceeding to require association to refrain from committing unfair trade practices.

Order enforced.

Simpson, *Circuit Judge*, filed dissenting opinion.

Raymond R. Dickey, *Robert D. Roadman*, Washington, D.C., *Sherwyn E. Syna*, Atlanta, Ga., for petitioners.

Joseph Martin, Jr., Gen. Counsel, *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, *Miles J. Brown*, Atty., Federal Trade Commission, Washington, D.C., for respondent.

Before JOHN R. BROWN, *Chief Judge*, and BELL and SIMPSON, *Circuit Judges.*

JOHN R. BROWN, *Chief Judge:*

We enter the workroom to review the propriety of an FTC cease and desist order which compels the Petitioners, National Association of Women's & Children's Apparel Salesmen (NAWCAS) to refrain from committing certain unfair trade practices within the context of their regional trade shows. Our role is chiefly that of a tailor: we must dart the seam of two interrelated public policies—the antitrust proscription and its labor exemption. The thread which fastens this seam is composed of three independently woven fibers: (i) is NAWCAS a "labor organization" under the cloak of the Norris LaGuardia

Act, **[141]** 29 U.S.C.A. § 104, and Clayton Act §§ 6, 20, 15 U.S.C.A. § 17, 29 U.S.C.A. § 52, special dispensation for labor? (ii) do the challenged activities arise in the context of a bona fide "labor dispute" as that term is used in these statutory provisions? and (iii) has NAWCAS acted only in its labor self-interest—eschewing any combination with non-labor groups? Unless all three questions can be answered affirmatively, NAWCAS is not entitled to don the protective cloak.

[1] The FTC, relying heavily on an NLRB holding in a collateral proceeding, answered the first two questions negatively and issued its order.[1] National Association of Women's and Children's Apparel Salesmen, 1971, 78 F.T.C. 446 [Docket No. 8691]. Because we are in agreement on these points, we enforce the order without addressing ourselves to the third question.[2]

The Wrinkled Cloak

When the National Association of Women's and Children's Apparel Salesmen was formed in 1945, its avowed purpose was to provide a forum for the free exchange of trade information and a force to represent the best interests of ready to wear clothing salesmen.[3] At that time, NAWCAS stitched together 21 local affiliate groups of salesmen.[4] One of the primary activities of these affiliates was the sponsoring of regional trade shows to minimize traveling.

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[1] Counsel for NAWCAS conceded before the Commission that if his client's activities were not protected by the labor exemption to the antitrust laws, that their conduct was violative of the Federal Trade Commission Act. Thus, there is no basis from which to attack the Commission's order on its intrinsic merits if the labor exemption will not stand up.

[2] Basing our holding upon the determination that NAWCAS may not act as a labor organization, we need not determine the extent to which certain component members of NAWCAS might constitute nonlabor groups. See generally, United States v. Hutcheson, 1941, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788; American Federation of Musicians v. Carroll, 1968, 391 U.S. 99, 88 S.Ct. 1562, 20 L.Ed.2d 460; Cedar Crest Hats, Inc. v. United Hatters, 5 Cir., 1966, 362 F.2d 322.

[3] The objective, aims, and purposes of NAWCAS were set forth in Article III, Section 1 of its constitution.

> The objectives, aims and purposes of this association shall be educational and for the promotion of the best interests of its members; to provide a national association of all organizations or groups composed of salesmen engaged in the wholesale selling of women's or children's wearing apparel or accessories * * * to promote, stimulate and protect the interests and welfare of salesmen in the women's and children's fields and the industry with which they are concerned * * * to cooperate with organizations composed of salesmen in kindred fields whenever practicable and feasible to the end that a strongly organized national voice of salesmen may be achieved * * * to institute and maintain an educational program concerning itself with the welfare and future security of salesmen * * * to create a clearing house for the interchange and dissemination of pertinent information, ideas, plans and facts helpful to members of affiliated organizations * * * to establish and maintain an active employment clearing house * * * to give wholehearted support to measures that are fair, reasonable and equitable to the interests and welfare of salesmen * * * to provide information and guidance, and promote a policy of helpful services to independent retailers, and generally foster a cordial relationship between manufacturers, retailers and salesmen and to represent the members as their bargaining agents and where appropriate to negotiate collective agreements in their behalf.

There are approximately ten thousand manufacturers of women's and children's apparel in the United States, mostly centered in and around the New York City area. Although there are **[142]** several industry giants, their share of the market is relatively miniscule—90 per cent of the business going to the smaller manufacturers. Their wares are normally marketed through the efforts of the hired salesmen. Most of these men work on commissions, although the trend among the larger firms is toward compensation by a fixed salary. They also tend to work exclusively for one manufacturer—purportedly to preserve design integrity and prevent "line piracy"—unless their territory is so threadbare that they must represent two or more noncompeting lines to make an adequate living.

The most effective method of marketing apparel has been found to be that of the regional, periodic trade show.[5] Sponsoring these shows is the role of the local affiliate. They are usually held in hotels, auditoriums, or merchandise marts. Long-term advance planning is necessary. The affiliate who sponsors the show rents the necessary facilities, solicits registration from members qualified to exhibit, and provides general logistical support for the registrants. Each show is governed by the rules and regulations of the sponsoring affiliate and violations of the rules may result in a fine or suspension. As noted by the NLRB and FTC, a number of the rules are designed to prevent members from participating in competing shows. Because of the tremendous prestige and economic impact of these shows, participation in them is almost a business necessity.

Many of NAWCAS's tangible goals[6] were union-like. But for the first 11 years its approach was strictly velveteen. Then, at its 1956 convention, NAWCAS adopted the "California Resolution". Under this Resolution NAWCAS decided to exert economic leverage by blacklisting "uncooperative manufacturers" from the affiliates' trade shows. At first the blacklists were confined to those manufacturers who did not put forth a cooperative effort towards resolving disputes with their association-member salesmen. In 1960, however, the economic tool of excluding uncooperative manufacturers from the trade shows was extended to those manufacturers who failed to hire their salesmen under the terms of NAWCAS's standard contract.

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[4] One of these affiliates, Style Exhibitors, Inc. of Chicago is also a named party in the FTC's order and a petitioner herein. The FTC Examiner determined that the advocacy of Style Exhibitors was adequate to represent the other members of its class of affiliates, all of whom had some notice of the pending proceedings before the FTC. There is no challenge to this ruling on appeal.

[5] Other methods of marketing include direct mail sales, home office showroom sales, regional sales offices in key cities, sales to jobbers, and direct sales to a common buyer/agent for several retailers.

[6] The two chief objectives which they sought to obtain via the unfair trade practices under attack were establishment of a binding system of grievance arbitration and industry-wide use of NAWCAS's standard contract of employment for salesmen. Both are certainly legitimate goals of a bargaining representative. They have also established some rather successful programs of insurance, retirement and death benefits.

It is this refusal to deal which the FTC seeks to collar with its order.[7]

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[7] The Commission's order, which is not challenged on its merits in this appeal, requires the Petitioners to cease and desist from the following:

(1) Refusing or threatening to refuse to promote, display, offer to sell, distribute, or sell at any trade show women's and children's apparel or accessories supplied by any manufacturer who is represented by a member of NAWCAS, a member of any affiliate, or person who is otherwise eligible for trade show participation.

(2) Entering into, continuing, cooperating in or carrying out any planned common course of action, understanding, or agreement with any other party for the purpose or with the effect of preventing, hindering, or interfering with a manufacturer from having his merchandise displayed, exhibited, offered for sale or sold in or from any location not actually contracted for and used as space by respondent NAWCAS or by a representative who is a member of NAWCAS, a member of any affiliate, or any person as a part of a NAWCAS trade show participation for the conduct of a trade show sponsored by NAWCAS, its members or affiliates.

(3) Entering into, continuing, cooperating in, or carrying out any [143] planned common course of action, understanding, or agreement with any other party for the purpose or with the effect of preventing, hindering, or interfering with a manufacturer's efforts to have his merchandise displayed, exhibited, sold or offered for sale in any space not actually contracted for and used by a representative who is a member of NAWCAS, trade show participation.

(4) Restricting, regulating, or limiting any member of NAWCAS, any member of any affiliate or any person who is otherwise eligible for trade show participation, in the selection of any merchandise that he may wish to display, offer for sale or sell at any trade show or exhibition.

(5) Requiring, whether directly or indirectly any manufacturer of women's and children's apparel or accessories to comply with any demand, term or condition made by NAWCAS or any of its affiliated members as a condition of having the manufacturer's goods exhibited in a NAWCAS affiliated trade show.

(6) Preparing, printing, publishing or otherwise communicating by any method or means any "uncooperative manufacturers list" or similar device with the purpose or effect of discouraging or preventing the merchandise of any particular manufacturer from being exhibited at any affiliate trade show.

(7) Prohibiting or forbidding any member of NAWCAS or of any of its affiliates, from soliciting the representation of any line of merchandise produced by any manufacturer.

(8) Prohibiting or forbidding any member of NAWCAS or of any of its affiliates, from representing any line of merchandise produced by any manufacturer because said member replaced another member as a representative of said manufacturer.

(9) Prohibiting or forbidding the merchandise of any manufacturer from being promoted or displayed, or offered for sale, distribution or sale by any member of NAWCAS or of any of its affiliates, because said member replaced another member as a representative of said manufacturer.

(10) Conditioning the showing by any member of NAWCAS of any merchandise of any manufacturer at any trade show organized by any affiliate or other NAWCAS group on the execution by said member of a contract with the manufacturer he represents containing terms or conditions established by and acceptable to respondents.

(11) Restricting or limiting any affiliate or NAWCAS group from accepting as a member any person who transfers from another affiliate or otherwise is eligible or qualified to sell merchandise of any manufacturer.

(12) Requiring any affiliate or other NAWCAS group to agree with any other affiliate on dates when or places where merchandise may be displayed or exhibited, offered for sale, or sold, except that nothing shall prevent any affiliate from continuing to utilize the dates at which such affiliate customarily held its shows, or voluntarily agree to show dates.

(13) Denying or granting courtesy or provisional showing of merchandise to any manu-

The Ironing Board

[144] The FTC skirted the necessity of ruling directly on the extent of protection afforded to NAWCAS's activities by labor's cloak of antitrust immunity by relying on the opinion of the NLRB in a collateral proceeding, Bambury Fashions, Inc., 1969, —— NLRB —— [Appendix at 146–156], to iron out the wrinkles. The Board held that because of the commercial nature of NAWCAS's trade shows it was disqualified from functioning as a labor organization.

[2, 3] The rationale behind this deference to the determination of the Board, is that labor's cloak of immunity must be lined with the fact that the putative labor organization is—or could be—the bargaining representative for the employees in question. This is so because the antitrust laws yield only insofar as the union pursues legitimate subjects of collective bargaining. *Meat Cutter's Union* v. *Jewel Tea Co.*, 1965, 381 U.S. 676, 689 and 710, 85 S.Ct. 1596, 1601 and 1614, 14 L.Ed.2d 640, 649 and 661; *American Federation of Musicians* v. *Carroll*, 1968, 391 U.S. 99, 88 S.Ct. 1562, 20 L.Ed.2d 460; *Hunt* v. *Crumboch*, 1945, 325 U.S. 821, 65 S.Ct. 1545, 89 L.Ed. 1954. If an organization cannot, under any set of circumstances, function as the collective bargaining agent of the employees of a particular employer, that organization may not transgress the employer's rights to unrestrained competition with impunity under the cloth of a labor label. *Allen Bradley Co.* v. *Local Union* No. 3, 1945, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939.

[4, 5] The authority to determine representational matters under the National Labor Relations Act is vested exclusively with the NLRB. See *NLRB* v. *Cabot Carbon Co.*, 1959, 360 U.S. 203, 79 S.Ct.

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facturer unless said manufacturer is first approved by NAWCAS or a NAWCAS affiliate other than the one to which application is being made.

(14) Prohibiting or forbidding any merchandise of any manufacturer represented by a member of NAWCAS or any of its affiliates from being promoted, displayed, exhibited, offered for sale, or sold at any place or any time by said manufacturer, representative, or other representative designated by said manufacturer.

(15) Prohibiting, restricting, or limiting any person or firm engaged in the offering for sale, distribution or sale of women's and children's apparel or accessories from obtaining any room, rooms, or office space at any time in any facility.

(16) Refusing to accept for membership in NAWCAS any individual who is otherwise eligible for membership and is actively and regularly engaged as a salesman or manufacturer who does not have salesmen and who travels a territory or territories himself, of women's and children's wholesale apparel and accessories irrespective of whether such individual was previously denied or excluded from membership.

(17) Refusing to accept as an exhibitor at any trade show any salesman who may also be a manufacturer, importer, wholesaler, or jobber, or officers or employees thereof, whose line or lines of women's and children's apparel are not exhibited at that trade show by a member of NAWCAS or a member of any of its affiliates.

(18) Continuing to retain any provision in its constitution, by-laws, code of ethics, or rules and regulations which contravenes or conflicts in any way with any of the above prohibitions.

1015, 3 L.Ed.2d 1175. Because of the immediacy usually attending such determinations, there is no means of securing direct judicial review of the Board's determination—it must be attacked collaterally in the context of an unfair labor practice charge.[8] *Boire* v. *Greyhound Corporation*, 1964, 376 U.S. 473, 84 S.Ct. 894, 11 L.Ed.2d 849; *Magnesium Casting Co.* v. *NLRB*, 1971, 401 U.S. 137, 91 S.Ct. 599, 27 L.Ed. 2d 735; *Templeton* v. *Dixie Color Printing Co.*, 5 Cir., 1971, 444 F.2d 1064. Given this commitment, under our national labor policy, to the Board's particular expertise of the task of defining what organizations are labor organizations, we hold that it was proper for the FTC to accord dispositive weight to the Board's holding.[9]

[**145**] [6] What the Board actually held in *Bambury Fashions* was that NAWCAS, because of its financial stake in the trade shows themselves, was precluded from acting as a labor organization. Thus, according to the Board, the disqualifying factor "is the latent danger that it may bargain, not for the benefit of unit employees, but for the protection and enhancement of its business interests which are in direct competition with those of the employer at the other side of the bargaining table." *Bambury Fashions*, *supra* at —. In essence it washes out to this. An organization purporting to represent the interests of a group of employees may disregard the potential impact of the antitrust laws on their chosen means if the ends to be accomplished are appropriate bargaining subjects for a labor union. But where the organization has a proprietary interest in the means, in and for themselves, it is disqualified from functioning as a labor organization under the protective cloak. "The labor exemption is inapplicable where the union acts not as a union but as an entrepreneur." *Jewel Tea supra*, 381 U.S. at 733, 85 S.Ct. at 1626, 14 L.Ed.2d at 675 (Goldberg, J.);

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[8] Notwithstanding this canon of labor law, NAWCAS attempted to collaterally challenge the Board's order. Its futile efforts culminated in *National Association of Women's & Children's Apparel Salesmen, Inc.* v. *NLRB*, D.C.Cir., 1972, 465 F.2d 662.

[9] The FTC phrased its deference in terms of "primary jurisdiction". Actually it is more than that. Although the Board's election procedures may occasionally be overturned by a court reviewing an unfair labor practice proceeding, until that time the Board action is unassailable. *Cf. Coca Cola* v. *FTC*, 5 Cir., 1973, 475 F.2d 299; *Alabama Gas Corp.* v. *FTC*, 5 Cir., 1973, 476 F.2d 142 [1973]. There is no concurrent jurisdiction in another tribunal which stands in abeyance pending reference to the Board, as in most cases of primary jurisdiction. *Cf. J. M. Huber Corp.* v. *Denman*, 5 Cir., 1966, 367 F.2d 104; *Weymouth* v. *Colorado Interstate Gas Co.*, 5 Cir., 1966, 367 F.2d 84; *Carter* v. *American Telephone & Telegraph Co.*, 5 Cir., 1966, 365 F.2d 486.

We are not unaware of Mr. Justice White's opinion in *Jewel Tea* declining to stay the proceeding there until a primary jurisdiction reference to the Board could be made. But he surely did not mean that a Board determination was inconsequential, for he also stated on that same day: "Unquestionably the Board's demarcation of the bounds of the duty to bargain has great relevance to any consideration of the sweep of labor's antitrust immunity." *United Mine Workers* v. *Pennington*, 1965, 381 U.S. 657, 665, 85 S.Ct. 1585, 1590, 14 L.Ed.2d 626, 633. *See also, Jewel Tea, supra*, 381 U.S. at 710, 85 S.Ct. at 1614, 14 L.Ed.2d at 661 (Opinion of Goldberg, J.).

Cf. Los Angeles Meat & Provision Drivers Union, Local 626 v. *United States*, 1962, 371 U.S. 94, 83 S.Ct. 162, 9 L.Ed.2d 150; *Columbia River Packers Association* v. *Hinton*, 1942, 315 U.S. 143, 62 S.Ct. 520, 86 L.Ed. 750; *Gulf Coast Shrimpers & Oystermans Association* v. *United States*, 5 Cir., 1956, 236 F.2d 658.

Given this disqualification by the Board,[10] the FTC was correct in button-holing NAWCAS's anticompetitive activities.

Enforced.

SIMPSON, *Circuit Judge* (dissenting):

I respectfully dissent.

The majority today holds that the Federal Trade Commission properly relied upon the decision of the National Labor Relations Board in a collateral proceeding, Bambury Fashions, 1969, 179 NLRB 447, which also involved NAWCAS. In *Bambury Fashions* the Board concluded that NAWCAS was not qualified under the National Labor Relations Act to act as the statutory bargaining representative for certain traveling salesmen who potentially competed with employers by conducting trade shows. The majority concludes that the Commission could rely on this Board decision to hold that because NAWCAS may not act as a bargaining representative, it is not a "labor organization" entitled to the protection of the labor exemption to the federal antitrust laws. The basic holding of the majority is:

> The rationale behind this [the Commission's] deference to the determination of the Board, is that labor's cloak of immunity must be lined with the fact that the putative labor organization is—or could be—the bargaining representative for the employees in question. This is so because the antitrust laws yield only insofar as the union pursues legitimate subjects of collective bargaining. [citations omitted] If an organization cannot, under any set of circumstances, function as the collective bargaining agent of the employees of a particular employer, that organization may not transgress the employer's right to unrestrained competition with impunity [146] under the cloth of a labor label." [citations omitted]

Majority opinion at 144.

The Commission's syllogism, which the majority here endorses, is improper because the Board decided only that NAWCAS could not be a bargaining representative. It did not hold that NAWCAS was not a labor organization.

The core of the Board's opinion in *Bambury Fashions* was:

> Finally, notwithstanding the fact that NAWCAS, as found by the Regional Director, satisfies the two part test of the statutory definition of a labor organization, we find that it is disqualified from acting as such because its interest in

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[10] The Board's finding here is bolstered by an independent finding of the FTC Examiner to substantially the same effect. Of course we are powerless to disturb this finding if "the evidence in the record reasonably supports the administrative conclusion." *Colonial Stores, Inc.* v. *FTC,* 5 Cir., 1971, 450 F.2d 733, 739.

> representing employee salesmen in the industry conflicts substantially with its primary interest in coordinating and strengthening the trade show activities of its affiliates. We agree with the Employers that NAWCAS in its trade show activities in behalf of independent contractor traveling salesmen members is engaged in the business of selling apparel in direct competition with apparel manufacturers. 179 NLRB at 450.

In *Bambury Fashions* the Board applied its rule in Bausch & Lomb Optical Co., 1954, 108 NLRB 1555, that "* * * the Union cannot perform its statutory function as bargaining representative if simultaneously it is an immediate business competitor of the particular employer whose employees it purports to represent." Ibid. at 1562. Clearly then the Board's holding in *Bambury Fashions* was no more than that NAWCAS was disqualified from acting as a bargaining representative, not that NAWCAS was not a labor organization.

The Commission's extension of the Board's position is unwarranted for another reason. While it is true, as the majority states, that a union is exempt from the antitrust laws only insofar as it unilaterally pursues mandatory subjects of collective bargaining—wages, hours and working conditions, *American Federation of Musicians* v. *Carroll*, 1968, 391 U.S. 99, 88 S.Ct. 1562, 20 L.Ed.2d 460—it does not follow that a union must be the National Labor Relations Act bargaining representative in order to pursue these goals, and hence enjoy the protection of the labor exemption to the antitrust laws. This is true because the umbrella of the antitrust exemption protects labor organizations. A group may be a "labor organization" within the statutory framework of the National Labor Relations Act without being a "bargaining representative" under that Act, as the language of the statute makes clear:

> The term "labor organization" means any organization of any kind or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. National Labor Relations Act, Section 2(5); Title 29 U.S.C., Section 152(5).

NLRB v. *Cabot Carbon Co.*, 1959, 360 U.S. 203, 79 S.Ct. 1015, 3 L.Ed.2d 1175, demonstrates that the National Labor Relations Act concepts of "labor organization" and "bargaining representative" are not coequal. In *Cabot Carbon* the NLRB had ordered the employer to cease and desist from unlawfully dominating certain employee committees, which coexisted with Board certified bargaining representatives at certain of the employer's plants. This Court refused to enforce the Board's order on the grounds that by the 1947 amendments to the Act Congress had not intended to include such committees within the statutory definition of labor organization, and that the term "dealing with employers" in the statutory definition of a labor organization meant in reality "bargaining with employers", and that the committees were not statutory bargaining representatives. The Supreme Court reversed, stating that the statutory term "dealing with em**[147]**ployers" was not to be read as synonymous with the more limited term "bargaining with employers". 360 U.S. at 211, 79 S.Ct. at 1020, 3 L.Ed.2d at 1180. Further the Court noted that Congress had rejected an amendment which would have substituted the term "bargaining collectively" for "dealing with employers" in the statutory definition of a labor organization. 360 U.S. at 211, 79 S.Ct. at 1021, 3 L.Ed.2d at 1181.

Upon this analysis it seems to me apparent that a group of persons may be a "labor organization" under the terms of the National Labor Relations Act without being a statutory bargaining representative under that Act. Furthermore, the "* * * grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work", National Labor Relations Act, Section 2(5); Title 29, U.S.C., Section 152(5), about which a "labor organization" deals with an employer are essentially equivalent to the "wages, hours, and working conditions" which constitute mandatory bargaining subjects. Unilateral labor organization activity concerning these mandatory bargaining subjects is immune from the federal antitrust laws. I conclude that a group which deals with an employer concerning such subjects is immune from the antitrust laws where such dealings are involved, even though that labor organization is not and cannot be the statutory bargaining representative. In short, an organization may pursue legitimate objectives of collective bargaining even though it is not a bargaining representative. Both the Federal Trade Commission and the majority in this case have fallen into the trap of equating qualification to act as a bargaining representative under the National Labor Relations Act with status as a labor organization.

Thus, I think the Commission based its decision below upon improper legal reasoning. A fundamental principle of judicial review of administrative action requires that in order for a reviewing court to sustain agency action the legal grounds upon which the agency acted must be correct. *FTC* v. *Sperry & Hutchinson Co.*, 1972, 405 U.S. 233, 92 S.Ct. 898, 31 L.Ed.2d 170; *SEC* v. *Chenery Corp.*, 1943, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 686. Because the Commission improperly relied upon the Board's decision in *Bambury Fashions*, supra, this case should be remanded to the Commission so that the Commission will have an opportunity to base its decision upon legally correct principles, including the extent to which certain components of NAWCAS might constitute non-labor groups not protected by the labor exemption to the antitrust laws. See generally, *United States* v. *Hutcheson*, 1941, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788; *American Federation of Musicians* v. *Carroll, supra; Cedar Crest Hats, Inc.* v. *United Hatters*, 5 Cir. 1966, 362 F.2d 322. This latter question, which is crucial to the issue before the Commission, the majority here finds it unnecessary to consider. See majority opinion, footnote 2 at page 141.

For this reason I dissent from the majority opinion.

SEVEN-UP COMPANY v. F.T.C.*

No. 72–1680. F.T.C. Docket 8857

(United States Court of Appeals, Eighth Circuit, May 31, 1973)

FEDERAL DISTRICT LACKED SUBJECT MATTER JURISDICTION OF ACTION SEEKING TO ENJOIN F.T.C. FROM FURTHER ACTION IN PENDING ADMINISTRATIVE PROCEEDING, AND ALLEGING PROCEEDING WAS FATALLY DEFECTIVE WITHOUT JOINDER OF MANUFACTURER'S BOTTLERS AS INDISPENSIBLE PARTIES. MANUFACTURER MUST AWAIT ISSUANCE OF A CEASE AND DESIST ORDER BEFORE JURISDICTION WOULD LIE FOR REVIEW OF CHALLENGED INTERLOCUTORY RULING.

[756] Federal district lacked subject matter jurisdiction of soft drink manufacturer's action seeking to enjoin Federal Trade Commission from further action in its pending administrative proceeding against the manufacturer and alleging that such proceeding was fatally defective without joinder of manufacturer's 470 bottlers as indispensable parties; rather, manufacturer was required to await a cease and desist order by the Commission, if such order was ever to be issued, before jurisdiction would lie for review of challenged interlocutory ruling which denied manufacturer's motion to dismiss the administrative complaint on ground that the bottlers were indispensible parties.

(Syllabus, with substituted caption, taken from 478 F.2d 755)

On appeal, court held that federal district lacked subject matter jurisdiction of subject action which alleged that proceeding by F.T.C. was fatally defective without joinder of appellant's 470 bottlers as indispensible parties. Affirmed.

Earl W. Kintner, and *Mark R. Joelson*, Washington, D.C., for appellant.

James P. Timony, Atty., F.T.C., Washington, D.C., for appellees.

Before LAY and STEPHENSON, *Circuit Judges*, and TALBOT SMITH, *District Judge.***

STEPHENSON, *Circuit Judge*.

The Seven-Up Company appeals from the order of the District Court dismissing appellant's claim for lack of subject matter jurisdic-

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*Reported in 478 F.2d 755 (1973); *cert. denied*, Nov. 5, 1973, 414 U.S. 1013, 94 S.Ct. 379. For case before the District Court, see page 366 herein. For case before the Commission, see —— F.T.C. ——.

**Eastern District of Michigan, sitting by designation.

tion. Seven-Up sought below to enjoin the Federal Trade Commission from further action in its proceedings against Seven-Up, alleging that the administrative proceeding itself is fatally defective without the joinder of Seven-Up's 470 bottlers as indispensable parties.

Seven-Up, along with several other major soft drink manufacturers,[1] has been charged by the FTC with using an unfair method of competition through its license agreements with bottlers whereby the bottlers agree to not sell outside of designated geographical areas. Seven-Up moved to dismiss the administrative complaint, claiming that the bottlers are indispensible parties since they have important contract rights which are at stake in the proceedings. The motion to dismiss was denied by the Hearing Examiner whose order was then upheld by the Commission.[2] Seven-Up then petitioned the District Court for both injunctive and declaratory relief.

The Coca-Cola Company and PepsiCo., Inc., other respondents in the FTC proceedings, have both unsuccessfully presented the identical claim to the Fifth and Second Circuits. *Coca-Cola Company* v. *FTC*, 475 F.2d 299 (CA5 1973) and *PepsiCo., Inc.* v. *FTC*, 472 F.2d 179 (CA2 1972). We particularly agree with the reasoning of the Fifth Circuit and likewise hold that the action was properly dismissed for lack of subject matter jurisdiction.

Federal Courts have traditionally declined to interfere with ongoing agency proceedings under the doctrine requiring exhaustion of administrative remedies. See, *McGee* v. *United States*, 402 U.S. 479, 91 S.Ct. 1565, 29 L.Ed.2d 47 (1971); *McKart* v. *United States*, 395 U.S. 185, **[757]** 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969) and *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–52, 58 S.Ct. 459, 82 L.Ed. 638 (1938). Furthermore, Congress has here specified a statutory scheme which contemplates judicial review of cease and desist orders issued by the FTC exclusively by a court of appeals. 15 U.S.C. § 45 (c) and (d) provide in pertinent part that:

> (c) Any person, * * * required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, * * *
>
> (d) * * * the jurisdiction of the court of appeals * * * shall be exclusive.

This is fully in harmony with § 10(c) of the Administrative Procedure Act. See 5 U.S.C. § 704 and *Coca-Cola, supra*, 475 F.2d at 302.

The statutory provisions for review, however, have been held not to preclude district court review under *all* circumstances. *See Elmo Divi-*

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[1] The manufacturers were charged in separate complaints.

[2] While we do not reach the merits of the indispensable party issue, we note that the joinder question also contains a dispute as to the underlying facts. The Hearing Examiner allowed any of the 470 bottlers to intervene if they so wished. One intervened. Seven-Up, however, asserts that this right to intervene was "limited" and insufficient. The FTC disagrees. *See, e.g., PepsiCo., Inc.* v. *F. T. C.*, 472 F.2d 179, 183–184 (CA2 1972).

sion of Drive-X Co. v. *Dixon*, 121 U.S.App.D.C. 113, 348 F.2d 342, 343 (1965) and *PepsiCo, supra*, 472 F.2d at 185. *Compare, Coca-Cola, supra*, 475 F.2d at 302. It has been held that district courts have jurisdiction to grant relief during agency proceedings which are not yet final in certain specific instances. These include, (1) where the agency has acted in excess of its delegated powers or contrary to a specific statutory mandate. *Leedom* v. *Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958); (2) where the proceedings involve questions of high national interest because of their international complexion. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963) and (3) where the agency has clearly violated the constitutional rights of the party seeking prior restraint. *Fay* v. *Douds*, 172 F.2d 720 (CA2 1949). Seven-Up clearly has not brought itself within any of these exceptions to the rule against judicial review of interlocutory agency rulings.

Seven-Up further asserts, however, that the FTC's refusal to join the bottlers as parties in its proceedings amounts to "final agency action for which there is no other adequate remedy in a court" under the Administrative Procedure Act. 5 U.S.C. § 704. We disagree, for while the Commission's ruling on Seven-Up's motion at the most amounts to final agency action on the joinder issue, judicial review by a court of appeals can clearly be had once the Commission's proceedings are concluded. 5 U.S.C. § 704 goes on to provide that an interlocutory agency ruling "is subject to review on the review of the final agency action." Neither are we convinced that the absence of the bottlers as parties renders the proceedings so fundamentally defective that immediate judicial relief is required. As the Fifth Circuit stated in *Coca-Cola*, 475 F.2d at 304:

> The extraordinary remedy of judicial intervention in agency proceedings still in process is unavailable unless necessary to vindicate an unambiguous statutory or constitutional right, and only when this condition is satisfied will a court look to the general body of equitable jurisprudence and other appropriate sources for the purpose of fashioning relief. To adopt the plaintiffs' position, on the other hand, would be to make the rule that judicial intervention to "correct" an interlocutory agency ruling is available wherever an agency ruling differed from some equitable maxim.

We conclude that Seven-Up must await a cease and desist order by the FTC, if such is ever to be issued, before jurisdiction will lie for a review of the interlocutory ruling it challenges.[3]

Affirmed.

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[3] We reject as without merit Seven-Up's contention that the standard of review on the joinder question, once the agency proceedings are completed, will necessarily be more stringent

AMERICAN GENERAL INSURANCE COMPANY, ET AL. v. FEDERAL TRADE COMMISSION*

Civ. A. No. 73-H-282. F.T.C. Docket 8847

(United States District Court, S.D. Texas, Houston Div., June 5, 1973)

1. By Seeking To Obtain Relief in District Court, Plaintiffs Were Improperly Attempting To Circumvent Statutory Scheme of Review and Avoid Adjudicatory Proceedings of F.T.C.

[887] Plaintiff holding company and the plaintiff company, which was proposed to be acquired, by seeking to obtain equitable relief in district court to declare Federal Trade Commission without subject matter jurisdiction to conduct proceeding with respect to challenge of merger were improperly attempting to circumvent statutory scheme of review and avoid adjudicatory proceedings of Commission which had denied motion of plaintiffs for summary decision on grounds that Commission lacked jurisdiction to challenge merger because subject matter of complaint involved business of insurance regulated by state law.

2. Action Must Be Made Reviewable by Statute or Final Agency Action With No Other Remedy in Court for Federal Court To Have Jurisdiction.

For federal court to have jurisdiction under Administrative Procedures Act, action must be one made reviewable by statute or a final agency action for which there is no other adequate remedy in court.

3. F.T.C.'s Summary Determination Was Not Res Judicata Even Though It Established Law of Case.

Federal Trade Commission's summary determination denying motion of plaintiffs to dismiss administrative proceedings on jurisdictional ground was interlocutory and while it established law of case it was not *res judicata*.

4. Denial of Summary Judgment Is Not a Final Decision as Contemplated by Statute.

Denial of motion for summary judgment is not a final decision as contemplated by statute such as to vest jurisdiction in an appellate forum to review the denial.

5. Interlocutory Appeal Will Not Lie From a Summary Interlocutory Order Which Is Not Made Appealable by Statute.

Interlocutory appeal will not lie from a summary interlocutory order which is not made appealable by statute.

6. Exception to Exhaustion Doctrine With Respect to Contravention of Statutory Mandate Is Narrowly Confined to Extreme Circumstances.

The exception to exhaustion doctrine with respect to administrative proceedings involving a plain contravention of statutory mandate is narrowly confined to the extreme circumstances.

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*Reported in 359 F. Supp. 887 (1973); *aff'd* 496 F. 2d 197 (5 Cir. 1974), see p. 1060 herein. For case before the Commission, see ____ F.T.C. ___.

7. ACTION OF PLAINTIFFS TO ENJOIN F.T.C. FROM PROCEEDING WITH HEARINGS DID NOT FALL WITHIN NARROW EXCEPTION TO EXHAUSTION DOCTRINE.

Because it was not clear that the McCarran-Ferguson Act subjecting business of insurance to the laws of the several states clearly barred ability of Federal Trade Commission to challenge mergers of insurance companies, action by proposed merger candidates to enjoin Commission from proceeding with hearing challenging merger did not fall with[888]in narrow exception to exhaustion doctrine in cases of plain contravention of statutory mandate; plaintiffs had adequate remedy at law by way of review of final Commission order.

8. IMMUNITY FROM FEDERAL ANTITRUST LAW IS NOT LIGHTLY IMPLIED.

Immunity from federal antitrust laws is not lightly implied.

9. F.T.C. WAS NOT DEPRIVED OF JURISDICTION BY MCCARRAN-FERGUSON ACT BECAUSE STATE COULD NOT REGULATE EXTRATERRITORIALLY THE POTENTIAL REGULATION OF MERGER OF TEXAS AND MARYLAND CORPORATIONS.

Because state could not regulate extraterritorially the potential regulation of merger of Texas corporation and Maryland corporation, Federal Trade Commission was not deprived of jurisdiction by the McCarran-Ferguson Act, subjecting business of insurance to the laws of several states, from challenging the merger under Clayton Act where the impact of the merger would be felt in all states.

10. MCCARRAN-FERGUSON ACT DOES NOT PREEMPT F.T.C. JURISDICTION OVER PROPOSED MERGER.

McCarran-Ferguson Act providing for regulation by the laws of the several states of the business of insurance does not preempt Federal Trade Commission jurisdiction over proposed merger of holding company with various insurance company subsidiaries and another insurance company since the "business of insurance" within meaning of statute does not include merger activity.

11. PHRASE "BUSINESS OF INSURANCE" IN FEDERAL STATUTE LEAVING REGULATION OF INSURANCE BUSINESS TO STATES PRIMARILY INVOLVES RELATIONSHIP BETWEEN INSURANCE COMPANY AND POLICYHOLDER.

The phrase "business of insurance" in federal statute leaving to the laws of the several states the regulation of the business of insurance involves primarily the relationship between the insurance company and the policyholder.

12. THERE ARE SEVERAL FACTORS TO BE CONSIDERED IN DETERMINING WHETHER PRELIMINARY INJUNCTIVE RELIEF IS APPROPRIATE.

Factors to be considered in determining whether preliminary injunctive relief is appropriate are: whether plaintiff is likely to prevail on merits, whether plaintiff is in danger of suffering irreparable harm, whether potential harm to defendant from issuance of injunction outweighs possible harm to plaintiff if injunctive relief is denied, and whether issuance of preliminary injunction will serve public interest.

13. PRELIMINARY INJUNCTIVE RELIEF TO PREVENT F.T.C. FROM CHALLENGING MERGERS WAS DENIED IN VIEW OF UNLIKELY SUCCESS OF PLAINTIFFS ON MERITS AND FAILURE TO ESTABLISH DANGER OF IRREPARABLE HARM.

Preliminary injunctive relief to prevent Federal Trade Commission from challenging mergers of plaintiffs under Clayton Act based on plaintiffs' assertion that the insurance business was regulated by the laws of the various states was denied in view of unlikely success of plaintiffs on the merits and the failure to establish danger of irreparable harm.

(Syllabus, with substituted captions, taken from 359 F. Supp. 887)

Court held that plaintiffs were improperly attempting to circumvent statutory scheme of review and avoid adjudicatory proceedings of Federal Trade Commission.

Motion for preliminary and permanent injunction and for declaratory relief denied; and defendants' motion to dismiss granted.

Leroy Jeffers, *Vinson, Elkins, Searls, Connally & Smith*, *George F. Reed*, Houston, Tex., for American Gen. Ins. Co.

Decatur H. Miller, *Pipe & Marbury*, *Richard F. Ober*, Baltimore, Md., for Fidelity and Deposit Co.

Anthony J. P. Farris, U.S. Atty., *William L. Bowers, Jr.*, and *James R. Gough*, Asst. U.S. Attys., Houston, Tex., *Harold D. Rhynedance, Jr.*, *Nicholas S. Reynolds*, Washington, D.C., for defendants.

MEMORANDUM AND ORDER

SEALS, *District Judge.*

Plaintiffs ask the Court in this action for declaratory and injunctive relief, to declare that the Federal Trade Commission is without subject matter jurisdiction to conduct proceedings in connection with *In the Matter of American General Insurance Company*, FTC Docket 8847, for the reason that the **[889]** McCarran-Ferguson Act, 15 U.S.C. § 1011 renders § 7 of the Clayton Act, 15 U.S.C. § 18 inapplicable to the merger of American General Insurance Company and Fidelity and Deposit Company of Maryland. Plaintiffs ask that a preliminary injunction issue against the Federal Trade Commission, its present members, and the administrative law judge involved in the administrative proceedings against Plaintiff American General Insurance Company enjoining them from conducting any further proceeding in FTC Docket No. 8847 until this Court has entered a final judgment determining the merits of this complaint, and that this Court enter a permanent injunction prohibiting Defendants from conducting any further proceedings in FTC Docket No. 8847 and directing Defendants to dismiss the Complaint therein in its entirety.

In response the Defendants have moved the Court to dismiss this action on the grounds that the Court lacks jurisdiction over the subject matter and that the Complaint fails to state a claim upon which relief can be granted. After hearing before the Court and upon the briefs and other papers filed with the Court, the Court makes the following Memorandum Opinion.

I.

This case has its roots in a merger agreement worked out in 1969 between American General Insurance Company and Fidelity and Deposit Company of Maryland. American General is a Texas corporation with its principal place of business in Houston, Texas. It is primarily a holding company: its subsidiaries include life insurance companies, property-liability insurance companies and financial noninsurance institutions. Fidelity and Deposit is a Maryland corporation with its principal place of business in Baltimore, Maryland. It is engaged in the business of writing property-liability insurance, primarily for commercial customers, and the majority of its writings consist of fidelity and surety bonds.

The merger agreement was submitted to the state insurance authorities of both Maryland and Texas who approved the plan. Subsequent to approval the new company applied for and received licenses to do business in all states where the prior companies had done business.

About June 17, 1971, the Federal Trade Commission issued a complaint alleging that American General had violated Section 7 of the Clayton Act by reason of its merger with Fidelity and Deposit. The basic allegation of the complaint was that the effect of the merger might be to lessen substantially competition or to tend to create a monopoly in the business of underwriting fidelity and surety bonds in the United States and in various states and other geographic markets.

In reply, American General alleged that the Federal Trade Commission lacked jurisdiction to challenge the merger in that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015 renders Section 7 of the Clayton Act, 15 U.S.C. § 18, inapplicable to the merger since the subject matter of the Commission's Complaint involves the business of insurance which is regulated by State law.[1] American General also denied the **[890]** principal allegations of the administrative complaint and requested that the complaint be dismissed. Following the intervention of Fidelity and Deposit in the administrative proceedings, plaintiffs filed a motion for summary decision on the jurisdictional ground.

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[1] The McCarran-Ferguson Act, 15 U.S.C. § 1012, provides in pertinent part:

Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948.

a. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

b. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically related to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended known as the Sherman Act, and the Act of October 15, 1914, as amended known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

On March 7, 1972, the Commission's administrative law judge issued his initial decision granting the Plaintiffs' motion for summary decision and dismissing the complaint. He held that "the States of Maryland and Texas, and many of the other states, have laws, capable of being enforced, which regulate the business of insurance, within the contemplation and meaning of the McCarran-Ferguson Act," and that therefore "the Federal Trade Commission lacks jurisdiction over the subject matter of the complaint herein."

The Commission counsel supporting the administrative complaint appealed to the whole Commission and after submission of written briefs and oral argument, the Commission vacated and set aside the decision of the administrative law judge and remanded the case for further proceedings. The Commission (per Dennison, C.) held that because of territorial limitations on a state's ability to regulate, neither Texas nor Maryland, the respective domiciliary states of American General and Fidelity and Deposit, nor any other state have regulations effectively reviewing the effects of mergers of national insurance companies on the industry as a whole. The Commission held further that the merger of insurance companies is not included in the "business of insurance," the regulation of which by a state preempts federal jurisdiction under the McCarran-Ferguson Act. Thus, the Commission concluded that it was not preempted by the McCarran-Ferguson Act from challenging the instant merger. Following the Commission's action remanding the case Plaintiffs filed the suit now pending before this Court.

II.

Before this Court can consider Plaintiffs' request for injunctive relief, it must first ascertain that it has the jurisdiction necessary to interfere in proceedings currently pending before an administrative agency such as the Federal Trade Commission. Stripped to the core, Plaintiffs' suit becomes an attempt to obtain review in this Court of the jurisdictional determination made by the Federal Trade Commission when it denied Plaintiffs' motion for summary decision. The Plaintiffs contend that such denial amounts to a final ruling within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704,[2]

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[2] 5 U.S.C. § 704 Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling out directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been and that it is therefore within the jurisdiction of this Court for review.

The position of the Defendants is that the denial of motion for summary decision is an interlocutory order, not a "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, and that therefore the Plaintiffs have failed to exhaust available administrative remedies. Defendants maintain that the issue raised in Plaintiffs' complaint is one the determination of which lies exclusively within the jurisdiction of the court of appeals upon a [**891**] petition for review of a final order of the Commission, if indeed any order is ultimately entered against American General at the conclusion of the administrative proceeding. Under Defendants' theory the proper forum for review of a Commission proceeding initiated under Section 7 of the Clayton Act, 15 U.S.C. § 18, is specified in Section 11(c) of the Act, 15 U.S.C. § 21(c), which provides:

> (c) Any person required by such order of the commission * * * to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States * * * .

Furthermore, the jurisdiction of the Court of Appeals over Commission Clayton Act proceedings is exclusive.[3]

[1] It is the opinion of this Court that the Plaintiffs, by seeking to obtain equitable relief in this Court are in reality attempting to circumvent the statutory scheme of review and avoid the adjudicatory proceedings of the Commission. It is equally clear that the Supreme Court and this Circuit have repeatedly refused to allow obstructions to the orderly and expeditious operation of the administrative process. *E.g.*, *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 74 S. Ct. 745, 98 L. Ed. 933 (1954); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638 (1938); *Bokat* v. *Tidewater Equipment Co.*, 363 F. 2d 667 (5th Cir. 1966).

[2–5] For this Court to have jurisdiction in this case under the Administrative Procedures Act, the action in question must either be one made reviewable by statute or a final agency action for which there is no other adequate remedy in a court. The denial of motion for summary decision in question in this instance is neither of these. In fact, it is analogous to a denial of motion for summary judgment and is therefore most properly characterized as interlocutory. While the Commission's summary determination as to its jurisdiction establishes

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presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

[3] Section 11(d) of the Clayton Act, 15 U.S.C. § 21(d) provides as follows:

(d) Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission or board shall be exclusive.

the law of the case, it is not res judicata. *Coffman* v. *Federal Laboratories, Inc.*, 171 F.2d 94 (3rd Cir. 1948); *6 Moore's Federal Practice*, §§ 5614(2) at 2258 and 56.20(3–4) at 2759. Certainly a denial of a motion for summary judgment is not a "final decision" as contemplated by 28 U.S.C. § 1291 such as to vest jurisdiction in an appellate forum to review the denial. It is also clear that interlocutory appeal will not lie from a summary interlocutory order which is not made appealable by statute. *6 Moore's Federal Practice* § 56.20(3.–1 at 2747).

Continuing the analogy, it is apparent that many of the considerations which support the final judgment rule with respect to appeals from interlocutory decisions of lower courts are equally applicable to actions by administrative agencies. It may be, for example, that the Commission will find in favor of American General on the merits of the administrative complaint, or that the case will be settled. However, should the Commission issue an order adverse to American General at the conclusion of the pending administrative proceeding, the court of appeals on review would best be able to assess the matter in the context of a completed administrative record. Since the denial of the motion of summary decision is not "final agency action" as contemplated by 5 U.S.C. § 704, this Court must conclude that it has no statutory jurisdiction to review the Commission's order.

The Plaintiffs maintain that a finding of jurisdiction under the Administrative Procedures Act is not essential to their case because jurisdiction is conferred by case law. It is their position that the instant case falls within the narrow exception to the exhaustion doctrine which has been judically carved by *Leedom* v. **[892]** *Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958).

[6] In *Kyne*, the National Labor Relations Board in the course of a proceeding resulting in union certification, had grouped professionals with non-professionals in the same bargaining unit without a vote of the professionals. Such action was in defiance of an express statutory prohibition. The Supreme Court sustained jurisdiction in the district court to enjoin the NLRB from depriving some of the affected employees of a substantive right clearly granted to them by statute and from exercising authority clearly in excess of its jurisdiction. Significantly, without the district court's intervention, the deprivation could not have been reviewed pursuant to the statutory review procedures at the instance of the employees whose rights had been obliterated by the NLRB action.

Within the Fifth Circuit, the exception created by *Leedom* v. *Kyne* that only "a plain contravention of a statutory mandate" justifies district court interventions has been very narrowly confined to the extreme type of circumstances which resulted in the decision. *Boire* v.

Miami Herald Publishing Co., 343 F.2d 687 (5th Cir. 1965). Furthermore, such a rule has been found applicable to Federal Trade Commission proceedings. *Federal Trade Commission* v. *J. Weingarten, Inc.*, 336 F.2d 687 (5th Cir. 1964). The Court stated its position most succinctly in *United States* v. *Feaster*, 410 F.2d 1354 (5th Cir. 1969):

> * * * Leedom v. Kyne represents only a narrow and rarely successfully invoked exception to the doctrine that exhaustion of administrative procedures is a condition precedent to federal court jurisdiction. Under this exception access to the courts is accorded only if the [agency's] determination is infused with error which is of a *summa* or *magna* quality as contraposed to decisions which are simply *cum* error. Only the egregious error melds the [agency's] decision into justiciability. Lesser malignancies thwart the jurisdiction of the courts (410 F.2d at 1368; citations omitted).

These narrow strictures of the *Kyne* exhaustion exception have been most recently reiterated in the *Coca-Cola Co.* v. *Federal Trade Commission*, 475 F.2d 299, 5th Cir., 1973.

[7] In the case at hand we do not have the inadequacy of legal remedies which resulted in *Kyne.* The legal question will be subject to review when and if a final order issues from the Federal Trade Commission which Plaintiff would seek to appeal. Nor do we have in this case an assertion of jurisdiction by the Federal Trade Commission in flagrant disregard of their statutory authority as a matter of law on which this Court could ground any interference by it in the orderly process of administrative proceedings. It simply is not clear that the McCarran-Ferguson Act is a complete bar to the ability of the Federal Trade Commission to challenge the mergers of insurance companies under Section 7 of the Clayton Act, 15 U.S.C. § 18. Indeed, federal courts have held in similar situations that the McCarran-Ferguson Act does not preclude federal regulation being applied to the insurance industry. *Federal Trade Commission* v. *Travelers Health Association*, 362 U.S. 293, 80 S.Ct. 717, 4 L.Ed.2d 724 (1960); *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969); *United States* v. *Chicago Title & Trust Co.*, 242 F. Supp. 56 (N.D.Ill.E.D.1965). In short, this case just does not fall within the narrow confines of *Leedom* v. *Kyne.*

This Court feels that the Plaintiff has an adequate remedy at law, that being review of the final Commission order as provided by the Clayton Act. Such a holding is consistent with the Fifth Circuit's ruling in *Frito-Lay, Inc.* v. *Federal Trade Commission*, 380 F.2d 8 (5th Cir. 1967), a case very close to this case on the facts. In that case, the Commission had issued an administra**[893]**tive complaint charging Frito-Lay with violations of Section 7 of the Clayton Act, 15 U.S.C. § 18. Frito-Lay challenged the Commission's jurisdiction to attack its acquisition of or merger with certain other corporations, arguing that it, Frito-Lay, was a "packer" within the meaning of the Packers and Stockyards Act; therefore, its acquisitions or mergers were under the exclusive jurisdiction of the Secretary of Agriculture.[4]

The Fifth Circuit Court of Appeals in affirming the District Court's dismissal of the suit for failure to exhaust administrative remedies observed:

> Jurisdiction to review proceedings conducted by the Federal Trade Commission pursuant to Section 7 of the Clayton Act, 15 U.S.C. § 18, is conferred upon the Courts of Appeals by Sectoin 11(c) of the Act, 15 U.S.C. § 21(c). Section 11(d), 15 U.S.C. § 21(d) makes that jurisdiction exclusive. All constitutional, jurisdictional, substantive, and procedural issues arising in Commission proceedings may be considered in a Section 11(c) appeal, * * * and this statutory right to review has long been viewed as constituting a speedy and adequate remedy at law. Where Congress has provided an adequate procedure for judicial review of administrative actions, that procedure must be followed * * * Judicial intervention without exhaustion of administrative remedies is not justified * * * where as here, the merit of [Plaintiff's] jurisdictional attack is far from clear, the administrative body may be more qualified than the court to initially consider the jurisdictional question, and the injury sought to be avoided is merely the normal cost of administrative litigation. See Davis, Administrative Law Text § 20.01-.03 (1959). [380 F.2d at 9; citations omitted.]

Having concluded that there has not yet been any final agency action, that the Federal Trade Commission has not clearly exceeded the bounds of its jurisdiction, and that the Plaintiffs have an adequate remedy at law through review of the final Commission order as provided by the Clayton Act, this Court is compelled to dismiss Plaintiffs' complaint for failure to exhaust administrative remedies.

III.

Even if this Court were to find that it was within its jurisdiction to review the Federal Trade Commission's exercise of jurisdiction to challenge the American General-Fidelity and Deposit merger, the Court would still be forced to deny Plaintiffs the declaratory and injunctive relief which they seek. As noted before the Plaintiffs have asked this Court to rule that the McCarran-Ferguson Act in terms of the situation at hand means that the regulation of insurance company mergers is to be done by the individual states, and that only in the instance where a state has made no attempt to pass such legislation would the Federal Trade Commission have any jurisdiction to challenge the mergers. The Plaintiffs further maintain that since both Texas and Maryland have anti-trust regulations applicable to mergers, it is beyond the scope of authority of the Federal Trade Commission because of the McCarran-Ferguson Act to challenge such mergers. The Defendants take the position as first advanced in the opinion issued by the Commission denying summary decision on the jurisdictional point, that state regulation of the instant merger could not have extraterri[**894**]torial effect, and that merger activity is not a part of the "business of insurance," the regulation of which by a state preempts federal jurisdiction under the McCarran-Ferguson Act.

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[4] Packers and Stockyards Act, 7 U.S.C. § 192 provides in pertinent part:

"It shall be unlawful * * * for any packer * * * to

(e) Engage in any course of business or do any act for the purpose or with the effect of * * * creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; * * *"

Packers and Stockyards Act, 7 U.S.C. § 193 authorized the Secretary of Agriculture to enforce the proscriptions contained in Section 192 of the Act.

Congress enacted the McCarran-Ferguson Act in reaction to the decision of the Supreme Court is *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), in which the Court held that insurance transactions were subject under the Commerce Clause to federal regulation, including federal anti-trust laws. Prior to the *South-Eastern Underwriters* case it had generally been assumed, on the basis of *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 1968, 19 L.Ed. 357 (1869), that the regulation of insurance transactions rested exclusively with the states. The legislative history of the Act indicates that Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the states to tax insurance companies. Indeed, the intent of the Act seemed to be to "assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulations." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 458–459, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1969).

The provision of the Act relevant to our consideration here, Section 2(b), 15 U.S.C. § 1012(b), states that the Sherman, Clayton, and Federal Trade Commission Acts "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." Interpretation of that section in light of the merits of the case at hand rests on the answers to two questions:

> A. Is it possible for individual States to regulate the merger activities of insurance companies operating in interstate commerce in national or regional markets?
>
> B. Does the "business of insurance" as used in Section 2(b) include the merger activities of such companies?

[8] The Court in interpreting Section 2(b) also takes note of the canon of construction set out in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963), that "immunity from the [federal] antitrust laws is not lightly implied."

A.

[9] The plaintiffs maintain that the individual states, in effect, regulate the merger activities through the anti-trust laws of the principal places of business of the merging companies, and through the licensing requirements of each of the states in which the new company does business. But the plain fact remains that a state's ability to regulate is bounded by its state lines. Furthermore, a state in regulating such activities as mergers will be concerned with the effect of the merger on business in that state; it will not examine a merger in terms of national effect, because it has no power to regulate beyond the boundaries of the state.[5]

In *Maryland Casualty Co.* v. *American General Insurance Co.*, (1964) Trade Cas. 71,188 (D.D.C.1964), a case somewhat similar to the case at bar, the jurisdictional issue involved the application of Section 7 to the stock acquisition of a Maryland domiciled insurance company by a Texas domiciled insurance company. As in our case the acquired company was licensed and doing business in all fifty states. The Court held that the McCarran Act did not preclude **[895]** application of Section 7 of the Clayton Act to the merger. As observed by the court:

> No regulation of the proposed acquisition of control of [Maryland Casualty Co.] or its agencies under Texas or Maryland statutes can be adequate or effective because of territorial limitations of Texas and Maryland regulations. Texas and Maryland statutes do not provide for adequate or effective regulation of the proposed acquisition of control of [Maryland Casualty Co.] or its agencies and there is no such regulation thereunder as precludes this suit under the antitrust laws (71,188 at 79,719).

This concept that the McCarran-Ferguson Act does not contemplate extraterritorial regulation by the states was established by the Supreme Court in *Federal Trade Commission* v. *Travelers Health Association*, 362 U.S. 293, 80 S.Ct. 717, 4 L.Ed.2d 724 (1960). In that case the Commission was attempting to apply Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, to the advertising practices of an insurance company which was licensed in Nebraska and Virginia but which sold insurance policies by mail in all states. Nebraska had in force a statute which prohibited its domiciliaries from engaging in unfair and deceptive practices in the conduct of the business of insurance in any other state, territory, country or district. It was the conclusion of the Court of Appeals that because the domiciliary state had made provisions for regulating such advertising practices, that the McCarran-Ferguson Act precluded the Federal Trade Commission from regulating insurance advertising in interstate commerce. *Travelers Health Association* v. *Federal Trade Commission*, 262 F.2d 241 (8th Cir. 1959).

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[5] An example of the inward focus of the states is found in the Model Insurance Holding Company System Regulatory Act, promulgated by the National Association of Insurance Commissioners and enacted and currently in force in substantially comparable form in some thirty-seven states including Maryland and Texas, which provides that:

The Commissioner is required to disprove the merger if he finds the effect of the purchases, exchanges, mergers, or other acquisitions of control may be substantially to lessen competition in insurance in *this state*, or tend to create a monopoly therein. (emphasis added).

The Supreme Court reversed. In concluding that McCarran-Ferguson does not operate to preempt federal jurisdiction by reason of a state's attempt to regulate its domiciliary's extraterritorial activities it observed:

> We cannot believe that this kind of law of a single state takes from the residents of every other State the protection of the Federal Trade Commission Act.
>
> (362 U.S. at 298, 80 S.Ct. at 720, footnotes omitted.)

The Court in construing the Act, delved into Congressional intent relative to its enactment and extraterritorial regulation by the respective states, and concluded:

> * * * It is clear that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders. (362 U.S. at 300, 80 S.Ct. at 721).

The Court quoted the following statement made by Senator O'Mahoney, one of the three Senate conferees on the bill, as illustrative of meaning intended by Congress for Section 2(b) of the Act:

> When the moratorium period passes, the Sherman Act, the Clayton Act, and the Federal Trade Commission Act come to life again in the field of interstate commerce, and in the field of interstate regulation. Nothing in the proposed law would authorize a State to try to regulate for other States, or authorize any private group or association to regulate in the field of interstate commerce."
>
> (91 Cong.Rec. 1483, as quoted as 362 U.S. at 301, 80 S.Ct. at 722).

Thus, it is clear that the extraterritoriality rationale of Travelers applies with equal force to federal antitrust regulation under the Clayton Act. It is the conclusion of this Court that because a state cannot regulate extraterritorially, the potential regulation of the instant merger by Texas and Maryland, the domiciliary states of the Plaintiffs, does not by way of the McCarran-Ferguson Act deprive the Commission of jurisdiction to challenge the merger under Section 7 of the Clayton Act when the im-**[896]**pact of the merger obviously will be felt in all fifty states.

B.

[10, 11] We have held that the McCarran-Ferguson Act does not preempt Commission jurisdiction over the instant merger since no State can regulate extraterritorially. It is the further conclusion of this Court that the McCarran Act does not preempt Commission jurisdiction over this merger since the "business of insurance" does not include merger activity. Section 2(b) of the Act bars application of federal law which would "invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance." Congress failed to define the scope of "business of insurance," and therefore it has been left to the courts to determine what activities of insurance companies are in fact the "business of insurance." [6]

The clearest delineation of what constitutes the "business of insurance" as contemplated by the McCarran-Ferguson Act is found in *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969). The SEC had brought suit against National Securities, an insurance company, alleging violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), with regard to a fraudulent scheme centering on a contemplated merger of a subsidiary of National Securities and another insurance company.

The Supreme Court reversed the court of appeals who had upheld the district court's refusal to take action on the ground that to do so would violate Section 2(b) of McCarran-Ferguson in that the pertinent Arizona statute regulated the "business of insurance." The Supreme Court's examination of what constitutes the "business of insurance" is particularly useful as it relates to the case at bar. As analyzed by the Court:

> [The McCarran-Ferguson Act] did not purport to make the States supreme in regulating all the activities of insurance companies; its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the business of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply. Certainly the fixing of rates is part of this business; that is what *South-Eastern Underwriters* was all about. The selling and advertising of policies, *FTC* v. *National Casualty*, 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958), and the licensing of companies and their agents, cf. *Robertson* v. *California*, 328 U.S. 440, 66 S.Ct. 1160, 90 L.Ed. 1366 (1946), are also within the scope of the statute. Congress was concerned

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[6] The Court takes note of the fact that issuing policies of insurance is only one facet of the modern insurance companies' activities; insurance companies, among other things, are major investors in the nation's public corporations; and are prime financers of commercial construction and land development.

> with the type of state regulation that centers around the contract of insurance, the transaction which Paul v. Virginia held was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." * * * But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance." (393 U.S. 459–460, 89 S.Ct. 568).

The relationship involved in the merger of insurance companies is in essence one between individual companies and between those companies seeking to [**897**] merge and the industry as a whole. State anti-trust statutes seek to deal with the competitive aspects of these mergers, certainly a subject far removed from the relationship between the insurance company and the policyholder contemplated in *National Securities* as constituting the "business of insurance" to be protected by McCarran-Ferguson. This Court must conclude that the merger activity of insurance companies is not part of the "business of insurance" over which state regulation is given paramount importance in McCarran, and that Section 7 of the Clayton Act which is grounded on the federal interest in maintaining competition in interstate commerce in no sense invalidates, impairs, or supersedes state insurance laws which regulate the "business of insurance," *i.e.* the relationship between the insurance company and the policyholder.

IV.

[12] Plaintiffs have requested that the Court issue a preliminary injunction to stop pending Federal Trade Commission proceedings in FTC Docket 8847 pending the determination of this case on the merits. The factors to be considered by the Court in determining whether preliminary injunctive relief is appropriate are:

(1) whether the plaintiff is likely to prevail on the merits;

(2) whether the plaintiff is in danger of suffering irreparable harm;

(3) whether the potential harm to the defendant from issuance of the injunction outweighs the possible harm to the plaintiff if injunctive relief is denied;

(4) whether issuance of a preliminary injunction will serve the public interest.

Blackshear Residents v. *Rommey*, 472 F.2d 1197 (5th Cir., 1973). The discussions of jurisdiction and the merits of the case in which this Court has already engaged negate in large part the need to consider the request for preliminary injunction. However, because proof was offered on the subject at the hearing, the Court will evaluate it in terms of the four criteria set out above.

[13] As indicated by the previous discussion of the McCarran-Ferguson Act, the Court does not believe Plaintiffs are likely to prevail on the merits of this complaint. Furthermore, it is the opinion of this Court that the Plaintiffs failed to establish that they are in danger of suffering irreparable harm if the Commission is not enjoined from conducting the administrative proceeding.

The Plaintiffs attempted to show through statistics and testimony that the pending Federal Trade Commission case has caused them to lose business and to lose an increasing number of key employees which is resulting in irreparable injury. They argue that because of the Commission proceedings they have been unable to merge the companies and begin to offer the multiple line insurance coverage which is necessary to maintaining their competitive position in the market place. However, the Commission has taken no action to prevent such a consolidation. In fact, almost a year lapsed between the consummation of the merger agreement and the instituting of the Commission proceedings. Clearly, it is the Plaintiffs who have determined to withhold merging pending the outcome of the proceedings. Such action hardly constitutes the kind of irreparable harm a preliminary injunction is designed to prevent.

Likewise, the Court cannot accept the argument advanced by Plaintiff Fidelity and Deposit that they are losing an increasing number of key personnel as a result of the uncertainty created by the Commission. The testimony at the hearing indicated that Fidelity and Deposit is the kind of company that hires young men and women right out of college and subjects them to an intensive training program. As a result they have a large percentage of highly-trained and skilled people available which makes them subject to raids of personnel by competing companies. **[898]** Thus it cannot be said that the loss of personnel is the result of the pending Commission proceedings.

This Court is of the opinion that the granting of the injunctive relief requested by Plaintiffs would serve only to impede the efficient administration of the law by the Federal Trade Commission and would adversely affect third parties, including customers and competitors of American General and Fidelity and Deposit by denying them effective antitrust protection. It is the Federal Trade Commission's statutory obligation to protect the public from mergers which might result in substantially lessening competion or tending to create a monopoly. In this case the public interest is best served by denying the request for preliminary injunctive relief.

For the foregoing reasons, it is ordered, adjudged and decreed that Plaintiffs' prayer for a preliminary, as well as a permanent injunction, and for declaratory relief shall be, and hereby is, denied; and that the Defendants' motion to dismiss is granted.

BORDEN, INC. v. F.T.C.*

Civ. A. No. 73 C 1187. FTC Docket 8866.

(United States District Court for the Northern District of Illinois, Eastern Division, June 7, 1973)

In an action for declaratory judgment determining the jurisdiction of the F.T.C. and injunctive relief to enjoin the F.T.C. from conducting further administrative proceedings, court held that it is deprived of jurisdiction of Count I by the doctrine of exhaustion of administrative remedies, and that even if it had jurisdiction, injunctive relief would not be warranted.

Before McLAREN, *District Judge.*

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon the motion of defendant Federal Trade Commission ("Commission") to dismiss Count I of the complaint and the motion of plaintiff Borden, Inc. ("Borden") for a preliminary injunction under that count restraining the Commission, its staff, administrative law judges, and other agents from any further proceedings on the Commission's complaint issued against Borden and The Great Atlantic & Pacific Tea Co., Inc. ("A&P"). For the reasons set forth below, the Commission's motion will be granted and Borden's motion will be denied

Count I alleges that the issuance of the Commission complaint (Docket No. 8866) followed a "clear and material violation of the Commission's own rules requiring notice to parties under investigation." The Commission had in effect during the relevant time period Rule 2.6, 16 C.F.R. § 2.6, or a rule substantially similar thereto. Rule 2.6 provides:

> Any person under investigation compelled or requested to furnish information or documentary evidence shall be advised with respect to the purpose and scope of the investigation.

It is alleged that one of the purposes and effects of Rule 2.6 is to provide the person under investigation an opportunity to furnish the Commission with exculpatory information respecting the acts or practices under investigation prior to the Commission's decision to issue a complaint.

It is further alleged on information and belief that during at least part of the relevant period the following unpublished Commission rule or directive implemented and interpreted Rule 2.6:

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*Not otherwise reported; *aff'd* 495 F. 2d 785 (7 Cir. 1974), see p. 931 herein. For case before the Commission, see *In the Matter of The Great Atlantic & Pacific Tea Company, Inc., et al.*, 87 F.T.C. 962. See also p. 802 herein for district court's ruling as to Count II.

> As a matter of standard operating procedure, in any matter in which a recommendation for a complaint is contemplated the proposed respondent should be * * * afforded an opportunity to furnish information respecting the acts or practices involved prior to submitting the matter to the Commission with recommendation for complaint.

In November 1965, Borden began selling private label fluid milk products to A&P stores in the Chicago area. Counts I and II of the Commission complaint allege that A&P wrongfully induced discriminatory prices on said sales. Count III charges A&P and Borden with a combination, the effect of which was stabilization of prices. Borden is not charged with price discrimination.

The Commission investigation leading to its complaint commenced at some time prior to March 1967. During March 1967, Borden received notice that the Commission's Chicago Office was investigating whether Borden's sale of milk to A&P involved illegal price discrimination in violation of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(f), or sales at unreasonably low prices or at prices below cost for the purpose of eliminating or lessening competition in violation of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. On January 21, 1969 the Commission authorized by formal resolution an investigation of Borden with respect to possible discriminatory pricing practices. Borden alleges that it was informed of this resolution in October 1969.

It is undisputed that Borden was not given notice that it was under investigation for possible charges of illegal combination or price stabilization prior to its receipt of a copy of the Commission complaint on June 1, 1971.

Borden moved before the administrative law judge that Count III of the Commission complaint be dismissed for violation of the Commission's rules. The motion was denied. Borden moved for reconsideratin of this denial, or in the alternative for certification of the denial to the Commission pursuant to Rule 3.23, 16 C.F.R. § 3.23. This motion was also denied. Administrative hearings on the complaint are scheduled to begin on June 11, 1973.

Borden alleges that the Commission's failure to provide notice and an opportunity to submit information relating to the Count III charges during the investigation violated the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551–59, and the Due Process Clause of the Fifth Amendment. As a result, the Commission is allegedly without jurisdiction to proceed on its complaint.

Borden's theory here is that Rule 2.6 and the unpublished rule cited above are designed to provide a potential respondent with an opportunity to present exculpatory information to the Commission staff prior to a decision to issue and prosecute a complaint. In effect, Borden contends that it is entitled by these rules to an opportunity to attempt to resolve the matter before the Commission issues a complaint. In support thereof it cites E. Pollock, *Pre-Complaint Investigations by the Federal Trade Commission*, 45 Chicago Bar Record 379, 381–82 (1964).

The Commission has taken the position here that the purpose of Rule 2.6 is to provide a standard of relevancy for one who is requested to produce documentary materials; it should not be interpreted—as Borden urges—to bar a complaint against a violation which is uncovered during an investigation simply because such a violation was not within the Rule 2.6 notification of purpose.[1]

Borden contends that it has shown that the requirements for the issuance of preliminary injunctive relief are met by the circumstances of this case. The Commission not only denies this, but seeks dismissal of Count I on the ground that Borden has failed to exhaust its administrative remedies, thus depriving this Court of jurisdiction. It has been recognized that the exhaustion doctrine relates to the timing of, rather than the power to, review, and rests, at least in part, on general equity principles. *Bannercraft Clothing Co.* v. *Renegotiation Bd.*, 466 F.2d 345, 355–59 (D.C.Cir. 1972). It is thus no coincidence that the two factors which the Court finds to be dispositive of the exhaustion issue in the Commission's favor below would, if jurisdiction existed, nevertheless require the denial of Borden's motion for a preliminary injunction.

The first factor is the requirement that a reasonable likelihood of success on the merits be shown. The "merits" of Count I has to do with the issue of whether the Commission has jurisdiction to proceed on its complaint against Borden. In cases challenging agency jurisdiction which have dealt with the exhaustion issue, the relative clarity of administrative jurisdiction appears to have been considered relevant. See *Lone Star Cement Corp.* v. *FTC*, 339 F.2d 505 (9th Cir. 1964); 3 K. Davis, *Administrative Law Treatise* § 20.03, at 69; *cf. Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958) (where the statute was "clear and mandatory").

Borden's asserted right to pursue informal settlement and explanation prior to the filing of a complaint does not appear plainly on the face of Rule 2.6. The unpublished rule cited as evidence of that interpretation simply states that a party *should* be given an opportunity to supply information respecting the matters under investigation. Granted that the latter rule begins with the phrase "as a matter of standard operating procedure," it is not clearly mandatory that such an opportunity be provided.

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[1] It should be noted that the scope of a formal subpoena *duces tecum* is defined by a Commission resolution.

Borden's contention that the Commission lacks jurisdiction must be considered in light of the explicit rule providing for informal disposition. Rule 2.21, 16 C.F.R. § 2.21, states:

> (a) The Commission, when it has information indicating that a person or persons may be engaging in a practice which may involve violation of a law administered by it, and if it deems the public interest will be fully safeguarded thereby may afford such person or persons the opportunity to have a matter disposed of on an informal nonadjudicatory basis.
>
> (b) In determining whether the public interest will be fully safeguarded through such informal administrative action, the Commission will consider: (1) the nature and gravity of the alleged violation; (2) the prior record and good faith of the parties involved; and (3) other factors, including, where appropriate, adequate assurance of voluntary compliance.[2]

On November 29, 1969, the Commission issued a statement explaining Rule 2.21. 34 Federal Register 19044; 3 Trade Reg. Rep. ¶9591.18, at 17,092.

It is clear from Rule 2.21 and the explanatory statement that the Commission considers this informal enforcement procedure to be within its discretion. Even granting *arguendo* that Borden could not have attempted to achieve an informal settlement on Count III of the Commission's complaint when it did not know of the nature of the investigation, the contention, based on Rule 2.6, that an opportunity for informal settlement is a jurisdictional requirement is weak in light of the apparent discretionary nature of such settlement.

However, the most significant point against Borden's reading of the Commission's rules—and thus its contention that the Commission lacks jurisdiction—is the interpretation contended for by the Commission itself. It is obvious that the best source for the meaning of the rules is the agency which promulgated them. The courts accord great weight to an administrative agency's interpretation of its rules; indeed, its interpretation is binding unless plainly erroneous or inconsistent with the regulation. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 n.6 (1940). The Commission's interpretation of the rules at issue is neither. Rather, it is a good deal more plausible than that proposed by Borden, particularly in the light of the Commission's procedure with respect to formal subpoenas, as noted above. Borden's reading would bar the Commission from filing a complaint for illegal acts discovered during an investigation unless a second Rule 2.6 notice were sent and opportunity provided for a second round of informal discussions—all notwithstanding the Commission's clear intention that the use of these procedures be discretionary.

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[2] The above rule has apparently been in existence since 1963. *Pollock, supra* at 382 n. 22.

This Court has concluded that it is not at all clear that the Commission lacks jurisdiction to proceed on its complaint.[3] This factor alone is sufficient to preclude judicial interference in the administrative process under the exhaustion doctrine and to prevent the issuance of a preliminary injunction, even if jurisdiction existed. This is so because plaintiff has thus failed to show a reasonable likelihood of success on the merits.

Another factor prevents jurisdiction and preliminary injunctive relief here as well. To justify deviation from the exhaustion doctrine and granting of injunctive relief, the cases demand that irreparable injury be shown.

Borden argues that it will be irreparably harmed if it does not obtain review of the Commission's jurisdiction to proceed on its complaint because the court of appeals will not inquire into the propriety of the issuance of the complaint if an appeal is taken from a final Commission order. It relies upon *Jewel Cos., Inc.* v. *FTC*, 432 F.2d 1155, 1159 (7th Cir. 1970). Whatever the basis for the court's statement there that on review it "would only decide whether the final order is supported by the evidence and not question the authority of the Commission in issuing the complaint * * *," this court believes that the factual and legal circumstances of this case are distinguishable from those in *Jewel*. The issue there was whether a commissioner had misconstrued the statute controlling the issuance of complaints under the Clayton Act. The court of appeals characterized the question as "inherently a legal one" and "one of statutory construction" and concluded that "[t]he legal obligation, * * * can be determined by the courts without delay and we think the proper approach is to allow such *inherently legal* attacks prior to an agency's final order." *Id.* (emphasis added)

The nature of the legal question involved here differs in a significant way from that in *Jewel*. There, the legal question required the interpretation of a statute—a task to which the courts are accustomed and well suited and to which administrative agencies have no claim of expertise. 4 Davis § 30.01, at 241. In the area of interpretation of agency rules, however, the primary responsibility of interpretation rests with the agencies themselves and, as noted above, great weight is accorded their interpretations. Thus the determination of the jurisdictional issue in this case, unlike that in *Jewel*, is not susceptible to determination by the Court without delay.

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[3] This absence of clarity that the Commission lacks jurisdiction is in marked contrast to the cases upon which Borden relies. In *Jewel Cos., Inc.* v. *FTC*, 432 F.2d 1155 (7th Cir. 1970) the result depended upon statutory construction. Similarly, in *Elmo Division of Drive-X Co.* v. *Dixon*, 348 F.2d 342 (D.C.Cir. 1965), the court considered the question analogous to statutory construction since the rule filled in the statute's "interstices" and furthermore was incorporated into an earlier consent decree.

The issuance of the Commission's complaint would seem to constitute intermediate agency action and the decisions of the administrative law judge would appear to be procedural rulings within the scope of the court of appeals' power to review under 5 U.S.C. § 704. No reported case has extended *Jewel's* statement that the propriety of the issuance of the Commission complaint would not be reviewed to the situation where the propriety depends upon an interpretation of the Commission's rules, rather than a statute. And the Court finds the situations to be distinguishable in any event, as previously noted. Thus the possibility that Borden will be deprived of all judicial review of the issuance of the complaint seems remote. Certainly the Commission, which has repeatedly asserted that this is the type of issue the court of appeals will consider on review (Memorandum in Support of Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, at 8–9; Transcript of Proceedings on May 23, 1973, at 47 and 49) cannot argue to the contrary in good conscience if appeal is taken from a final order. To the extent that Borden contends that it will suffer actual prejudice in the Commission hearing due to the action complained of, the FTC has argued, and it appears, that the court of appeals would be free to examine any alleged unfairness. *Sterling Drug Inc.* v. *FTC*, 450 F.2d 698, 712 n. 13 (D.C. Cir. 1971).

Borden also alleges in its complaint that it will be irreparably harmed in that there is a risk that a different standard of review would apply on a final appeal of a Commission order. Borden apparently assumes that this Court could substitute its own judgment with respect to the Commission's interpretation of its rules, whereas on appeal the standard would be whether the Commission acted reasonably. Such an assumption seems to be unmerited. *Cf. FCC* v. *Schreiber*, 381 U.S. 279, 291 (1965). In reaching this conclusion the Court also notes that an agency's interpretation of its own procedural rules is to be given great weight, *supra.*

Borden further contends that it will be irreparably injured by the cost and inconvenience of defending against the Commission complaint. In other cases in which agency jurisdiction has been challenged, the courts have responded to this contention in various ways. In *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 221 (1938) the Supreme Court declared that the cost of the administrative proceeding "is not the sort of irreparable injury against which equity protects." The Supreme Court did take such costs into account in affirming an injunction against a state utilities commission in *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U.S. 456, 469 (1943). There, however, the commission orders were "plainly invalid."

In comparing these two cases, Professor Davis has observed with respect to *Petroleum Exploration, Inc.* that:

> [i]nstead of this unqualified proposition that equity does not protect against expense of an investigation that may be unauthorized, the Court might well have advanced the proposition that equity does protect against such expense if the lack of the agency's jurisdiction clearly appears from facts and policy that the Court is qualified to pass upon.

Following *United Fuel Gas*, this Court is of the view that jurisdiction must be clearly lacking before the cost of the administrative proceeding can justify judicial intervention.

For the foregoing reasons, the Court has concluded that it is deprived of jurisdiction of Count I by the doctrine of exhaustion of administrative remedies, and that even if it had jurisdiction, injunctive relief would not be warranted. Accordingly, the Commission's motion to dismiss that count is granted and Borden's motion for a preliminary injunction is denied.

IT IS SO ORDERED.

WARNER-LAMBERT COMPANY v. FEDERAL TRADE COMMISSION, ET AL.*

Civ. A. No. 652–73. F.T.C. Docket 8891

(United States District Court, District of Columbia, June 14, 1973)

1. Drug Manufacturer Did Not Have Standing To Challenge Memorandum of Understanding Between F.T.C. and F.D.A.

   [949] Drug manufacturer did not have standing, in proceeding to restrain FTC from undertaking further proceedings with regard to the labeling claims of drug and to restrain FDA from further proceeding with its review of over-the-counter cold remedies, to challenge memorandum of understanding which was issued jointly by the FTC and FDA and which was promulgated primarily for convenience of agencies in carrying out their functions under two different statutes.

2. Proceedings by F.D.A. To Review All OTC Drugs and by F.T.C. Against One Such Drug Were Not Within Provisions of Memorandum of Understanding Between the Two Regulatory Agencies.

   Proceedings by FDA to review all over-the-counter drugs and by FTC against one such drug were not within provisions of memorandum of understanding which was issued jointly by FTC and FDA and by which these agencies agreed to limit proceedings where FTC would file a complaint seeking a cease and desist order on basis of false and misleading claims and where FDA would initiate a seizure proceeding seeking to condemn product on same grounds.

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*Reported in 361 F.Supp. 948 (1973). For case before Commission, see 86 F.T.C. 1398.

3. **More Than One Agency May Proceed Simultaneously Against Same Issues and Parties.**

Same issues and parties may be proceeded against simultaneously by more than one agency.

4. **Concurrent Proceedings by FDA–FTC Involving Same Matters Are Proper.**

Concurrent FDA–FTC proceedings involving same or similar matters are proper.

5. **Statutory Remedies of FDA and FTC Are Not Mutually Exclusive.**

Statutory remedies of the FDA and FTC are cumulative and not mutually exclusive.

6. **Where Action Was Neither Unlawful nor Arbitrary and Capricious, Drug Manufacturer Had No Basis on Which To Maintain Action To Restrain F.D.A. or F.T.C. Even if Disparate Actions of Agencies Could Be Construed as Simultaneous Duplicative Proceedings.**

Even if disparate actions of FTC, which issued administrative complaint with regard to cold and sore throat labeling claims of drug, and FDA, which sought review of all over-the-counter drugs, could be construed as simultaneous duplicative proceedings against a mouthwash preparation, manufacturer had no basis on which to maintain action to restrain these agencies from undertaking further proceedings, where action was neither unlawful nor arbitrary and capricious.

(Syllabus, with substituted captions, was taken from 361 F. Supp. 948)

On defendants' motion for summary judgment, court held that even if disparate actions by FTC and FDA could be construed as simultaneous duplicative proceedings, plaintiff had no basis on which to maintain action to restrain agencies from further proceedings where action was neither unlawful nor arbitrary and capricious.

H. A. Bergson and *Arthur B. Wineburg*, *Bergson*, *Borkland*, *Margolis & Adler*, Washington, D.C., for plaintiff.

Robert M. Werdig, Jr., Washington, D.C., for defendants.

John H. Pratt, *District Judge:*

Memorandum Opinion and Order

This matter is before the Court for consideration of defendants' motion for summary judgment. Upon consideration of the complaint, the motion of defendants for summary judgment, the opposition of plaintiff thereto, and it appearing to the Court that there is no genuine issue as to any material fact, the motion of defendants for summary judgment is granted, based upon the following:

Plaintiff, Warner-Lambert Company (hereinafter referred to as "Warner-Lambert"), is engaged in the manufacture, advertising, labeling and sale of [950] the mouthwash preparation Listerine Antiseptic (hereinafter referred to as "Listerine").

The Federal Trade Commission (hereinafter referred to as "FTC") is an administrative agency of the United States established by the Federal Trade Commission Act, 15 U.S.C. § 41 et seq. for the purpose, *inter alia*, of preventing unfair methods of competition and unfair and deceptive acts and practices.

Individual defendants, Engman, Dixon, MacIntyre, Jones and Dennison are commissioners of the FTC.

Individual defendants Weinberger and Gardner (hereinafter referred to collectively as "FDA") are the Secretary of Health, Education and Welfare and the Acting Commissioner of Food and Drugs, respectively.

The Secretary and Commissioner are responsible, *inter alia*, for the enforcement of the Federal Food, Drug and Cosmetic Act. 21 U.S.C. § 301 et seq.

PRELIMINARY STATEMENT

This action seeks to restrain the Federal Trade Commission from undertaking further proceedings in FTC Docket No. 8891, and to restrain the Secretary of Health, Education and Welfare and the Commissioner of Food and Drugs from further proceeding with its review of over-the-counter cold remedies, unless and until the two federal agencies take appropriate action to prevent the conduct of two simultaneous proceedings with regard to the cold and sore throat claims of Listerine Antiseptic. The action further seeks to restrain the Federal Trade Commission from undertaking further proceedings in FTC Docket No. 8891 with regard to the cold and sore throat labeling claims of Listerine Antiseptic.

A.

The FTC Proceeding

Plaintiff is the respondent in an adjudicative proceeding presently pending before the FTC under FTC Docket 8891. The proceeding was initiated by issuance of an administrative complaint on June 27, 1972. A copy of the administrative complaint is attached to Warner-Lambert's complaint as Attachment A.

The complaint, in general, alleges Warner-Lambert, in its advertising, offering for sale, sale and distribution of the mouthwash preparation Listerine to retailers for resale to the public, has misrepresented by false, deceptive and misleading statements the effect of the product in the prevention, cure, treatment and mitigation of colds and sore throats. The false, deceptive and misleading statements were, it is averred, made on packages or labels, printed advertisements, and television commercials.

The allegations of the complaint also state Warner-Lambert has falsely represented that the use of Listerine would make colds milder or less severe, by relieving or lessening the severity of cold symptoms to a significant degree. It is also stated Warner-Lambert has misrepresented that its most recent test results and studies prove or support the representation that children "who gargle with Listerine twice a day have fewer and milder colds and miss fewer days of school because of colds than do those children who do not gargle with Listerine twice a day."

The complaint further alleges Warner-Lambert, through the use of the statement "Kills Germs by Millions on Contact," represents, contrary to fact, that the ability of Listerine to kill germs is of medical significance in the prevention, cure or treatment of colds and sore throats. Such representations, the complaint states, have the capacity and tendency to mislead the purchasing public into the purchase of substantial quantities of Listerine to the injury of the public and in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

Warner-Lambert, on August 30, 1972, filed an answer denying the substantive averments of the FTC complaint (Attachment B to the complaint). Hear[**951**]ings before the Administrative Law Judge have been scheduled to commence on September 24, 1973.

B.

The FDA Proceeding

Recognizing that self-medication is essential to the nation's health care system, FDA has concluded: it is "imperative that over-the-counter drugs available for human use be safe and effective and bear fully informative labeling" and a substantial number of the 100,000 to 500,000 over-the-counter drugs on the market do not have their claimed effect. 37 Fed.Reg. 85 (1972). Because of the inadequacy, great cost, and burden on the courts of proceeding against individual drugs on a case-by-case basis, the Commissioner of Food and Drugs, on December 30, 1971, proposed new regulations setting up a procedure for a thorough and complete review of all over-the-counter drugs. 37 Fed.Reg. 85 (1972).

The proposed regulations were published in final form on May 11, 1972.[1] An advisory panel of qualified experts, for each of 26 categories of over-the-counter drugs, upon consideration of, *inter alia*, data submitted by drug manufacturers relating to the safety and effectiveness of the drug involved, will submit to the Commissioner a report containing its conclusions and recommendations with respect to the category of drug it has reviewed. Included in this report will be a recommended monograph, which shall establish the conditions under which the drugs involved are generally recognized as safe and effective and not misbranded. 21 C.F.R. 130.301(a)(1)–(5), 37 Fed.Reg. 9474 (1972). Thereafter, the Commissioner shall publish: (1) a proposed monograph, after which comments are invited; (2) a tentative final monograph following a review of the comments received; and (3) a final monograph, following a review of the objections of the tentative final monograph and a consideration of any oral hearing before the Commissioner, if any. The final monograph constitutes final agency action from which appeal lies to the courts 21 C.F.R. 130.301(a)(10). Any product which fails to conform to the final monograph is liable to regulatory action. 21 C.F.R. 130.301(a)(12), 37 Fed.Reg. 9475 (1972).

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[1] **"Over-the-Counter (OTC) drugs for human use; procedures for rulemaking * * *." 37 Fed.Reg. 9473.**

Advisory panels of experts for certain of the categories of OTC drugs have already convened. One proposed monograph, relating to antacid drugs, has been published. 38 Fed.Reg. 8714 (1973). With respect to cold remedies, Listerine is one of many products to be reviewed. No monograph has yet been proposed. An invitation for all interested persons to submit data bearing on the safety and effectiveness of the ingredients of cough-cold remedies was published on August 9, 1972. 37 Fed.Reg. 16029. The purpose of FDA's request is to gain information seeking to establish product standards applicable to the entire industry. As a nonprescription cough and cold remedy, Listerine will be subject to the requirements of any monograph issued by FDA pursuant to the rulemaking proceedings.[2]

C.

Plaintiff argues the two proceedings complained of are unlawful in that they violate a "rule" of both agencies. The "rule" which plaintiff asserts is binding upon defendants is a "Memorandum of Understanding" issued jointly by FTC and FDA and published at 36 Fed. Reg. 18539 (1971). Plaintiff's contention is erroneous. Even assuming, arguendo, the "rule" is binding on defendants,[3] it is [**952**] clear it does not apply to the proceedings in issue.

[1] The Memorandum is an agreement between the two agencies promulgated primarily for the convenience of the agencies in carrying

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[2] *Abbott Laboratories v. Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Ciba-Geigy Corp. v. Richardson,* 446 F.2d 466 (2 Cir., 1971).

[3] The informality of the agreement is evident in that by its express terms the Memorandum of Understanding may be terminated by either party upon thirty days' notice.

out their functions under two different statutes. The only parties to the agreement were the two agencies involved, and an individual private party, such as plaintiff, may not invoke the agreement in challenging these agency actions. Furthermore, in the Court's opinion, the agreement has not been breached. It is apparent from the affidavits of Messrs. Freer and Fine filed with the Court on May 1, 1973 that there was considerable liaison resulting in an express agreement between the two agencies sufficient to satisfy the requirements of the Memorandum of Understanding.

As far as the proceedings themselves are concerned, it is the Court's opinion they are quite different. As has been pointed out previously, the proceeding before the Federal Trade Commission is an adversary proceeding. It is an adjudicatory proceeding. It involves only Warner-Lambert.

The proceeding before the Food and Drug Administration is a rulemaking proceeding. It involves thousands of manufacturers of over-the-counter products, including cold remedies. It is a proceeding which individual companies can participate in or decline to participate in, at their option, recognizing it may also be to their possible disadvantage.

If this Court were to require the Food and Drug Administration to exempt plaintiff from its proceeding, it seems such action would give plaintiff a discriminatory preference over the manufacturers of many products of a similar kind, namely, over-the-counter cold remedy products.

[2] The joint proceedings which FDA and FTC agreed to limit were intended to be proceedings where the FTC would file a complaint seeking a cease-and-desist order on the basis of false and misleading claims, and where the FDA would institute a seizure proceeding seeking to condemn the product on the same grounds. It is certain that the present proceedings, i.e., the FDA review of all OTC drugs, and the FTC complaint against *one* OTC drug, are not within the provisions of the Memorandum of Understanding. For if this were the case, then the FTC would now be foreclosed from proceeding against any of the 100,000 to 500,000 OTC drugs currently on the market, no matter how false or how misleading the claims for such a product.

D.

[3] The Supreme Court has long held that the same issues and parties may be proceeded against simultaneously by more than one agency. *FTC* v. *Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948); *United States* v. *W. T. Grant Company*, 345 U.S. 629, 631–632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953); *United States* v. *Radio Corpo-*

ration of America, 358 U.S. 334, 343–344, 79 S.Ct. 457, 3 L.Ed.2d 354 (1959); *FTC* v. *Motion Picture Advertising Service Company*, 344 U.S. 392, 73 S.Ct. 361, 97 L.Ed. 426 (1953); *United States* v. *Borden Company*, 347 U.S. 514, 74 S.Ct. 703, 98 L.Ed. 903 (1954). In *FTC* v. *Cement Institute*, *supra*, the defendant sought dismissal of the FTC proceedings on the basis that the Department of Justice had proceeded against them in District Court under the Sherman Act. The defendant, as plaintiffs do here, asserted that it was against the public interest to defend both the FTC proceeding and the Sherman Act proceeding which were based on the same alleged misconduct. The Supreme Court, in a holding that has been followed many times, stated that the Sherman Act and the Federal Trade Commission Act provide the Government with cumulative remedies which are not mutually exclusive.

[4, 5] These same principles apply to the concurrent actions of FDA and FTC which may involve the same parties or **[953]** issues. The propriety of simultaneous FDA–FTC proceedings involving the same issues does not, as claimant would have this Court believe (Complaint, par. 17), present a novel legal issue. For in at least three cases, the courts, including this Court, have held that concurrent FDA–FTC proceedings involving the same or similar matters are proper, and that the statutory remedies of the two agencies are cumulative and not mutually exclusive. *United States* v. *1 Dozen Bottles, etc.*, 146 F.2d 361 (4 Cir. 1944); *United States* v. *5 Cases * * * Capon Springs Water*, 156 F.2d 493 (2 Cir. 1946); *United States* v. "* * * *Instant Alberty Food* * * *.", 83 F. Supp. 882 (D.D.C. 1949).

[6] In the present case, even if the disparate actions of the FTC and FDA could be construed as simultaneous duplicative proceedings against Listerine Antiseptic, it is clear that the action is neither unlawful nor arbitrary and capricious and therefore plaintiff has no basis upon which to maintain this action.

E.

Plaintiff has available administrative remedies before each agency which have not been exhausted. Still to be completed before FTC is the administrative proceeding in which Warner-Lambert will have full opportunity to present evidence and argument in its behalf. If the adjudicative proceedings do terminate in an order against Warner-Lambert to cease and desist, Warner-Lambert has the right to appeal directly to a United States Court of Appeals. Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Act further provides that the jurisdiction of the courts of appeals "to affirm, enforce, modify or set aside orders of the Commission shall be exclusive." 15

U.S.C. § 45(d). The Act nowhere provides for a review in district courts of interlocutory rulings by the Commission, and 5 U.S.C. § 704 expressly provides: "A preliminary, procedural or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." Similarly, if FDA issues a monograph at the conclusion of its proceedings, review of that action may be sought in the courts.[4]

CONCLUSION

Having considered the foregoing, the Court concludes: there is a rational basis for the actions of each of the agencies in initiating and pursuing their individual proceedings; plaintiff does not have standing to challenge, in this action, the Memorandum of Understanding between the agencies; the two agencies complied with the provisions of the Memorandum of Understanding; the proceedings before the two agencies are not duplicative; plaintiff has not exhausted its administrative remedies; there is no evidence of record that plaintiff is required to respond to the proceeding before FDA, although its failure to respond may be at its peril; and there is no indication that it is in the public interest to enjoin the disparate agency proceedings at this stage.

In summary, plaintiff has not met the criteria for the granting of a preliminary injunction and its motion for a preliminary injunction is denied. Count II of the complaint seeking a permanent injunction against FTC maintaining the labeling charges against plaintiff is dismissed and defendants' motion for summary judgment is granted.

The foregoing shall constitute the Court's Findings of Fact, Conclusions of Law, and Order.

CHARNITA, INC., ET. AL. v. FEDERAL TRADE COMMISSION, ET AL.*

No. 72-1707. F.T.C. Docket 8829

(United States Court of Appeals, Third Circuit, June 25, 1973)

1. JUDGMENT NOTE TRANSACTIONS PERMITTED BY LAW OF PENNSYLVANIA ARE COVERED BY REGULATION OF BOARD OF GOVERNORS OF FEDERAL RESERVE SYSTEM ENACTED TO CARRY OUT PURPOSES OF TRUTH IN LENDING ACT.

[684] Regulations of board of governors of Federal Reserve system enacted to carry out purposes of Truth in Lending Act covered judgment note transactions whereby real estate vendor took judgment notes which

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[4] 21 C.F.R. 130.301(a)(10) provides that the monograph contained in the final order constitutes final agency action from which appeal lies to the courts.

*Reported in 479 F.2d 684 (1973). For case before the Commission, see 80 F.T.C. 892.

were permitted by law [685] of Pennsylvania and which, when filed with prothonotary, created lien on all real estate of debtor in the county.

2. PROMULGATION OF REGULATION WAS REASONABLE EXERCISE OF AUTHORITY GRANTED BOARD OF GOVERNORS OF FEDERAL RESERVE SYSTEM BY STATUTE.

Promulgation of regulation, by board of governors of Federal Reserve system, to carry out purposes of Truth in Lending Act was reasonable exercise of authority granted by the statute and was consonant with discretion granted by Congress to effectuate the purposes of the Act.

3. REALTY VENDORS' INSISTENCE IN KEEPING POSSESSION DEED UNTIL CERTAIN NUMBER OF PAYMENTS ARE MADE, CONSTITUTED "SECURITY INTEREST" UNDER THE TRUTH IN LENDING ACT.

Insistence of realty vendor in keeping possession of deed until certain number of payments had been made by purchaser, depriving purchaser of possibility of recordation, constituted "security interest" within Truth in Lending Act and regulations promulgated thereunder.

4. SALE OF UNIMPROVED LAND NOT COVERED BY PROVISION OF TRUTH IN LENDING ACT APPLYING TO RETENTION OF FIRST LIEN AGAINST DWELLING TO FINANCE ACQUISITION OF THAT DWELLING.

Provision of Truth in Lending Act that "this section does not apply to the creation or retention of a first lien against a dwelling to finance the acquisition of that dwelling" applied only to "dwelling" and not to mere sale of unimproved land.

5. F.T.C. ORDER REQUIRING VENDOR TO OFFER RIGHT OF RESCISSION WAS REASONABLE AND NOT BEYOND AUTHORITY OF COMMISSION.

Where vendor of realty committed various violations of Truth in Lending Act and was found to have taken security interests by reason of which purchasers should have had right to rescind the transactions until midnight of third business day following consummation of transaction or delivery of disclosures required, Federal Trade Commission's order that vendor offer right of rescission by two-step process designed to identify eligible parties and extend to them the opportunity to rescind was reasonable and not beyond authority of Commission, and would be enforced.

(Syllabus, With Substituted Captions, Was Taken From 479 F.2d 684)

Court held that regulations of board of governors of the Federal Reserve System were a reasonable exercise of authority under the Truth in Lending Act and that the F.T.C. order requiring vendor to offer right of rescission by a two-step process was reasonable and not beyond the Commission's authority.

Order affirmed and enforced.

Leroy W. Preston, *John J. O'Connor*, *Jr.*, Baltimore, Md., for petitioners.

Ronald M. Dietrich, Gen. Counsel, *Harold D. Rhynedance*, *Jr.*, Asst. Gen. Counsel, Washington, D.C., *Karl H. Buschmann*, Federal Trade Commission, Washington, D.C., for respondent.

Before JAMES HUNTER, III, and WEIS, *Circuit Judges*, and SCALERA, *District Judge*.

OPINION OF THE COURT

WEIS, *Circuit Judge*.

The Federal Trade Commission has issued an order finding that there were violations of the Truth in Lending Act by petitioner Charnita, Inc. and requiring it to give notice to certain of its customers an opportunity to rescind their transactions.

Charnita, Inc. is a Pennsylvania corporation engaged in the business of selling land for recreational and residential home sites in that state. Many of the sales are credit transactions and in the period from July 1, 1969 to March, 1970 involved the use of the "judgment note" which is permitted by the law of Pennsylvania. This type of promissory note enables the holder to enter judgment in the state court without notice or opportunity to be heard being extended to the maker. Filing of the note with the prothonotary of the court immediately creates a lien on all real estate in the county.

In the period after November, 1970, the promissory note was altered to state that real estate to be used as a principal residence of the maker was exempted from the lien of the confessed judgment, but Charnita then instituted the practice of retaining the deed to the lot in its possession until after the purchaser had made four or more payments.

[**686**] The FTC found that various violations of the Truth in Lending Act [1] had occurred which were not seriously questioned by appellant. The Commission further determined that the judgment notes given by the purchasers in the period from July 1, 1969 to March, 1970 and the withholding of the deeds by Charnita constituted "security interests" within the scope of the Act and interpretative regulations. The appellant was therefore required to take appropriate steps to advise eligible purchasers of the right to rescind granted by § 125 of the Act, 15 U.S.C. § 1635(a).[2]

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[1] 15 U.S.C. § 1601 et seq.

[2] "(a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part whichever is later by notifying the creditor, in accordance with regulations of the Board of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section."

The principal issues to be decided on this appeal are whether the determinations of the existence of "security interests" were properly made.

The Act authorized the Board of Governors of the Federal Reserve System to enact appropriate regulations to carry out the purposes of the statute. The authorization was quite broad and provided, "These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of tranactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith."[8]

The Supreme Court in *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed. 318 (1973), recognizing the wide scope of authority granted, noted that Congress was aware that there could be evasion of the requirements of the Act and that accordingly the Board was given the power to prevent noncompliance by the use of varied and ingenious subterfuges. The Court stated the standard to be "Given that some remedial measure was authorized, the question remaining is whether the measure chosen is reasonably related to its objectives." (page —, 93 S.Ct. page 1661).

The Act itself does not set out the meaning of "security interest" but the Board supplied the definition in its regulation, 12 CFR § 226.2 (z), where we read the following:

> "Security interest" and "security" means any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interest under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation.

By way of further explanation, in 12 CFR § 226.202(a) the Board said:

> Under § 226.2(z) "security interest" is defined to include confessed liens whether or not recorded * * * (b) In some of the States, confession of judgment clauses or cognovit provi[**687**]sions are lawful and make it possible for the holder of an obligation containing such clause or provision to record a lien on property of the obligor simply by recordation entry of judgment; the obligor is afforded no opportunity to enter a defense against such action prior to entry of the judgment. (c) * * * such clauses and provisions in those States are security interests under § 226.2(z) and for the purposes of §§ 226 * * *.9.

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[8] 15 U.S.C. § 1604.

Section 226.9 sets forth the requirements for rescission granted by § 125.[4]

[1] Clearly then the regulations do cover the judgment note transactions in which Charnita participated.

[2] We hold that the promulgation of the regulation was a reasonable exercise of the authority granted by the statute and is consonant with the discretion granted by Congress to effectuate the purposes of the Act. *See Mourning* v. *Family Publication Service, Inc., supra; N. C. Freed Company, Inc.* v. *Board of Governors of Federal Reserve System and Federal Trade Commission*, 473 F.2d 1210 (2nd Cir. 1973); *Gardner and North Roofing and Siding Corp.* v. *Board of Governors of Federal Reserve System*, 150 U.S.App.D.C. 329, 464 F.2d 838 (1972); *cf. Douglas* v. *Beneficial Finance Co. of Anchorage*, 469 F.2d 453 (9th Cir. 1972). As the Court said in the *Freed* case:

> The challenged regulation constitutes a clarification, and not an improper extension, of the statute and it therefore does not exceed the bounds of the mandate given the Board by Congress. Since the regulation is clearly consistent with the legislative purpose, it may not be overturned. (473 F.2d page 1217)

[3] We have little difficulty, also, in finding that the insistence of the seller that it keep possession of the deed until a certain number of payments have been made by the buyer constitutes a security interest within the meaning of the Act and the regulations. Retention of title or its indicia is one of the classic methods of protection, utilized by sellers for centuries to pressure purchasers to comply with their commitments. Charnita's retention of the deed prevented its recordation by the purchaser and thus deprived him of the very valuable rights of the holder of record title.

[4] Additionally, however, petitioner posits the proposition that it is entitled to the exemption granted by 15 U.S.C. § 1635(e):

> This section does not apply to the creation or retention of a first lien against a dwelling to finance the acquisition of that dwelling.

We do not accept Charnita's position. The language in the statute obviously applies only to a "dwelling" and not to the mere sale of land. And as the legislative history reveals, this section was intended to apply to a first mortgage on the sale of a residence. *See* 114 Congressional Record 14388 (1968). We concur with the finding of the FTC that the practices here do not fall within the exemption.

The Commission ordered Charnita to offer the right of rescission by a two-step process which was designed to, first identify those parties who had acquired the real estate for use or expectation of use as the principal place of residence and are thus covered by § 125, and then, extend to only those eligible persons the opportunity to rescind.

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[4] 15 U.S.C. § 1635(a).

Since this provision of the Act grants the purchaser the right to rescind until midnight of the third business day following the consummation of the transaction or until the required disclosures are made to the buyer, the Board reasoned that until such time as the seller complies with the requirement of furnishing information to its customer, the violation is a continuing one.

[5] Charnita contends that the order is in effect punishment for past misdeeds and hence beyond the authori-**[688]**ty of the FTC. However, in our view, the construction of the statute by the Board and the remedial action prescribed are not unreasonable and enforcement is required.[5] We find that the corrective measures devised meet the test set out in *Windsor Distributing Co.* v. *Federal Trade Commission*, 437 F.2d 443 (3rd Cir. 1971), as being within the area of the Commission's discretion in framing relief appropriate to the practices found to exist. We do not think the notification requirements imposed upon Charnita are unduly burdensome but conclude that they represent a reasonable exercise of the Commission's authority to redress continuing violations.

The order of the Commission will be affirmed and will be enforced in its entirety.

FIRESTONE TIRE & RUBBER COMPANY v. F.T.C.*

No. 72–1990. F.T.C. Docket 8818.

(United States Court of Appeals, Sixth Circuit, June 27, 1973)

1. **F.T.C. FINDINGS OF FACT ENTITLED TO BE GIVEN GREAT WEIGHT.**

   [246] Federal Trade Commission's findings of fact in area of trade and commerce are entitled to be given great weight.

2. **F.T.C. PERMITTED TO DRAW REASONABLE INFERENCES AND FINDINGS ARE CONCLUSIVE IF SUPPORTED BY EVIDENCE.**

   The Federal Trade Commission is permitted to draw reasonable inferences from the evidence in hearing on deceptive advertising matter and its findings are conclusive if supported by substantial evidence.

3. **F.T.C. FINDINGS THAT "SAFE TIRE" CLAIM WAS DECEPTIVE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.**

   Findings of Federal Trade Commission in unfair advertising proceeding that tire manufacturer's advertising of its product as the "safe tire" was deceptive was supported by substantial evidence.

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[5] **In *Waohtel* v. *West*, 476 F.2d 1062 (6th Cir. 1973), the Court said, "The provisions with respect to the right of rescission seem to contemplate a continuing violation when the disclosures are not made, but such is not the case when damages are sought."**

* **Reported in 481 F.2d 246 (1973). *Cert. denied*, Dec. 17, 1973, 414 U.S. 1112, 94 S.Ct. 841. For case before the Commission, see 81 F.T.C. 398.**

4. **F.T.C. FINDINGS THAT CLAIM "STOPS 25% QUICKER" WAS UNFAIR AND DECEPTIVE, WAS SUPPORTED BY EVIDENCE.**

Finding of Federal Trade Commission in unfair advertising proceeding that tire manufacturer's claim that its product "stops 25% quicker" was unfair and deceptive to consumers because it was without substantial scientific test data to support it was supported by the evidence and by the fair inferences which the Commission was entitled to draw therefrom.

(Syllabus, with substituted captions, was taken from 481 F.2d 246.)

On petition to review, court held that advertisement of tire manufacturer that its product was the "safe tire" was deceptive and that its advertisement that its product "stopped 25% quicker" was unfair and deceptive because it was without substantial scientific test data to support it; and that F.T.C. findings were supported by substantial evidence.

Order affirmed and granted enforcement.

Fred H. Bartlit, Jr., Kirkland & Ellis, Chicago, Ill., for petitioner; *Hammond E. Chaffetz, Thomas A. Gottschalk, Kirkland & Ellis*, Chicago, Ill., *William L. Blum, Dinsmore, Shohl, Coates & Deupree*, Cincinnati, Ohio, on brief; *John F. Floberg, Harold L. Henderson*, Akron, Ohio, of counsel.

Louis C. Keiler, Jr., Ronald M. Dietrich, Gen. Counsel, *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, *Miles J. Brown*, Washington, D.C., for the Federal Trade Commission.

Before PHILLIPS, *Chief Judge*, and EDWARDS and PECK, *Circuit Judges*.

EDWARDS, *Circuit Judge*.

Petitioner Firestone seeks review of an order of respondent Federal Trade Commission under 15 U.S.C. § 45(c) (1970), FTC had found Firestone guilty of unfair and deceptive advertising, in violation of 15 U.S.C. § 45(a) (1970), in relation to two particular advertisements. One of them may be characterized as the "Safe Tire" ad and the second ad as the "Stop 25% Quicker" ad.

I THE "SAFE TIRE" AD.

As to this series of advertisements, the parties stipulated as follows:

I. Duration of Advertising Program

1. Beginning on December 25, 1967, and continuing through May 18, 1968, the following text, or a text substantially similar to it, was used in certain Firestone advertisements:

THE SAFE TIRE. FIRESTONE

When you buy a Firestone tire—no matter how much or how little you pay—you get a safe tire.

Firestone tires are custom-built one by one. By skilled craftsmen. And they're personally inspected for an extra margin of safety. If these tires don't pass all of the exacting Firestone inspections, they don't get out.

Every new Firestone design goes through rugged tests of safety and strength far exceeding any driving condition you'll ever encounter. We prove them in our test lab. On our test track. And in rigorous day-to-day driving conditions. All Firestone tires meet or exceed the new Federal Government testing requirements. (They have for some time.)

Firestone—The Safe Tire. At 60,000 Firestone Safe Tire Centers. At no more cost than ordinary tires.

II. *Firestone's Design And Manufacturing Testing And Quality Control Procedures*

1. The state of tire manufacturing technology in [sic] such that use of the best manufacturing procedures and tests and quality control techniques known to the industry cannot insure that each tire produced by a manufacturer is absolutely free from any defects in materials or workmanship.

2. During the period of the advertisements set forth above, Firestone exercised due care and used its best efforts to employ the best manufacturing procedures and tests and quality control techniques known to the industry to design and manufacture tires free from defects in materials and workmanship.

As to this issue the Commission's opinion says:

> We conclude that respondent's absolute representation that its tires are "safe" is false and deceptive on its own admission that tires cannot under today's technology be assured of being free of defects. In view of this technological impossibility, it is an unfair and deceptive act and practice for respondent to make the unqualified assertion of safety which it made in this case.
>
> *Conditions of Use Claim*
>
> [248] While it is clear from the face of the advertisement that respondent makes no *explicit* claim that its tires are safe under all conditions of use, we believe it does so implicitly. Respondent's advertisement asserts flatly that the Firestone tire is "The Safe Tire" and describes the exacting rugged tests ("far exceeding any driving conditions" consumers will ever encounter) which the tires are put through to assure this safety. Respondent's advertisement gives no indication that there is any limit to the safety of this tire or what such limits might be.

Firestone, on the other hand, emphasizes the stipulation recited above as to its employing the language, "the best manufacturing procedures and tests and quality control techniques known to the industry" and interprets the "Safe Tire" ad as "assuring average tire consumers that Firestone did everything humanly and technically possible to sell tires free of defects." Firestone also emphasizes that a large majority of persons interviewed concerning the "Safe Tire" ad thought that it meant something less than a guarantee of absolute safety.

As to this issue the Commission ordered Firestone to cease and desist from:

> 1. Representing, directly or by implication, that every purchaser of tires bearing the brand name "Firestone," or any other brand name, is assured of receiving tires free from defects in materials or workmanship or other manufacturing defects.
>
> 2. Misrepresenting, in any manner, the effectiveness of respondent's quality control or inspection procedures.
>
> 3. Using the words, "The Safe Tire," or any other word or phrase of similar import or meaning to describe or designate respondent's tires or otherwise representing, directly or by implication, that respondent's tires will be safe under all conditions of use.
>
> 4. Making any representation, directly or by implication, regarding the safety of respondent's tires without disclosing clearly and conspicuously and in close conjunction with such representation that the safety of any tire is affected by conditions of use, such as inflation pressure, vehicle weight, wear, and other operating conditions.

[1, 2] In approaching decision of this issue, this court is limited by statute and case law as to its proper function. The statute which provides for our review also provides that "the findings of the Commission as to the facts if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c) (1970). This court has described such findings as "entitled to be given great weight," and has noted that "the Commission is permitted to draw reasonable inferences from the evidence * * *" *Doherty, Clifford, Steers & Shenfield, Inc.* v. *FTC*, 392 F.2d 921, 925 (6th Cir. 1968).

Even more to the point and worth quoting at length is the following description of our function in the words of a leading Supreme Court opinion:

> In reviewing the substantive issues in the case, it is well to remember the respective roles of the Commission and the courts in the administration of the Federal Trade Commission Act. When the Commission was created by Congress in 1914, it was directed by § 5 to prevent "[u]nfair methods of competition in commerce." Congress amended the Act in 1938 to extend the Commission's jurisdiction to include "unfair or deceptive acts or practices in commerce"—a significant amendment showing Congress' concern for consumers as well as for competitors. It is important to note the generality of these standards of illegality; the proscriptions in § 5 are flexible, "to be defined with particularity by the myriad of cases from the field of business." *Federal Trade Comm'n* v. *Motion Picture Advertising Service* [249] *Co.*, 344 U.S. 392, 394, 73 S.Ct. 361, 97 L.Ed. 426.

> **This statutory scheme necessarily gives the Commission an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations. Moreover, as an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is "deceptive" within the meaning of the Act. This Court has frequently stated that the Commission's judgment is to be given great weight by reviewing courts. This admonition is especially true with respect to allegedly deceptive advertising since the finding of a § 5 violation in this field rests so heavily on inference and pragmatic judgment. Nevertheless, while informed judicial determination is dependent upon enlightenment gained from administrative experience, in the last analysis the words "deceptive practices" set forth a legal standard and they must get their final meaning from judicial construction. *Cf. Federal Trade Comm'n* v. *R. F. Keppel & Bros., Inc.*, 291 U.S. 304, 314, 54 S.Ct. 423, 427, 78 L.Ed. 814. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 384–385, 85 S.Ct. 1035, 1042, 13 L.Ed. 2d 904 (1965). (Footnotes omitted.)**

[3] Employing these standards, we affirm the findings of the FTC on the "Safe Tire" issue and enforce its order.

There is, of course, no question but that the ad indulges in some puffing. The statement, "When you buy a Firestone Tire * * * you get a safe tire," contains no use qualifications as to inflation, load and speed, and is measured against no comparative performance.

When the statement is compared to the stipulation previously quoted, its deficiencies are obvious:

> 1. The state of tire manufacturing technology in [sic] such that use of the best manufacturing procedures and tests and quality control techniques known to the industry cannot insure that each tire produced by a manufacturer is absolutely free from any defects in material or workmanship.

This stipulation, in effect, concedes that defective Firestone tires can and do reach the consumer.

We deal, of course, with a statutory ban on "unfair or deceptive acts or practices." If no one were misled, we might reexamine our own conclusions vis-a-vis the Commission's inferences about this ad in considerably more detail. Here, however, Firestone's own consumer survey demonstrated that 15.3% of a scientifically selected sample of tire purchasers thought the "Safe Tire" ad meant:

> **(d) "Every Firestone tire is absolutely safe no matter how it is used and regardless of the tire inflation pressure and load of the car;" or "Every single Firestone tire will be absolutely free from any defects."**

We find it hard to overturn the deception findings of the Commission if the ad thus misled 15% (or 10%) of the buying public.

We find no overbreadth or deficiency in the remedial order of the Commission, and as to it we affirm and grant enforcement.

II The "Stops 25% Quicker" Ad.

The Firestone "Stops 25% Quicker" ad reads:

> * * * Like the original Super Sports Wide Oval Tire. It came straight out of Firestone racing research. It's built lower, wider. Nearly two inches wider than regular tires. To corner better, run cooler, stop 25% quicker.

By stipulation the parties agreed that the "stop 25% quicker" portion of the ad above was employed by Firestone in nationwide magazine advertising from January 16, 1967 to September 20, 1968, and omitted thereafter.

The only comparative stopping test submitted by Firestone was also stipu-[**250**]lated by the parties as having been proved for this proceeding:

TESTED 5-13-66—SURFACE WET SMOOTH CONCRETE

	Stopping Dist.	Load—1120 lbs/tire infl—24 psi
	SIZE	
	7.75-14	F70-14
	002AD363	L3126-03
	002AD389	L3126-08
	75 FT TO	54 FT TO
	80 STOP	55 STOP
	70	55
	78	55
	75	51
	78	52
	75	50
	75	54
	75	54
	77	52
AVG.	75. 8	53. 2

The Commissioner's position on this issue is stated as follows:

> In sum, we find that the admitted circumstances under which respondent tested its tires were limited and that despite these limited test conditions, respondent used these tests as its sole support for its advertisement representing that its Wide Oval tires would stop 25% quicker under all road and weather conditions and relative to all other types of regular tires. Its test did not support, either directly or by reasonable extrapolation, respondent's broad stopping claim. The particular claim at issue here involves a matter of human safety. It is a claim which consumers themselves cannot verify since they have neither the equipment nor the knowledge to undertake the complicated tire tests required. They must rely on the technical expertise of the manufacturer to assure the validity of its claims. Under such circumstances, it is both unfair and deceptive to consumers to make a specific advertising claim without substantial scientific test data to support it.

Firestone's position, on the other hand, as stated in its brief is as follows:

> As set forth in the statement of facts, there is no dispute in the record that (1) Firestone conducted stopping tests of its Wide Oval tires prior to publishing the advertised claim, (2) Firestone's tests were adequate and well controlled scientific tests conducted according to established technological standards, (3) the wet concrete test surface was a typical wet hazardous road surface which might be encountered by motorists, (4) the tests demonstrated that on the wet concrete surface, the Wide Oval tire stopped 29.8% quicker than the regular width tire. These record facts, combined with Dr. Brenner's expert conclusion that the effect of the greater tread width would be more pronounced on dry surfaces, affirmatively demonstrate that Firestone's scientific tests adequately established the factual accuracy of the "stops 25% quicker" comparison between the Wide Oval and narrow tires.

As to this issue the Commission's order directed Firestone to cease and desist from:

> 5. Representing, directly or by implication, that any of respondent's automobile tires have any safety or performance characteristic or are superior in quality or performance to other products unless each such characteristic was fully and completely substantiated by competent scientific tests, with the results of the test, the original test data collected in the course of the test, and a detailed description of how the test was performed available in written form for inspection for at least three years following the final use of the representation.

On this appeal Firestone argues that 1) its ad did not impliedly assert that the "stops 25% quicker" language was based on scientific testing and that the Commission made no explicit finding to that effect; 2) that in any event, its own series of tests on wet, slippery pavement did represent adequate scientific proof of its assertion, or if not that, such proof could reasonably be extrapolated from that test, and 3) that the cease and desist order was unreasonably broad and restrictive in requiring **[251]** scientific proof as to *any* safety or performance characteristic advertised.

As to the first of these issues, we believe the Commission did find that the "Stops 25% Quicker" ad implied scientific testing. It said:

> In the circumstances of *this* case, we believe that consumers could reasonably have expected Firestone's performance and safety claims to have been substantiated by scientific tests.

In addition, we think such an implication is entirely reasonable from the comparison and percentage language employed.

As to Firestone's second argument above, we note at the outset that Firestone presented no witnesses at all in this proceeding. It relied entirely upon data provided by a comparison of two tires (both Firestone products) in ten runs on the same day on the same wet, smooth concrete surface at 15 m.p.h. with the same tire pressure and load. These ten runs showed an average stopping distance of 29.8% less for the Firestone Super Sports Wide Oval tire as compared to a Firestone Super Sports tire of standard tread width.

The Commission makes no comment derogatory to the scientific nature or the accuracy of the test upon which Firestone relies. Rather, it attacks the adequacy of one set of tests on one surface (we would be tempted to add, at one speed) to support the "stops 25% quicker" generalization. Of course, we note that the Commission's own expert witness, Dr. Brenner, seemed to concede that a tire which stopped quicker on a wet surface would, under similar conditions, as to surface, speed, etc., stop still more quickly on a dry surface. What Dr. Brenner would not concede was that testing on any one surface was adequate to represent driving conditions nationwide. As to his own testing practices, he testified:

> In our attempts to develop a test method in order to establish a standard for traction, we laid out five surfaces with different coefficients of friction and different textures, and we ran somewhere in the neighborhood of sixty-five different sets of tires through a variety of tests using skid trailers and vehicle in two maneuvers, stopping distance and in spin-out on a curve. And then we ranked the tires according to their performance on each test, on each surface in each maneuver.

[4] We are by no means sure that the Firestone Wide Oval tire does not "stop 25% quicker." But that is not our question. We have to deal with the record that has been submitted in this case. On this record we conclude that the Commission's finding (that Firestone's "broad stopping claim" was "unfair and deceptive to consumers" because it was "without substantial scientific test data to support it") was supported by the evidence in this record and by the fair inferences which the Commission was entitled to draw therefrom. Under our limited standard of review, we certainly cannot hold to the contrary. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 384–385, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965).

As to Firestone's third argument regarding the "stops 25% quicker" ad, we find no overbreadth or violation of due process in the cease and desist order paragraph 5.

The Commission's order to cease and desist is affirmed and granted enforcement.

NATIONAL PETROLEUM REFINERS ASSOCIATION, ET AL.

v.

FEDERAL TRADE COMMISSION, ET AL. *

No. 72-1446, F.T.C. No. 215-21

(United States Court of Appeals, District of Columbia Circuit, June 27, 1973)

1. Only By Considering Powers Granted By Congress, Can Extent of Power of F.T.C. Be Decided, Since It Is a Creation of Congress.

[672] Federal Trade Commission is creation of Congress and extent of its powers can be decided only by considering powers Congress specifically granted it in light of statutory language and background.

2. In Statutory Construction, Maxim *Expressio Unius Est Exclusio Alterius* Is Increasingly Considered Unreliable.

Maxim *expressio unius est exclusio alterius* is increasingly considered unreliable in statutory construction.

3. F.T.C. Has Responsibility To Protect Consumer From Being Misled.

Federal Trade Commission has responsibility to protect consumer from being misled by governing conditions under which goods and services are advertised and sold to individual purchasers.

4. Court's Duty Is To Favor Interpretation Which Would Render Statutory Design Effective in Determining Legislative Intent.

In determining legislative intent, court's duty is to favor interpretation which would render statutory design effective in terms of policies behind its enactment and to avoid interpretation which would make such policies more difficult of fulfillment.

5. Court Must Consult Both the Language of Statute and the Articulated Concerns Motivating Law's Framers Where Statute Is Susceptible of More Than One Meaning.

Where statute is said to be susceptible of more than one meaning, court must not only consult its language but must also relate interpretation provided to felt and openly articulated concerns motivating law's framers.

6. Defendant Must Be Given Opportunity To Demonstrate That Circumstances Warrant Waiving Rule's Applicability.

Defendant in enforcement proceeding by Federal Trade Commission must be given opportunity to demonstrate that special circumstances of his case warrant waiving rule's applicability.

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*Reported in 482 F.2d 672 (1973); rehearing denied Aug. 6, 1973; *cert. denied,* Feb. 25, 1974, 415 U.S. 951 (1974), 94 S.Ct. 1475.

7. **ANY RULES ADOPTED BY F.T.C. ARE SUBJECT TO JUDICIAL REVIEW.**

Any rules adopted by Federal Trade Commission as part of carrying out its duties to prevent unfair methods of competition are subject to judicial review testing their legality and insuring that they are within scope of broad statutory prohibition they purport to define.

8. **F.T.C. NOT FREE TO WRITE ITS OWN LAW.**

[673] Federal Trade Commission is not free to write its own law of consumer protection and antitrust.

9. **FACT THAT F.T.C. DID NOT ASSERT POWER TO PROMULGATE SUBSTANTIVE RULES DID NOT PRECLUDE FINDING THAT F.T.C. HAD POWER TO MAKE SUCH RULES.**

Fact that Federal Trade Commission did not assert power to promulgate substantive rules for many years and had indicated before that time that it lacked such power did not preclude finding that Commission had power to make such rules.

10. **STATEMENTS BY F.T.C. REPRESENTATIVES QUESTIONING F.T.C. AUTHORITY WERE NOT DETERMINATIVE.**

Various statements made by Federal Trade Commission representatives questioning Commission's authority to promulgate rules which could be used with binding effect on subsequent adjudications were not determinative of whether Commission did in fact have power to make substantive rules.

11. **FACT CONGRESS WAS AWARE OF F.T.C. RESTRICTIVE VIEW DID NOT PRECLUDE FINDING THAT COMMISSION DID HAVE RULE-MAKING POWER.**

Fact that Congress was fully aware of Federal Trade Commission's restrictive view of its power and passed series of laws granting limited substantive rule-making authority to Commission did not preclude finding that Commission did have rule-making power under original enactment.

12. **F.T.C. ACT CONFERRED ON F.T.C. AUTHORITY TO PROMULGATE RULES HAVING EFFECT OF SUBSTANTIVE LAW.**

Federal Trade Commission Act conferred on Federal Trade Commission the authority to promulgate trade regulation rules having effect of substantive law.

(Syllabus, with substituted captions, taken from 482 F.2d 672)

On appeal, court held that F.T.C. Act conferred on F.T.C. the authority to promulgate trade regulation rules which have effect of substantive law.

Reversed and remanded.

Ronald M. Dietrich, Gen. Counsel, F.T.C., of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of court, with whom *Harold H. Titus, Jr.*, U.S. Atty., *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, *Miles J. Brown*, Atty., F.T.C., and *Morton Hollander* and *William D. Appler*, Attys., Dept. of Justice, were on the brief, for appellants.

William Simon, Wash., D.C., with whom *J. Wallace Adair*, *John Bodner, Jr.*, *Francis A. O'Brien* and *Roger C. Simmons*, Wash., D.C., were on the brief, for appellees.

Gladys Kessler, Washington, D.C., for intervenors-appellants.

Before Bazelon, *Chief Judge*, and Wright and Robinson, *Circuit Judges.*

J. Skelly Wright, *Circuit Judge:*

This case presents an important question concerning the powers and procedures of the Federal Trade Commission. We are asked to determine whether the Commission, under its governing statute, the Trade Commission Act, 15 U.S.C. § 41 *et seq.* (1970), and specifically 15 U.S.C. § 46(g), is empowered to promulgate substantive rules of business conduct or, as it terms them, "Trade Regulation Rules." The effect of these rules would be to give greater specificity and clarity to the broad standard of illegality—"unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce"—which the agency is empowered to prevent. 15 U.S.C. § 45(a). Once promulgated, the rules would be used by the agency in adjudicatory proceedings aimed at producing cease and desist orders against violations of the statutory standard. The central question in such adjudicatory proceedings would be whether the particular defendant's conduct violated the rule in question. *See* 16 C.F.R. § 1.12(c) (1973).

The case is here on appeal from a District Court ruling that the Commission lacks authority under its governing stat**[674]**ute to issue rules of this sort. *National Petroleum Refiners Assn.* v. *FTC*, D.D.C., 340 F. Supp. 1343 (1972). Jurisdiction in the District Court was based on Section 10 of the Administrative Procedure Act. 5 U.S.C. § 706(2) (1970). Specifically at issue in the District Court was the Commission's rule declaring that failure to post octane rating numbers on gasoline pumps at service stations was an unfair method of competition and an unfair or deceptive act or practice.[1] The plaintiffs in the District Court, appellees here, are two trade associations and 34 gasoline refining companies. Plaintiffs attacked the rule on several grounds,[2] but the District Court disposed of the case solely on the question of the Commission's statutory authority to issue such rules. That is the only question presented for our consideration on appeal. We reverse and remand to the District Court for further consideration of appellees' challenge to the validity of the procedure before the Commission which resulted in the rule.

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[1] The rule provides:

"In connection with the sale or consignment of motor gasoline for general automotive use, in commerce as 'commerce' is defined in the Federal Trade Commission Act, it constitutes an unfair method of competition and an unfair or deceptive act or practice for refiners or others who sell to retailers, when such refiners or other distributors own or lease the pumps through which motor gasoline is dispensed to the consuming public, to fail to disclose clearly and conspicuously in a permanent manner on the pumps the minimum octane number or numbers of the motor gasoline being dispensed. In the case of those refiners or other distributors who lease pumps, the disclosure required by this section should be made as soon as it is legally practical; for example, not later than the end of the current lease period. Nothing in this section should be construed as applying to gasoline sold for aviation purposes.

"NOTE: For the purposes of this section, 'octane number' shall mean the octane number derived from the sum of research (R) and motor (M) octane numbers divided by 2; (R + M)/2. The research octane (R) and motor octane number (M) shall be as described in the American Society for Testing and Materials (ASTM) 'Standard Specifications for Gasoline' D 439–70, and subsequent revisions, and ASTM Test Methods D 2699 and D 2700."

36 Fed.Reg. 23871 (1971).

I

[1] Our duty here is not simply to make a policy judgment as to what mode of procedure—adjudication alone or a mixed system of rule-making and adjudication, as the Commission proposes—best accommodates the need for effective enforcement of the Commission's mandate with maximum solicitude for the interests of parties whose activities might be within the scope of the statutory standard of illegality. The Federal Trade Commission is a creation of Congress, not a creation of judges' contemporary notions of what is wise policy. The extent of its powers can be decided only by considering the powers Congress specifically granted it in the light of the statutory language and background. *See Textile and Apparel Group* v. *FTC*, 133 U.S. App.D.C. 353, 356–357, 410 F.2d 1052, 1055–1056, *cert. denied*, 396 U.S. 910, 90 S.Ct. 223, 24 L.Ed.2d 185 (1969). The question to be answered is "not what the [Commission] thinks it should do but what Congress has said it can do." *CAB* v. *Delta Air Lines*, 367 U.S. 316, 322, 81 S. Ct. 1611, 1617, 6 L.Ed. 869 (1961).

As always, we must begin with the words of the statute creating the Commission and delineating its powers. Section 5[3] directs the Commission to **[675]** "prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."[4] Section 5(b) of the Trade Commission Act specifies that the Commission is to accomplish this goal by means of issuance of a complaint, a hearing,[5] findings as to the facts, and issuance of a cease and desist order. The Commission's assertion that it is empowered by Section 6(g) to issue substantive rules defining the statutory standard of illegality in advance of specific adjudications does not in any formal sense circumvent this method of enforcement. For after the rules are issued, their mode of enforcement remains what it has always been under Section 5: the sequence of complaint, hearing, findings, and issuance of a cease and desist order. What rule-making does do, functionally, is to narrow the inquiry conducted in proceedings under Section 5(b). It is the legality of this practice which we must judge.

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[2] In addition to arguing that the Commission lacked statutory authority to promulgate the rule, appellees also charged that the rule was an unconstitutional usurpation of Congress' legislative powers; that the procedures under which the rule was adopted deprived them of rights to a hearing allegedly guaranteed by § 5 of the Federal Trade Commission Act, the due process clause of the 5th Amendment, and the Administrative Procedure Act; that the rule lacks factual support; and that promulgating the rule was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

[3] 38 Stat. 719 *et seq.* (1914), as amended, 15 U.S.C. § 45 (1970).

[4] 15 U.S.C. § 45(a)(6).

[5] 15 U.S.C. § 45(b).

[2] Appellees argue that since Section 5 mentions only adjudication as the means of enforcing the statutory standard, any supplemental means of putting flesh on that standard, such as rule-making, is contrary to the overt legislative design. But Section 5(b) does not use limiting language suggesting that adjudication alone is the only proper means of elaborating the statutory standard. It merely makes clear that a Commission decision, after complaint and hearing, followed by a cease and desist order, is the way to force an offender to halt his illegal activities.[6] Nor are **[676]** we persuaded by appellees' argument that, despite the absence of limiting language in Section 5 regarding the role of adjudication in defining the meaning of the

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[6] Section 5(b) provides:

"Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person; partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person; partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section."

statutory standard, we should apply the maxim of statutory construction *expressio unius est exclusio alterius* and conclude that adjudication is the *only* means of defining the statutory standard. This maxim is increasingly considered unreliable, *see Potomac Passengers Assn.* v. *Chesapeake & Ohio R. Co.*, 154 U.S.App.D.C. ——, ———, 475 F.2d 325, 331–332 (1973), *cert. granted, sub nom. Nat'l. R. R. Passenger Corp.* v. *Nat'l. Assn. of R. R. Passengers*, 411 U.S. 981, 93 S.Ct. 2273, 36 L.Ed.2d 957 (1973), for it stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen. *See American Trucking Assns.* v. *United States*, 344 U.S. 298, 309–310, 73 S.Ct. 307, 97 L.Ed. 337 (1953); *Durnin* v. *Allentown Federal Savings & Loan Assn.*, E.D.Pa., 218 F. Supp. 716, 719 (1963). Here we have particularly good reason on the face of the statute to reject such arguments. For the Trade Commission Act includes a provision which specifically provides for rule-making by the Commission to implement its adjudicatory functions under Section 5 of the Act. Section 6(g) of the Act, 15 U.S.C. § 46(g), states that the Commission may "[f]rom time to time * * * classify corporations and * * * make rules and regulations for the purpose of carrying out the provisions of sections 41 to 46 and 47 to 58 of this title." [7]

According to appellees, however, this rule-making power is limited to specifying the details of the Commission's non-adjudicatory, investigative and informative functions spelled out in the other provisions of Section 6 [8] and should not be read to encompass substantive

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[7] 15 U.S.C. § 45 is § 5 of the Trade Commission Act.

[8] Section 6 of the Trade Commission Act provides:

The Commission shall also have power—

(a) *Investigation of corporations.*

To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) *Reports by corporations.*

To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission.

(c) *Investigation of compliance with antitrust decrees.*

Wherenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon is own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its rule-**[677]**making in implementation of Section 5 adjudications. We disagree for the simple reason that Section 6(g) clearly states that the Commission "may" make rules and regulations for the purpose of carrying out the provisions of Section 5 and it has been so applied. For example, the Commission has issued rules specifying in greater detail than the statute the mode of Commission procedure under Section 5 in matters involving service of process, requirements as to the filing of answers, and other litigation details necessarily involved in the Commission's work of prosecuting its complaints under Section 5. Such rule-making by the Commission has been upheld. *See Hunt Foods & Industries, Inc.* v. *FTC*, 9 Cir., 286 F.2d 803, 810 (1960); *United States* v. *San Juan Lumber Co.*, D.Colo., 313 F. Supp. 703, 708 (1969).

Moreover, the Supreme Court has ruled that the powers specified in Section 6 do not stand isolated from the Commission's enforcement and law-applying role laid out in Section 5. In *United States* v. *Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950), the Court unanimously rejected arguments that the powers in the two sections are to be exercised separately. There the Court upheld the Commission's power to utilize its authority under Section 6(b) to compel the filing of "special reports" to monitor a defendant's compliance with a cease and desist order issued under Section 5. The Commission sought information in such reports to supplement the reports the defendants had been ordered to file by the Court of Appeals which had affirmed

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findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the Commission.

(*d*) *Investigations of violations of antitrust statutes.*

Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(*e*) *Readjustment of business of corporations violating antitrust statutes.*

Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(*f*) *Publication of information; reports.*

To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(*g*) *Classification of corporations; regulations.*

From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of sections 41 to 46 and 47 to 58 of this title.

(*h*) *Investigations of foreign trade conditions; reports.*

To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

15 U.S.C. § 46 (1970).

the Commission's original cease and desist order. Finding the Commission's request squarely within a commonsense definition of a "special report," the Court reasoned that the power to compel "special reports" meant that the agency could "elicit any information beyond the ordinary data of a routine annual report." *Id.* at 650, 70 S.Ct. at 368. More importantly, the Court rejected arguments that the legislative history compelled an opposite result, pointing out that while the legislative history did not specifically underwrite this function of "special reports," neither did it explicitly "deny [their] use for any purpose within the duties of the Commission, including a § 5 proceeding." *Id.* at 649, 70 S.Ct. at 367. The Court concluded **[678]** that the Trade Commission Act should be read as an "integrated whole." *Id.* at 650, 70 S.Ct. 357.

A similarly broad construction was given the Commission's powers in *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966), where the Commission sought a temporary restraining order and a preliminary injunction against the consummation of a corporate merger against which it was proceeding under Section 5 of the Trade Commission Act and Section 7 of the Clayton Act.[9] The Supreme Court rejected arguments that the Commission lacked the specific authority under its enabling statute to move into court in advance of issuing a cease and desist order and that the Commission, having sought similar powers unsuccessfully from Congress, should not be granted them by judicial implication. *Id.* at 607–611, 86 S.Ct. 1738. The Court upheld the Commission's authority to petition Courts of Appeals to exercise their power under the All Writs Act, 28 U.S.C. § 1651(a) (1970), to preserve the *status quo* in merger cases pending Commission proceedings. Significantly, for our purposes here, the Court reasoned that, while the Commission was acting without specific statutory warrant, "[s]uch ancillary powers have always been treated as essential to the effective discharge of the Commission's responsibilities." *Id.* at 607, 86 S.Ct. at 1744.

Of course, it is at least arguable that these cases go no farther than to justify utilizing Section 6(g) to promulgate procedural, as opposed to substantive, rules for administration of the Section 5 adjudication and enforcement powers. But we see no reason to import such a restriction on the "rules and regulations" permitted by Section 6(g). On the contrary, as we shall see, judicial precedents concerning rule-making by other agencies and the background and purpose of the Federal Trade Commission Act lead us liberally to construe the term "rules and regulations." The substantive rule here unquestionably implements the statutory plan. Section 5 adjudications—trial type proceedings—will still be necessary to obtain cease and desist orders against offenders, but Section 5 enforcement through adjudication will be expedited, simplified, and thus "carried out" by use of this substantive rule. And the overt language of both Section 5 and Section 6, read together, supports its use in Section 5 proceedings.

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[9] 64 Stat. 1125 (1914), as amended, 15 U.S.C. § 18 (1970).

II

Our belief that "rules and regulations" in Section 6(g) should be construed to permit the Commission to promulgate binding substantive rules as well as rules of procedure is reinforced by the construction courts have given similar provisions in the authorizing statutes of other administrative agencies. There is, of course, no doubt that the approved practices of agencies with similar statutory provisions is a relevant factor in arriving at a sound interpretation of the Federal Trade Commission's power here. *See FTC* v. *Dean Foods Co., supra*, 384 U.S. at 607, 86 S.Ct. 1738; *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 39–41, 84 S.Ct. 1105, 12 L.Ed.2d 112 (1964). In *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943), for example, the Supreme Court upheld the Federal Communications Commission's chain broadcasting rules regulating programming arrangements between networks and affiliates, in part on the basis of the FCC's generalized rule-making authority in 47 U.S.C. § 303(r) (1970). *See* 319 U.S. at 217, 63 S.Ct. 997. It rejected arguments similar to those made here, ruling that this authority extended beyond specification of technical and financial qualifications to be used as guides in the administration of the Commission's license-granting power. *Id.* at 220, 63 S.Ct. 997. It permitted the FCC to use rule-making to elaborate the [**679**] terms of its mandate to pursue the "public convenience, interest, or necessity," 47 U.S.C. § 303, by framing rules carrying out public policy objectives like affiliate independence and avoidance of undue network control over programming in the hope that listeners would be ensured a diversity of program offerings.

United States v. *Storer Broadcasting Co.*, 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1956), took the FCC's rulemaking power a step further, holding that applicants for licenses could be rejected before receiving a hearing specified by statute, *see* 47 U.S.C. § 309(b) (1970), in the event they did not comply with the Commission's rule limiting networks' power to own stock in affiliates and did not give sufficient reasons why the rule should be waived. The Court held:

> We do not read the hearing requirement, however, as withdrawing from the power of the Commission the rulemaking authority necessary for the orderly conduct of its business. * * *

> *** * * The Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation. * * ***

351 U.S. at 202–203, 76 S.Ct. at 770. *See also WBEN, Inc.* v. *United States*, 2 Cir., 396 F.2d 601, *cert. denied*, 393 U.S. 914, 89 S.Ct. 238, 21 L.Ed.2d 200 (1968), upholding the FCC's alteration by rule-making of presunrise broadcasters' permissible operations even though the rule's effect was to modify license holders' operating powers without an individualized hearing specified for cases of license modification by 47 U.S.C. § 316 (1970); *California Citizens Band Assn.* v. *United States*, 9 Cir., 375 F.2d 43 (1967), applying the *Storer* doctrine allowing rule-making to alter the powers of citizens radio service licensees without individualized hearings; *Weinberger* v. *Hynson, Westcott & Dunning, Inc.* 411 U.S. 903, 93 S.Ct. 2469, 37 L.Ed.2d 207 (1973).

Storer and its successors are, of course, closely related to the question we face here. For a major component of appellees' complaint is the abridgement of their interest in having the Trade Commission Act's standard of illegality elaborated only in an adjudicatory context. In our view, this argument was adequately answered in *Storer*, at least to the extent the FTC's rule serves the "purpose of shortening and simplifying the adjudicative process and of clarifying the law in advance,"[10] and thus, in *Storer's* language, aids the Commission in the "orderly conduct of its business."[11]

This obvious judicial willingness to permit substantive rule-making to undercut the primacy of adjudication in the development of agency policy is not limited to cases involving the FCC. The Federal Power Commission has successfully utilized rules regulating practical business conduct to frame, and even to cut off, what were once thought to be certificate applicants' absolute rights to individualized adjudications. This practice was upheld in large part on the authority of *Storer* in *FPC* v. *Texaco, Inc., supra.* Similarly, this court has upheld the authority of the Civil Aeronautics Board to utilize substantive rules affecting allocation of air cargo business among different types of air carriers to modify existing certificates without the full adjudicatory hearing contemplated by the agency's statute. *See American Airlines, Inc.* v. *CAB*, 123 U.S.App.D.C. 310, 359 F.2d 624 (1966) (*en banc*). *And see also Air Lines Pilots Assn. Int.* v. *Quesada*, 2 Cir., 276 F.2d 892 (1960), **[680]** upholding a Federal Aviation Agency regulation barring pilots from service after their 60th birthday without providing for individualized hearings on the resultant modification of their pilots' licenses. The propriety of using rulemaking rather than adjudication alone to set substantive regulatory standards has also been approved under the Poultry Products Inspection Act which, like the Federal Trade Commission Act, authorizes an agency, there the Secretary of Agriculture, to promulgate rules and regulations, 21 U.S.C. § 463 (1970), and also provides for specific adjudicatory procedures to determine the existence of misleading food labels, 21 U.S.C. § 457 (1970). *Borden Co.* v. *Freeman*, D.N.J., 256 F. Supp. 592, *affirmed*, 3 Cir., 369 F.2d 404 (1966) (*per curiam*).[12]

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[10] Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv.L.Rev. 921, 962 (1965). *See also Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 93 S.Ct. 2488, 37 L.Ed.2d 235 (1973).

[11] *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202, 76 S.Ct. 763, 100 L.Ed. 1081 (1956).

Just as there has been little question of allowing substantive rulemaking to intrude on asserted rights to a full hearing before an agency for a determination of a party's rights and liabilities, there has been a similar lack of hesitation in construing broad grants of rulemaking power to permit promulgation of rules with the force of law as a means of agency regulation of otherwise private conduct. *See, e.g., American Trucking Assns.* v. *United States*, *supra*, upholding the Interstate Commerce Commission's authority under the Motor Carrier Act, 49 U.S.C. § 301 *et seq.* (1970), to promulgate rules regulating the use of leased equipment by authorized motor carriers; *Morgan Stanley & Co.* v. *SEC*, 2 Cir., 126 F.2d 325 (1942), upholding SEC rules involving underwriters' commissions in public utility offerings under the Public Utility Holding Company Act, 15 U.S.C. § 79a *et seq.* (1970). Indeed, the general rule courts have adopted toward agencies' use of rule-making power to define standards of conduct by regulated parties, where a general rule-making provision is in the agency statute, was stated succinctly and definitively for this court by Judge Fahy in *Public Service Comm'n of State of New York* v. *FPC*, 117 U.S.App.D.C. 195, 199, 327 F.2d 893, 897 (1964):

> All authority of the Commission need not be found in explicit language. Section 16 [the general rule-making provision] demonstrates a realization by Congress that the Commission would be confronted with unforseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation. While the action of the Commission must conform with the terms, policies and purposes of the Act; it may use means which are not in all respects spelled out in detail. * * *

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[12] *See also Permian Basin Area Rate Cases*, 390 U.S. 747, 774–777, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968) (upholding authority of FPC to adopt area maximum rate system against challenge that the Natural Gas Act, 15 U.S.C. § 717 *et seq.* (1970), permitted computation of natural gas producers' rates only on an individual basis); *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 411 U.S. 903, 93 S.Ct. 2469, 37 L.Ed.2d 207 (1973) (upholding authority of Food & Drug Administration to issue declaratory orders classifying similar products as "new drugs" under § 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e) (1970), against challenge that individualized proceedings involving each manufacturer were required); *cf. Weinberger* v. *Bentex Pharmaceuticals, Inc.*, *supra* note 10, 412 U.S. at 645, 93 S.Ct. 2488 (endorsing FDA expert-drawn "monographs" to determine whether products are "new drugs" within the meaning of 21 U.S.C. § 321(p)(1) (1970).

The need to interpret liberally broad grants of rule-making authority like the one we construe here has been emphasized time and again by the Supreme Court. Just recently the Court upheld the authority of the Federal Reserve Board to promulgate rules under the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.* (1970), specifying new cost and financing disclosure requirements for merchants selling goods payable in more than four installments. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973). One such rule, promulgated un[**681**]der a general rule-making provision authorizing the Board to "prescribe regulations to carry out the purposes of [the Act]," 15 U.S.C. § 1604, was attacked on the ground that it was inconsistent with some portions of the statute, that the statute itself authorized a disclosure requirement with reference to transactions actually involving a finance charge, and that the Board was exceeding its authority and countermanding the statutory plan by using rule-making power to impose disclosure requirements on credit transactions where no finance charges are involved. Thus the challenge to the Federal Reserve Board's rule was in some respects similar to the challenge here: we are told that rule-making is authorized with reference to one part of the Federal Trade Commission Act but not another, that the statutory standard of illegality may be enforced only through the case-by-case adjudication specifically mentioned in Section 5 of the Act, and that the grant of rule-making power in Section 6(g) must not be extended to allow elaboration of the Section 5 standard in nonadjudicatory proceedings. But *Mourning* rejected this crabbed, inhospitable construction of a broad grant of rule-making authority, relying in large part on *American Trucking Assns.* v. *United States, supra:*

> To accept respondent's argument would undermine the flexibility sought in vesting broad rule making authority in an administrative agency. In American Trucking Association[s] v. United States, 344 U.S. 298, [73 S.Ct. 307, 97 L.Ed. 337] (1953), we noted that it was not—
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> "a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. * * * [N]o great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess." 344 U.S., at 309–310, [73 S.Ct. at 314] (citations omitted).
>
> Neither the sections of the Truth-in-Lending Act which refer specifically to transactions involving finance charges nor any other sections of the Act indicate that Congress attempted to list comprehensively all types of transactions to which the

> Board's regulations might apply. To the contrary, [the] broad grant of rule making authority [in 15 U.S.C. § 1604] reflects an intention to rely on those attributes of agency administration recognized in *American Trucking*. We cannot then infer that references in the Act to transactions involving credit charges were intended to limit the deterrent measures which the Board might choose.

411 U.S. at 372–373, 93 S.Ct. at 1662.

Thus there is little question that the availability of substantive rule-making gives any agency an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate. More than merely expediting the agency's job, use of substantive rule-making is increasingly felt to yield significant benefits to those the agency regulates. Increasingly, courts are recognizing that use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication.

The Supreme Court made this suggestion initially in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947), where it dealt with an agency adjudication imposing novel restraints on the power of management of corporations to purchase stock during periods of reorganization under the Pub-**[682]**lic Utility Holding Company Act of 1935. While the Court did not hold that the Securities and Exchange Commission was bound to follow rule-making procedures in making such a market policy departure, it was clearly aware that exclusive reliance on adjudication could be criticized for unfairly focusing on a single defendant in a restricted proceeding when promulgating a new policy with industry-wide ramifications. The Court said:

> * * * The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. * * * 332 U.S. at 202, 67 S.Ct. at 1580.

Four years ago a majority of the Supreme Court hinted that there may be circumstances where agency policy innovations should be made *only* in rule-making proceedings. In *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed. 709 (1969), the Court upheld an adjudicatory order based on a prior decision where the Labor Board had decided that a new rule of management conduct during election campaigns should operate only prospectively. But the four-man plurality opinion by Mr. Justice Fortas sharply criticized the Board's initial promulgation in adjudicatory proceedings of a rule applicable in election campaigns generally. He argued that rule-making, under the Administrative Procedure Act's provisions for advance notice and broad public participation, 5 U.S.C. § 553 (1970), assured "fairness and mature consideration" in a way that adjudication, inevitably tending to focus more narrowly on the behavior of given parties, could not. 394 U.S. at 764, 89 S.Ct. 1426. Mr. Justice Douglas, dissenting from the majority's actual holding, argued similarly that where the Board imposed a new standard of conduct that is "not particularized to special facts * * * [but] is a statement of far-reaching policy covering all future representation elections," *id.* at 777, 89 S.Ct. at 1435, it should be required to follow the APA's rule-making procedures. He stressed that rulemaking, unlike adjudication, "gives notice to an entire segment of society of those controls or regimentation that is forthcoming * * * [and] an opportunity for persons affected to be heard." *Ibid.*, 89 S.Ct. at 1436. And since the agency is bound under the APA to consider the submissions of those affected between the time a rule is proposed and when it is promulgated, 5 U.S.C. § 553 (c), (d), it has a valuable opportunity to modify its initial inclinations. In other words, by exposing itself to a wider range of criticism and advice than is ordinarily available in adjudicatory proceedings the agencies may, in Mr. Justice Douglas' words, "discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice." *Id.* at 777–778, 89 S.Ct. 1436. Also dissenting, Mr. Justice Harlan said that where the agency had taken the position that its new adjudication-based rule was so revolutionary that it could be applied only prospectively, such marked departures in agency policy could only be taken through rule-making: "Either the rule-making provisions [of the APA] are to be enforced or they are not. Before the Board may be permitted to adopt a rule that so significantly alters pre-existing labor-management understandings, it must be required to conduct a satisfactory rule-making proceeding, so that it will have the benefit of wide-ranging argument before it enacts its proposed solution to an important problem." *Id.* at 781, 89 S.Ct. at 1438.

Even more recently, the Second Circuit has taken *Wyman-Gordon*'s suggestions to their logical conclusion. In *Bell Aerospace Div. of Textron, Inc.* v. *NLRB*, 2 Cir., 475 F.2d 485 (1973), that court refused to enforce a Labor Board bargaining order in part on the ground that the Board had made such a significant change in its previous definition of types of workers protected by the Na**[683]**tional Labor Relations Act that rule-making rather than adjudication was required. In holding that the agency "should be particularly sure that it has all available information," 475 F.2d at 497, Chief Judge Friendly's opinion ordering rule-making, *id.* at 496, relied heavily on a factor stressed in the opinions of Justices Fortas, Douglas and Harlan in *Wyman-Gordon*—a sharp change in agency policy with obvious effects on a vastly wider range of parties than those immediately before the agency. *Id.* at 496–497. Moreover, he stressed that the argument for mandatory rule-making was especially strong where the defendant was exposed by the adjudicatory order to "new and unexpected liability." *Id.* at 497.

This judicial trend favoring rule-making over adjudication for development of new agency policy does not, of course, directly dispose of the question before us. There was no question that the SEC in *Chenery* had substantive rule-making powers. *See* 332 U.S. at 201, 67 S.Ct. 1575. And *Wyman-Gordon* assumed that the NLRB also had substantive rule-making powers under 29 U.S.C. § 156 (1970). 394 U.S. at 763–765 & n. 3, 89 S.Ct. 1426. Here we must decide just that question, whether Congress has given the FTC the same alternate means of proceeding, not whether the FTC should be required to use rule-making in some circumstances. But *Chenery*, *Wyman-Gordon* and *Bell Aerospace* cannot be ignored, for they indisputably flesh out the contemporary legal framework in which both the FTC and this court operate and which we must recognize. *See Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 390–391, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). To us, these cases suggest that contemporary considerations of practicality and fairness—specifically the advisability of utilizing the Administrative Procedure Act's rule-making procedures to provide an agency about to embark on legal innovation with all relevant arguments and information, 5 U.S.C. § 553—certainly support the Commission's position here. As *Wyman-Gordon* and *Bell Aerospace* explicitly noted, utilizing rule-making procedures opens up the process of agency policy innovation to a broad range of criticism, advice and data that is ordinarily less likely to be forthcoming in adjudication. Moreover, the availability of notice before promulgation and wide public participation in rule-making avoids the problem of singling out a single defendant among a group of competitors for initial imposition of a new and inevitably costly legal obligation, *cf. Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 93 S.Ct. 2488, 37 L.Ed.2d 235 (1973); *Weinberger* v. *Hynson, Westcott & Dunning, Inc., supra*, 411 U.S. at 903, 93 S.Ct. 2469; *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 87 S.Ct. 1622, 18 L.Ed.2d 749 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 78 S.Ct. 377, 2 L.Ed.2d 370 (1958).

Such benefits are especially obvious in cases involving initiation of rules of the sort the FTC has promulgated here. The Commission's statement on basis and purpose indicated that the decision to impose the obligation of octane rating disclosure on gasoline dealers entailed careful consideration of automobile engine requirements, automobile dealers' practices in instructing purchasers how to care for their engines, consumer gasoline purchasing habits, and costs to gasoline dealers. In addition, the Commission had to choose exactly what kind of disclosure was the fairest. In short, a vast amount of data had to be compiled and analyzed, and the Commission, armed with these data, had to weigh the conflicting policies of increasingly knowledgeable consumer decision-making against alleged costs to gasoline dealers which might be passed on to the consumer. True, the decision to impose a bright-line standard of behavior might have been evolved by the Commission in a single or a succession of adjudicatory proceedings, *see, e.g., FTC* v. *Texaco, Inc.*, 393 U.S. 223, 89 S.Ct. 429, 21 L.Ed.2d 394 (1968), much as the Supreme Court has imposed *per se* rules of **[684]** business behavior in antitrust cases. *See, e.g., United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972) (horizontal territorial restraints); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) (price fixing). But evolution of bright-line rules is often a slow process and may involve the distinct disadvantage of acting without the broad range of data and argument from all those potentially affected that may be flushed out through use of legislative-type rule-making procedures. *Cf. United States* v. *Topco Associates, Inc.*, *supra*, 405 U.S. at 620, 92 S.Ct. 1126 (Mr. Chief Justice Burger, dissenting). And utilizing rule-making in advance of adjudication here minimizes the unfairness of using a purely case-by-case approach requiring "compliance by one manufacturer while his competitors [engaging in similar practices] remain free to violate the Act." *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, *supra*, 412 U.S. at 645, 93 S.Ct. at 2494. In light of *Chenery*, *Wyman-Gordon* and *Bell Aerospace*, therefore, it is hard to escape noting that the policy innovation involved in this case underscores the need for increased reliance on rule-making rather than adjudication alone.

III

[3] Appellees contend, however, that these cases and the general practice of agencies and courts in underwriting the broad use of rule-making are irrelevant to the FTC. They argue that the Trade Commission is somehow *sui generis*, that it is best characterized as a prosecuting rather than a regulatory agency, and that substantive rule-making power should be less readily implied from a general grant of rule-making authority where the agency does not stand astride an industry with pervasive license-granting, rate-setting, or clearance functions. Initially it should be noted that appellees, for obvious reasons, do not rely on the NLRB in making their prosecutorial argument. The statutory method of adjudication and enforcement used by the NLRB is, of course, very similar to that of the FTC. *Compare* 29 U.S.C. § 160 (1970) *with* 15 U.S.C. § 45. And the courts, including the Supreme Court, have, as shown in the preceding section, repeat-

edly encouraged the NLRB to make use of its general grant of rule-making authority, 29 U.S.C. § 156, to issue substantive rules. We do not assert that the FTC is compelled by its statutory charter to exert the kind of ongoing regulatory scrutiny exercised by agencies like the FCC, FPC, ICC, SEC, CAB, or even the Department of Agriculture. But we do not find the absence of license-granting, rate-making or clearance power a sufficiently principled distinction to accept appellees' argument. For a more compelling argument can be made that the FTC's duty to prevent "unfair methods of competition" and "unfair or deceptive acts or practices" is just as potentially pervasive, in the sense of affecting commercial practices, as the regulatory schemes of agencies utilizing rate-making, licensing, and similar means of regulation. The FTC's charter to prevent unfair methods of competition is tantamount to a power to scrutinize and to control, subject of course to judicial review, the variety of contracting devices and other means of business policy that may contradict the letter or the spirit of the antitrust laws. *FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 320–322, 86 S.Ct. 1501, 16 L.Ed.2d 587 (1966); *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394–395, 73 S.Ct. 361, 97 L.Ed. 426 (1953); *FTC* v. *Cement Institute*, 333 U.S. 683, 689–695, 68 S.Ct. 793, 92 L.Ed. 1010 (1948). The pervasiveness of the antitrust laws' coverage, in the sense of affecting business decision-making, needs no elaboration. Suffice it to say that it cuts deeply into and, with limited exceptions,[13] widely across virtually all, **[685]** of American business. In addition, under its mandate to prevent "unfair or deceptive acts or practices," the Commission has the responsibility to protect the consumer from being misled by governing the conditions under which goods and services are advertised and sold to individual purchasers. *See FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239–244, 92 S.Ct. 898, 31 L.Ed. 170 (1972). And while the boundaries of the Commission's power to proscribe conduct it deems harmful to the consumer or to competition are not clearly defined, they are indeed expansive. *Id.* at 244, 92 S.Ct. 898.

Given the expanse of the Commission's power to define proper business practices, we believe it is but a quibble to differentiate between the potential pervasiveness of the FTC's power and that of the other regulatory agencies merely on the basis of its prosecutorial and adjudicatory mode of proceeding. Like other agencies, wholly apart from the question of rule-making power it exerts a powerfully regulatory effect on those business practices subject to its supervision. Of course, its regulatory authority is not complete. But neither is the regulation exercised by other agencies. *See J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). And the Commission has this regulatory effect irrespective of whether it chooses to elaborate the vague but comprehensive statutory standards through rule-making or through case-by-case adjudication. Businesses whose practices appear clearly covered by the Trade Commission's adjudicatory decisions against similarly situated parties presumably will comply with the Commission's holding rather than await a Commission action against them individually; we must presume that in many cases where a guideline is laid down in an individual case it is, like many common law rules, generally obeyed by those similarly situated. Moreover, there are ample indications in the Commission's legislative history that the agency, by gathering information on business practices, issuing periodic reports, and moving against those practices which appear "unfair," was meant to have just this sort of regulatory impact, despite the purely prosecutorial mode of proceeding provided in Section 5 of the Act.[14] Not only is the Commission's regulatory power much broader than appellees would have us believe; there is simply no compelling evidence in the Act's legislative history or in the language of the statute itself which would limit the exercise of that power to the prosecutorial function or prevent the Commission from making that function more effective by rule-making.

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[13] The Federal Trade Commission Act exempts from its coverage banks, common carriers subject to other federal regulation, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons subject to the Packers and Stockyards Act of 1921. *See* 15 U.S.C. § 45(a)(6).

IV

Although we believe there are thus persuasive considerations for accepting the FTC's view that the plain meaning of the statute supports substantive rule-making, the question is not necessarily closed. For appellees' contention—that the phrase "rules and regulations for the purpose of carrying out" Section 5 refers only to rules of procedure and practice for carrying out the Commission's adjudicatory responsibility—is not implausible. The opinion of the District Court argues forcefully that, in spite of the clear and unlimited language of Section 6(g) granting rule-making authority to the Commission, the Congress that enacted Section 5 and Section 6(g) gave clear indications of its intent to reject substantive rule-making, that the FTC's own behavior in the years since that time supports a narrow interpretation of its mandate to promulgate "rules and regulations," and that where Congress desired to give the FTC substantive rule-making authority in discrete areas it did so in subsequent years in unambiguous terms. Our own conclusion, **[686]** based on an independent review of this history, is different. We believe that, while the legislative history of Section 5 and Section 6(g) is ambiguous, it certainly does not compel the conclusion that the Commission was not meant to exercise the power to make substantive rules with binding effect in Section 5(a) adjudications. We also believe that the plain language of Section 6(g), read in light of the broad, clearly agreed-upon concerns that motivated passage of the Trade Commission Act, confirms the framers' intent to allow exercise of the power claimed here. We do not find the District Court's reliance on the agency's long-standing practice, until 1962, of not utilizing rule-making or the District Court's reliance on enactment of specific grants of rule-making power in narrow areas sufficiently persuasive to override our view, and the Commission's view, that rule-making is not only consistent with the original framers' broad purposes, but appears to be a particularly apt means of carrying them out.

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[14] *See, e.g.*, S.Rep. No. 597, 63d Cong., 2d Sess., 9–10 (1914); H.R.Rep. No. 1142, 63d Cong., 2d Sess., 18–19 (1914).

In analyzing the origins of the Federal Trade Commission Act of 1914, and Section 5 and 6(g) in particular, both parties would have us focus heavily on the floor debates and committee reports that accompanied the legislation on its tortuous path toward enactment. Certainly these materials are relevant to our inquiry and cannot be ignored. But our examination of the comments made by legislators that allegedly bear directly on the question whether the Commission was initially meant to exercise substantive, legislative-type rule-making power has led us to the conclusion, familiar in cases dealing with strongly contested questions of statutory interpretation, that the *specific* intent of Congress here cannot be stated with any assurance. The materials cited to us indicate that the question before us—whether the Commission can elaborate the meaning of Section 5's standard of illegality through rule-making as well as through case-by-case adjudication—was not confronted straightforwardly and decisively. Given this conclusion, which we elaborate in detail in the appendix to this opinion, we are hardly at liberty to override the plain, expansive language of Section 6(g) as well as the gloss that has been placed on that kind of rule-making provision by the series of decisions dealing with agencies whose enabling statutes have similar rule-making provisions. *See United States* v. *Oregon*, 366 U.S. 643, 647–648, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961).

Moreover, while we believe the historical evidence is indecisive of the question before us, we are convinced that the broad, undisputed policies which clearly motivated the framers of the Federal Trade Commission Act of 1914 would indeed be furthered by our view as to the proper scope of the Commission's rule-making authority. The multiplicity of differing plans proposed for a trade commission prior to 1914[15] and during [**687**] the intensive debates in 1914[16] immediately preceding enactment of the Trade Commission Act demonstrates, of course, that proponents of the agency were hardly agreed on exactly what powers the agency should assume. But the variety of plans and the proponents of the agency all unquestionably shared deep objections to the existing structure of judicial monopolization of cases involving unfair, anticompetitive business practices. Those who believed from the start in a commission with independent enforcement powers,[17] as the Commis**[688]**sion was finally given in the

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[15] *See* S. 2941, 62d Cong., 2d Sess. (1911). This bill, introduced by Senator Newlands of Nevada, then a ranking member of the Senate Commerce Committee, provided for a 5-man independent commission whose presidentially appointed members would have fixed tenure, with powers to compel corporations whose annual gross receipts exceeded $5 million to furnish annual reports showing their "organization, financial condition, and operations as may be prescribed by regulations to be made in pursuance of this act." Such corporations, moreover, would be subject to a federal registration requirement, and registration could be revoked upon a commission finding that they had engaged in "unfair or oppressive methods of competition," or suffered from "overcapitalization," or "improper financial organization." Application of these standards to the facts of any given corporation was left to the commission. Finally, the commission was empowered under the plan to order that a defendant corporation found liable "thereafter shall not engage in interstate commerce." This order was enforceable by fine and injunction in the federal district courts. Although this stringent legislation was not voted upon during the session, it does serve to indicate serious unease with the existent policy of entrusting the courts with exclusive responsibility for antitrust enforcement. A subsequent proposal, S. 5485, 62d Cong., 2d Sess. (1912), provided for a commission without any independent enforcement authority, but with powers to investigate and report publicly on corporate financial and business practices, to recommend antitrust prosecutions to the Department of Justice, and to assist the federal courts, as a sort of special master, in framing decrees of dissolution or reorganization once underlying antitrust liability under the Sherman Act had been found. Stronger legislation was introduced in the House in 1913, H.R. 9299, H.R. 9300 & H.R. 9301, 63d Cong., 1st Sess. (1913), by the Progressive Party leader, Congressman Murdock of Kansas. These bills would create a commission with power to issue orders restraining unfair competitive practices that would be enforceable in federal courts, but these bills too were not reported to the floor. Moreover, the platforms of both the Republican and the Progressive Parties in the 1912 election called for establishment of a commission. The Republicans called for a "Federal trade commission, thus placing in the hands of an administrative board many of the functions now necessarily exercised by the courts. This will promote promptness in the administration of the laws and avoid delays and technicalities incident to court procedure." Quoted in H.R. Rep. No. 553, 63d Cong., 2d Sess., Views of the Minority, 1 (1914). The Progressives called for a "commission of high standing, which shall maintain permanent active supervision over industrial corporations engaged in interstate commerce, * * * doing for them what the Government now does for national banks, and what is now done for the railroads by the Interstate Commerce Commission." Quoted in *id.*, Part 3, at 2. The 1912 Democratic platform signally failed to promote a trade commission, though it did call for greater specificity in the antitrust laws. *See* G. Henderson, The Federal Trade Commission : A Study in Administrative Law and Procedure 16 (1924). The reluctance of the Democrats, including President Wilson, to embrace plans for an independent commission was based on several grounds. First, through his campaign Mr. Wilson opposed creation of a new agency to supervise corporate behavior simply on the ground that additional bureaucracy was undesirable *per se*. *See* A. Link, Wilson : The New Freedom 327 (paper ed. 1956). Second, the Progressive Party plan for a commission treating large trusts as corporations with a "public use" appeared to contemplate an extraordinary degree of regulation, including licensing and price control. Such supervision raised the spectre of possible government immunization, through regulation, of monopolistic practices from more straightforward legal attack. *See* G. Henderson, *op. cit, supra,* at 22–24.

[16] *See* Appendix at pp. 698–700 *infra.*

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[17] Senator Newlands, for example, stated in a hearing before the Senate Committee on Interstate Commerce on Aug. 4, 1911, that his bill, S. 2941, *supra* note 15, would allow the commission to achieve ends that had eluded the courts:

"* * * We want traditions; we want a fixed policy; we want trained experts; we want precedents; we want a body of administrative law built up. This can not be well done by the single occupant of an office, subject to constant changes in its incumbency and subject to higher executive authority. Such work must be done by a board or commission of dignity, permanence, and ability, independent of executive authority, except in its selection, and independent in character."

Quoted in Appendix to S. Rep. No. 597, *supra* note 14, at 22.

President Wilson did not originally back proposals giving a trade commission independent enforcement power. When he announced his antitrust program in an address to Congress on Jan. 20, 1914, 51 Cong.Rec. (Part 2) 1963 (1914), he relented his campaign opposition to any new commission. But the agency he proposed had no independent enforcement power, as had been proposed in 1911 and 1913, *see* note 15 *supra,* and was clothed with merely investigative and publicity powers, "a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided," 51 Cong.Rec. (Part 2) at 1963. He also proposed permitting the commission to assist the courts and the Justice Department in framing decrees and settlements. His rejection of an agency with its own enforcement power was seemingly based on fears that it might thus be "empowered to make terms with monopoly or * * * to assume control of business." *Ibid.*

Those who felt that Wilson did not go far enough sharply disagreed with the President's apparent willingness to leave powers of enforcement exclusively to the courts. Congressman Stevens of New Hampshire, whose views subsequently helped change the President's opposition to a commission with independent enforcement power, *see* A. Link, *op. cit. supra* note 15, at 436–438, refused to sign the majority report of the House Committee on Interstate Commerce when it reported out the Administration's original proposal for a commission without any independent enforcement power. He stressed that the "regulation of large corporations by suits at law is a slow, costly process and even where the Government has eventually won, the results have been most disappointing," and that only an "administrative board having general power to prevent unfair competitive practices" could ameliorate this problem. H.R. Rep. No. 553, *supra* note 15, Part 2 at 1. On the House floor, members who opposed the President's bill on the ground that it gave the commission insufficient power made similar arguments, namely, that the commission, as proposed, simply did not strike at the core problem of antitrust enforcement. Congressman Murdock of Kansas, a leading Progressive, sharply attacked the original Administration plan:

"The pending Democratic measures, save for a mere rudimentary and purely investigative trade commission, which is to go hunting in the trust jungles—with a camera—leave all the work to the lingering, laborious, inexpert adjustments of the overcrowded courts. 51 Cong.Rec. (Part 9) 8973 (1914). Murdock argued that the Administration's supplement to its original trade commission proposal, a set of laws specifying in greater detail anticompetitive practices, was defective precisely because the new proposals were to be "enforced only by the long, difficult, delaying processes of the courts." *Id.* at 8974. Congressman Dillon of South Dakota, another proponent of a stronger commission, argued that giving enforcement power to the commission would avoid this problem:

"* * * If we rely on the judiciary, our progress must necessarily be slow. We prefer to place our hopes and aspirations in an administrative board, a board that would not be hampered by appeals, delays, and technicalities."

Id. at 9057.

Criticism of exclusive reliance on judicial enforcement of the antitrust laws was equally evident when Wilson changed his mind after passage of the weak commission bill in the House and backed a commission with independent enforcement authority. *See generally* Appendix at pp. 700–702 *infra.* The report of the Senate Commerce Committee, chaired by Newlands, endorsing the latter plan argued that a commission composed of members familiar with the problems of business competition "could be vastly more effectual than through the courts alone, which in most cases will take no cognizance of violations of the law for months or years after the violations occurred, and when the difficulty of awarding reparation for the wrong is almost unsurmountable." S. Rep. No. 597, *supra* note 14, at 5–6. During the subsequent floor debate, Senator Saulsbury of Delaware, who subsequently

1914 legislation, and those who believed the Commission should have lesser powers,[18] agreed that entrusting enforcement of **[689]** congressional policy to prevent undue incursions on competition exclusively to the courts was a serious mistake. The courts were said to lack sufficient expertise in matters of economic complexity,[19] their decisions were said to be wanting in the clarity planners of complicated business transactions and innovations required,[20] and finally and most importantly, the courts lacked both the resources and the skill to proceed with speed and expedition in the trial and disposition of complicated cases involving economic questions.[21] This concern over judicial delay, inefficiency and uncertainty was echoed time and again throughout the 1914 debates over the form a commission would take.[22]

[4, 5] In determining the legislative intent, our duty is to favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where, as here, that interpretation is consistent with the plain language of the statute. *See Bird* v. *United States*, 187 U.S. 118, 124, 23 S.Ct. 42, 47 L.Ed. 100 (1902); *United States* v. *Blasius*, 2 Cir., 397 F.2d 203, 207 n. 9 (1968), *cert. dismissed*, 393 U.S. 1008, 89 S.Ct. 615, 21 L.Ed.2d 557 (1969). "[I]n the absence of an unmistakable direc-

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served on the conference committee which produced the final bill, argued in favor of a commission with its own enforcement power on the ground that "[t]he delays and expense incident to obtaining redress for such wrongs in the courts have made adequate relief to litigants almost unattainable in these cases and, in the public mind there has been growing up a belief, which to some extent may be justified, that the courts were not efficient, because of the usual delay and expense in providing early, adequate, and inexpensive relief from oppressions. 51 Cong.Rec. (Part 12) 11593 (1914).

[18] Congressman Covington of Maryland, the floor manager of the Administration's original proposal which gave the commission no independent enforcement power, said as much on the House floor shortly after a bill embodying the Administration's plans was reported out from committee when he described the problems that ensued in attempting to render a decree of dissolution in one notable antitrust case:

> "* * * [B]y reason of the lack of an efficient body charged with the handling of the numerous facts relating to all those tobacco concerns and assisting the court, a delay was caused and an imperfect decree resulted. If Judge Lacombe had been able to refer to a commission of the sort now proposed the whole record in the case and obtain a report concerning the form of a proper constructive decree of dissolution, the public would have been more speedily and more effectively served."

51 Cong.Rec. (Part 9) at 8846–8847. The Senate Commerce Committee, while it decided not to report S. 5485, discussed at note 15 *supra*, noted that the bill's feature of permitting the commission to act as a sort of special master in assisting the federal courts to frame decrees of dissolution or settlement in Sherman Act cases would serve as a partial cure for "judicial deliberation and delay," ensuring that violations would be promptly attacked and remedies imposed quickly if they were needed. S.Rep. No. 1326, 62d Cong., 3d Sess. (1913), quoted in Appendix to S.Rep. No. 597, *supra* note 14, at 33.

[19] *See* statements of Senator Newlands and Congressman Murdock, quoted in note 17 *supra*. *See also* H.R.Rep. No. 1142, *supra* note 14, at 19; S.Rep. No. 597, *supra* note 14, at 6, 8–10, 12, 13.

[20] *See generally* G. Henderson, *op. cit. supra* note 15, at 11–15.

[21] *See* note 17 *supra*.

[22] *See* notes 17–19 *supra*.

tive," we cannot "construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate." *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349, 88 S.Ct. 904, 908, 19 L.Ed.2d 1222 (1968). Indeed, as Mr. Justice Harlan put it in a case involving a question of the Federal Power Commission's power under a general rule-making provision to alter radically its customary modes of proceeding, "This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred." *Permian Basin Area Rate Cases*, 390 U.S. 747, 776, 88 S.Ct. 1344, 1364, 20 L.Ed.2d 312 (1968); *see also id*. n. 40; *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 277–281, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969) (upholding rules of the United States Department of Housing and Urban Development promulgated pursuant to a rule-making provision, 42 U.S.C. § 1408 (1970), phrased in terms almost identical with those of Section 6(g) of the Trade Commission Act). This view was reiterated just a few weeks ago by Mr. Chief Justice Burger, writing for the Court:

> * * * Where the empowering provision of a statute states simply that the agency may "make * * * such rules and regulations as may be necessary to carry out the provisions of this Act," we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation." * * *

[**690**] *Mourning* v. *Family Publications Service, Inc.*, *supra*, 411 U.S. at 369, 93 S.Ct. 1660–1661. (Footnote omitted.) In short, where a statute is said to be susceptible of more than one meaning, we must not only consult its language; we must also relate the interpretation we provide to the felt and openly articulated concerns motivating the law's framers. *See J. I. Case Co.* v. *Borak*, *supra*, 377 U.S. at 432–433, 84 S.Ct. 1555. In this way we may be sure we are construing the statute rather than constructing a new one.

The problems of delay and inefficiency that proponents of both a strong and a weak commission aimed to eliminate or minimize have plagued the Trade Commission down to the present. While the Commission has broad common law-like authority to delineate the scope of the statute's prohibitions, *see FTC* v. *Sperry & Hutchinson Co.*, *supra*, 405 U.S. at 244, 92 S.Ct. 898, like the federal courts it was designed to supplement, it has remained hobbled in its task by the delay inherent in repetitious, lengthy litigation of cases involving complex factual questions under a broad legal standard. Close students of the agency agree that the historic case-by-case purely adjudicatory method of elaborating the Section 5 standard and applying it to discrete business practices has not only produced considerable uncertainty, *see* Report of the ABA Commission to Study the Federal Trade

Commission 11 (1969); Auerbach, The Federal Trade Commission: Internal Organization and Procedure, 48 Minn.L.Rev. 383, 445–449, 464–465, 518–519 (1964); Cushman, The Problem of the Independent Regulatory Commission 24 *in* President's Comm'n on Administrative Management, Studies No. 1–5 (1937); Baum, Reorganization, Delay and the Federal Trade Commission, 15 Admin.L.Rev. 92, 93, 108–110 (1963), but also has helped to spawn litigation the length of which has frequently been noted ruefully by commentators on the Commission's performance. *See* Note, The Federal Trade Commission and Reform of the Administrative Process, 62 Colum.L.Rev. 671, 692–693 (1962); Report of the ABA Commission to Study the Federal Trade Commission, *supra*, at 10, 28–32. We believe that, to the extent substantive rule-making to implement Section 5 proceedings is likely to deal with these problems given the statutory authority provided in Section 6(g), the Commission's position should be upheld as a reasonable means of attacking ills the Commission was created to cure.

There is little disagreement that the Commission will be able to proceed more expeditiously, give greater certainty to businesses subject to the Act, and deploy its internal resources more efficiently with a mixed system of rule-making and adjudication than with adjudication alone. With the issues in Section 5 proceedings reduced by the existence of a rule delineating what is a violation of the statute or what presumptions the Commission proposes to rely upon, proceedings will be speeded up. For example, in an adjudication proceeding based on a violation of the octane rating rule at issue here, the central question to be decided will be whether or not pumps owned by a given refiner are properly marked. *See also* pages 691–692 *infra*. Without the rule, the Commission might well be obliged to prove and argue that the absence of the rating markers in each particular case was likely to have injurious and unfair effects on consumers or competition.[23] Since this laborious process might well have to be repeated every time the Commission chose to proceed subsequently against another defendant on the same ground, the difference in administrative efficiency between the two kinds of proceedings is obvious. Furthermore, rules, as contrasted with the holdings reached by case-by-case adjudication, are more specific as to their scope, and industry com[**691**]pliance is more likely simply because each company is on clearer notice whether or not specific rules apply to it.

Moreover, when delay in agency proceedings is minimized by using rules, those violating the statutory standard lose an opportunity to turn litigation into a profitable and lengthy game of postponing the effect of the rule on their current practice[24] As a result, substantive rules will protect the companies which willingly comply with the law against what amounts to the unfair competition of those who would profit from delayed enforcement as to them. This, too, will minimize useless litigation and is likely to assist the Commission in more effectively allocating its resources. In addition, whatever form rules take, whether bright-line standards or presumptions that are rebuttable, they are likely to decrease the current uncertainty many businesses are said to feel over the current scope and applicability of Section 5.[25] But the important point here is not that rule-making is assuredly going to solve the Commission's problems. It is rather that recognition and use of rule-making by the Commission is convincingly linked to the goals of agency expedition, efficiency, and certainty of regulatory standards that loomed in the background of the 1914 passage of the Federal Trade Commission Act.

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[23] *See* Case Note, 14 B.C.Ind. & Comm.L. Rev. 368, 379 (1972). *But cf. FTC* v. *Texaco, Inc.*, 393 U.S. 223, 89 S.Ct. 429, 21 L.Ed.2d 394 (1968).

This relationship between rule-making's probable benefits and the broad concerns evident when the FTC was created, together with the express language of Section 6(g), help persuade us that any purported ambiguity of the statute be resolved in favor of the Commission's claim. "In a case much more clouded with doubts than this one, we held that we would not 'in the absence of compelling evidence that such was Congress' intention * * * prohibit administrative action imperative for the achievement of an agency's ultimate purposes.' Permian Basin Area Rate Cases, 390 U.S. 747, 780, 88 S.Ct. 1344, 1367, 20 L.Ed. 2d 312." *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, *supra*, 412 U.S. at 645, 93 S.Ct. at 2494.

V

Despite the import of Section 6(g)'s plain language, the overwhelming judicial support given to expansive agency readings of statutory rule-making authorizations that are not flatly inconsistent with other statutory provisions, and the incontestable relationship between the broad policies behind the 1914 Act and the utility of substantive rule-making power, appellees argue that substantive rule-making represents a sufficiently important innovation in Commission practice for us to balk at authorizing its use on the basis of an arguably ambiguous statute in the absence of very firm indications of affirmative and specific legislative intent. Indeed, courts have assumed such a stance toward novel assertions of agency powers. This court did so in *Textile and Apparel Group* v. *FTC*, *supra*, where we reviewed an agency rule allowing for *ex parte* seizure of imports at Customs and a procedure for testing goods prior to entry, both without provision for the Trade Commission's normal enforcement procedure of adversary cease-and-desist proceedings and judicial review. Because this procedure entirely dispensed with a hearing and because it varied so sharply from the Commission's customary mode of proceeding against possible wrongdoers, we structured our review to "look for some fairly strong indication, backed by sound policy, that Congress meant for the Commission to act in this way." [**692**] 133 U.S.App.D.C. at 356, 410 F.2d at 1055. *See also FMC* v. *Anglo-Canadian Shipping Co.*, 9 Cir., 335 F.2d 255, 258–259 (1964) (involving agency use of prehearing discovery procedures).

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[24] Address by FTC Chairman Paul Rand Dixon, American Association of Advertising Agencies, April 28, 1962, quoted in Auerbach, The Federal Trade Commission: Internal Organization and Procedure, 48 Minn.L.Rev. 383, 456 (1964); Chapiro, *supra* note 10, 78 Harv. L.Rev. at 962.

[25] *See* Report of the ABA Commission to Study the Federal Trade Commission 11 (1969); Elman, Rulemaking Procedures in the FTC's Enforcement of the Merger Law, 78 Harv.L. Rev. 385 (1964).

[6] Unlike either *Textile & Apparel Group* or *Anglo-Canadian Shipping Co.*, this case does not involve nearly so drastic a departure from accustomed modes of agency proceeding. The rule here does not bypass the Commission's statute-based cease-and-desist proceedings. It merely supplements them. Moreover, in light of the concern evident in the legislative history that the Commission give attention to the special circumstances of individual businesses in proceeding against them, *see* Appendix at pages 704–705, the Commission should administer any rules it might promulgate in much the same way that courts have ordinarily required other agencies to administer rules that operate to modify a regulated party's rights to a full hearing. That is, some opportunity must be given for a defendant in a Section 5 proceeding to demonstrate that the special circumstances of his case warrant waiving the rule's applicability, as where the rationale of the rule does not appear to apply to his own situation or a compelling case of hardship can be made out. *See FPC* v. *Texaco, Inc.*, *supra*, 377 U.S. at 40, 84 S.Ct. 1105; *United States* v. *Storer Broadcasting Co.*, *supra*, 351 U.S. at 205, 76 S.Ct. 763; *Gulf Oil Corp.* v. *Hickel*, 140 U.S. App. D.C. 368, 375, 435 F.2d 440, 447 (1970); *WAIT Radio* v. *FCC*, 135 U.S. App. D.C. 317, 321, 418 F.2d 1153, 1157 (1969); *Sun Oil Co.* v. *FPC*, 5 Cir., 355 F.2d 181, 183 (1965). *See generally* Sofaer, Judicial Control of Informal Discretionary Adjudication and Enforcement, 72 Colum.L.Rev. 1293, 1329–1330 (1972); Note, The Use of Agency Rulemaking to Deny Adjudications Apparently Required by Statute, 54 Iowa L.Rev. 1086, 1104–1105, 1115–1119 (1969).

[7] Moreover, as we have pointed out, substantive rule-making is a widely utilized practice throughout our administrative agencies, and its use has been upheld even in cases where its use appears to conflict with regulated parties' adjudicatory rights, as in *Storer*, *Texaco*,

Inc., and their successors. In dealing with this apparent conflict of private parties' adjudicatory rights and the agencies' interests in promulgating clear policy guidelines to provide notice to an industry and to avoid time-consuming individualized hearings on issues that are common in that industry, courts have stressed the advantages of efficiency and expedition which inhere in reliance on rule-making instead of adjudication alone. *See FPC* v. *Texaco, Inc., supra*, 377 U.S. at 44, 84 S.Ct. 1105; *American Airlines, Inc.* v. *CAB, supra*, 123 U.S. App. D.C. at 315, 359 F.2d at 629; *see also Weinberger* v. *Bentex Pharmaceuticals, Inc., supra*, 412 U.S. at 645, 93 S.Ct. 2488; *Weinberger* v. *Hynson, Westcott & Dunning, Inc., supra*, 411 U.S. at 903, 93 S.Ct. 2469. Furthermore, under the Administrative Procedure Act the public, including all parties in the industry who might be affected, are given a significant opportunity prior to promulgation of a rule to ventilate the policy and empirical issues at stake through written submissions, at a minimum, *see* 5 U.S.C. § 553, or more, as here, where the agency permitted oral argument in a nonadjudicatory setting. Finally, any rules promulgated by the agency are subject to judicial review testing their legality and ensuring that they are within the scope of the broad statutory prohibition they purport to define.

[8] Any fears that the agency could successfully use rule-making power as a means of oppressive or unreasonable regulation, seem exaggerated in view of courts' general practice in reviewing rules to scrutinize their statement of basis and purpose to see whether the major issues of policy pro and con raised in the submissions to the agency were given sufficient consideration. *Automotive Parts & Accessories Assn.* v. *Boyd*, 132 U.S.App.D.C. 200, 208–213, 407 F.2d 330, 338–343 (1968). *See also City of Chicago, Ill.* v. *FPC*, 147 U.S. App.D.C. 312, 322–326, 458 F.2d 731, 741–745 **[693]** (1971), *cert. denied*, 405 U.S. 1074, 92 S.Ct. 1495, 31 L.Ed.2d 808 (1972). The Commission is hardly free to write its own law of consumer protection and antitrust since the statutory standard which the rules may define with greater particularity is a legal standard. Although the Commission's conclusions as to the standard's reach are ordinarily shown deference, *see FTC* v. *Motion Picture Advertising Service Co., supra*, 344 U.S. at 396, 73 S.Ct. 361; *FTC* v. *Cement Institute, supra*, 333 U.S. at 720–721, 68 S.Ct. 793; *FTC* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 314, 54 S.Ct. 423, 78 L.Ed. 814 (1934), the standard must "get [its] final meaning from judicial construction." *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, 85 S.Ct. 1035, 1043, 13 L.Ed.2d 904 (1965). *See also FTC* v. *Cement Institute, supra*, 333 U.S. at 709, 68 S.Ct. 793; *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 368, 85 S.Ct. 1498, 14 L.Ed.2d 443 (1965).

As we suggested earlier, our task in determining the meaning of this legislation is the usual one of "starting from the areas where the legislative intent is readily discernible, and projecting to fair and reasonable corollaries of that intent for the specific issue before us." *Montana Power Co.* v. *FPC*, 144 U.S. App.D.C. 263, 270, 445 F.2d 739, 746 (1970) (*en banc*), *cert. denied*, 400 U.S. 1013, 91 S.Ct. 566, 27 L.Ed.2d 627 (1971). Under this approach, we start here with the language of Section 6(g). It is as clear as it is unlimited: "The Commission shall also have power * * * to make rules and regulations for the purpose of carrying out the provisions of [Section 5]." Ambiguous legislative history cannot change the express legislative intent. The Commission is using rule-making to carry out what the Congress agreed was among its central purposes: expedited administrative enforcement of the national policy against monopolies and unfair business practices. Under the circumstances, since Section 6(g) plainly authorizes rule-making and nothing in the statute or in its legislative history precludes its use for this purpose, the action of the Commission must be upheld.

VI

[9, 10] Our conclusion as to the scope of Section 6(g) is not disturbed by the fact that the agency itself did not assert the power to promulgate substantive rules until 1962 [26] and indeed indicated intermittently before that time that it lacked such power.[27] As the

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[26] *See* note 29 *infra.*

[27] *See* 1922 FTC Annual Report 36; Hearings on H.R. 2321 Before the House Committee on Interstate & Foreign Commerce, 82d Cong., 1st Sess., 160 (1951) (statement of Mr. Henry Miller, Assistant General Counsel, FTC); Kintner, The Current Ordeal of the Administrative Process: In Reply to Mr. Hector, 69 Yale L.J. 965, 970–971 (1960) (the author was the current chairman of the FTC). *See generally* 117 Cong.Rec. S. 17877–17879 (daily ed. Nov. 8, 1971). During its early years, the Commission relied heavily on trade practice conferences in which members of certain industries would convene and agree on guidelines defining fair trade practices and would attempt to comply with them. But these agreements had merely advisory status for purposes of determining what practices the agency would move against. FTC, Trade Practice Submittals 22 (1925). One attempt was made, by Sen. Nye of S. Dak., to give these rules the force of law, as substantive rules are said to have today, *see* S. 2628, 72d Cong., 1st Sess. (1932), 75 Cong.Rec. (Part 2) 1287 (1932), but no action was taken in Congress on his bill. In some cases, moreover, the Supreme Court has referred to the Commission's method of elaborating the statutory standard as a " 'gradual process of judicial inclusion and exclusion,' " *see FTC* v. *Raladam Co.*, 283 U.S. 643, 648, 51 S.Ct. 587, 590, 75 L.Ed. 1324 (1931), *quoting Davidson* v. *New Orleans*, 96 U.S. (6 Otto) 97, 104, 24 L.Ed. 616 (1878). *See also Pan American World Airways* v. *United States*, 371 U.S. 296, 307–308, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963); *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 533, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); *FTC* v. *Gratz*, 253 U.S. 421, 435–437, 40 S.Ct. 572 64 L.Ed. 993 (1920). But these isolated quotes are hardly determinative, since the Court has never faced the precise question of whether the Commission was delegated substantive rule-making power by Congress and the various comments can be best understood as descriptive of the Commission's then existent mode of operation rather than as prescriptive of the lawful bounds of the agency's powers. To give weight to these quotes would force us to weigh them against the unelaborated assertion by Mr. Justice Goldberg in his dissenting opinion in *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 390–391, 85 S.Ct. 1498, 1517, 14 L.Ed.2d 443 (1965), that "[t]he Commission has the general power to choose to

Su**[694]**preme Court put it in *United States* v. *Morton Salt Co.*, *supra*, a case which involved what was thought to be a novel assertion of the FTC's statutory authority:

> The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescripted by an unchallenged exercise. We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns. We find no basis for holding that any power ever granted to the Trade Commission has been forfeited by nonuser [*sic*].

338 U.S. at 647–648, 70 S.Ct. at 366. *See also FTC* v. *Dean Foods Co.*, *supra*, 384 U.S. at 610, 86 S.Ct. 1738; *United States* v. *E. I. du Pont & Co.*, 353 U.S. 586, 590, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957). The various statements made by Commission representatives questioning its authority to promulgate rules which are to be used with binding effect on subsequent adjudications are not determinative of the question before us. True, the accustomed judicial practice is to give "great weight" to an agency's construction of its own enabling legislation, particularly when such a construction stretches back, as here, to a time close to the agency's origin.[28] *See Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); *United States* v. *American Trucking Assns.*, 310 U.S. 534, 549, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315, 53 S.Ct. 84, 77 L.Ed. 512 (1933). The argument for judicial deference is not so strong where, as here, the question does not require special agency competence or expertise, requiring the agency, for example, to make a complex judgment involving its areas of expertise, competition and impact of business practices on consumer behavior. Here, the question is simply one of statutory interpretation concerning the procedures and setting in which the Commission may elaborate its statutory standard. Since this sort of question calls largely for the exercise of historical analysis and logical and analogical reasoning, it is the everyday staple of judges as well as agencies. Thus we feel confident in making our own judgment as to the proper construction of Section 6(g). *See Wilderness Society* v. *Morton*, 156 U.S.App.D.C. 121, 145, 479 F.2d 842, 866 (1973) (*en banc*), *cert. denied*, 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed.2d 309, (1973); *Thompson* v. *Clifford*, 132 U.S.App.D.C. 351, 364, 408 F.2d 154, 167 (1968). We are, of course, reassured by the

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proceed in this field, as in others, through either rule-making or the process of case-by-case adjudication. * * * Whichever method the Commission chooses to use, however, it seems obvious to me that the Commission must formulate a clear rational rule which is based on an adequate economic explication and takes into consideration the situation of all industry members affected by the rule." In our view, to repeat, it seems safe to conclude that no decision of the Supreme Court concerning the agency foreshadows today's result either way.

[28] *See* 1922 FTC Annual Report, *supra* note 27, at 36.

fact that the Commission itself, as distinguished from its former spokesmen, has come to the same conclusion.

Our refusal to abdicate our "ultimate responsibility to construe the language employed by Congress," *Zuber* v. *Allen*, 396 U.S. 168, 193, 90 S.Ct. 314, 328, 24 L.Ed.2d 345 (1969), is further supported by the fact that the Commission's **[695]** present claim of substantive rule-making authority is not new, but of several years' standing,[29] and, more important, by our belief that rejecting the claim of rule-making power would run counter to the broad policies of expeditious enforcement and greater certainty in the administration of the statute that clearly motivated Congress in 1914. *Cf. ibid.* So far as we can tell, the earlier assertions of lack of rule-making power were based on an unduly crabbed and cautious analysis of the legislative background, an analysis that we have conducted independently and that has brought us to an opposite but, in our judgment, correct conclusion.

A more troubling obstacle to the Commission's position here is the argument that Congress was made fully aware of the formerly restrictive view of the Commission's power and passed a series of laws granting limited substantative rule-making authority to the Commission in discrete areas allegedly on the premise that the 1914 debate withheld such authority. Where there has been evidence of congressional knowledge of and acquiescence in a long-standing agency construction of its own powers, courts have occasionally concluded that the agency construction had received a *de facto* ratification by Congress. *See Power Reactor Development Co.* v. *Int. Union of Elec., Radio & Machine Wkrs.*, 367 U.S. 396, 409, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1961); *cf. Boesche* v. *Udall*, 373 U.S. 472, 482–483, 83 S.Ct. 1373, 10 L.Ed.2d 491 (1963).

But *de facto* ratification through acquiescence in an administrative construction is not lightly attributed. *See Zuber* v. *Allen*, *supra*, 396 U.S. at 193, 90 S.Ct. 314; *Power Reactor Development Co.* v. *Int. Union of Elec., Radio & Machine Wkrs.*, *supra*; *Ex parte Endo*, 323 U.S. 283, 303 n. 24, 65 S.Ct. 208, 89 L.Ed. 243 (1944). The argument before us is not that Congress, by a combination of its knowledge of the agency construction and its inaction, as in *Power Reactor*, could be said to have accepted the construction. Even in these cases it can be argued quite plausibly that imputing ratification in this fashion fails to take into account significant practical aspects of the legislative process: those legislators actually aware of the construction in question may not have been so concerned as to raise it to the attention of most members,[30] and even in the event some legislators were deeply troubled by the construction, the press of other business was such as to keep the question on the "back burner." [31] Here the situation is different. The view that the Commission lacked substantive rule-making power has been clearly brought to the attention of Congress [32] and, rather than simply failing to act on [**696**] the question, Congress, in expanding the agency's powers in several discrete areas of marketing regulation, affirmatively enacted limited grants of substantive rule-making authority in the Wool Products Act of 1939,[33] the Fur Products Labeling Act of 1951,[34] the Flammable Fabrics Act of 1953 as amended in 1967,[35] the Textile Fiber Products Identification Act of 1958,[36] and the Fair Packaging and Labeling Act of 1967.[37] Thus it is argued that Congress would not have granted the agency such powers unless it had felt that otherwise the agency lacked rule-making authority.

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[29] The Commission first announced it would enforce the prohibitions of § 5 with the assistance of substantive rules in 1962 when it amended its Rules of Practice to provide for issuance of Trade Regulation Rules, 27 Fed.Reg. 4636, 4796 (1962). But the actual effect of these rules and the Commission's view of whether they were merely to be viewed as interpretive or statutorily based and thus determinative of the questions to be litigated in § 5 proceedings remained unclear. *See* Statement of Basis and Purpose of Trade Regulation Rule [Cigarette Advertising], 29 Fed.Reg. 8325, 8369 n. 143 (1964). The chairman of the FTC, Mr. Paul Rand Dixon, indicated after 1962 that the kind of binding rule-making authority the FTC asserts here did not exist. *See, e.g.,* Hearings on H.R. 15440 Before House Interstate & Foreign Commerce Committee, 89th Cong., 2d Sess., 990 (1966); Hearings on S. 387 Before Senate Subcommittee on Antitrust & Monopoly of the Committee on the Judiciary, 88th Cong., 1st Sess., 281–282 (1963). *See generally* Case Note, *supra* note 23, 14 B.C.Ind. & Comm.L.Rev. at 376–382.

[11] Conceding the greater force of this argument than one premised on congressional inaction, we believe it must not be accepted blindly. In such circumstances, it is equally possible that Congress granted the power out of uncertainty, understandable caution, and a desire to avoid litigation. While this argument, like any theory requir-

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[30] *See Zuber* v. *Allen*, 396 U.S. 168, 193, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969); *Thompson* v. *Clifford*, 132 U.S.App.D.C. 351, 361, 408 F.2d 154, 164 (1968).

[31] *See* Jaffe, An Essay on Delegation of Legislative Power: I, 47 Colum.L.Rev. 359, 366 (1947).

[32] *See, e.g.*, Hearings on H.R. 2321, *supra*, note 27, at 160–161; Hearings on H.R. 15440, *supra* note 29, at 990. *See also* H.R.Rep. No. 986, 85th Cong., 1st Sess., 2 & n. 1 (1957) (discussing the predecessor of the Textile Fiber Products Identification Act of 1958).

[33] *See* 15 U.S.C. § 68a (1970). The FTC, in furtherance of its power to enforce § 2 of the Clayton Act, as amended by the Robinson-Patman Act of 1936, 15 U.S.C. § 13 (1970), is also empowered "after due investigation and hearing to all interested parties, [to] fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established * * *." 15 U.S.C. § 13(a). And it is argued that the existence of this narrow provision should be taken, by implication, to exclude any broader Commission rule-making authority, especially in the pricing field. F. Rowe, Price Discrimination Under the Robinson-Patman Act 123–124 (1964 Supp.). But, as we suggested in text, *see* pp. 675–676 *supra*, this sort of logic, resting on the maxim *expressio unius est exclusio alterius*, is unreliable.

[34] *See* 15 U.S.C. §§ 69a(a)–(c), 69f(b) (1970).

[35] 81 Stat. 571 (1967), 15 U.S.C. § 1194(c) (1970)

[36] 15 U.S.C. § 70a(a), (b), (c) (1970).

[37] 15 U.S.C. § 1456(b) (1970).

ing us to draw inferences from congressional action or inaction, may be speculative, we believe it cannot be ignored here. For there is ample evidence that, while some of the limited rule-making legislation may well have been influenced by the belief that the 1914 Act did not grant the Commission substantive rule-making power,[38] at least during the passage of the Packaging and Labeling Act of 1967, this assumption was not accepted and was thought by many congressmen to be an open question, despite the protestations of the Commission's chairman that the agency was powerless under the 1914 Act.[39] The report of the House Committee on Interstate and Foreign Commerce, while pointing out that the agency lacked "*specific* authority" (emphasis added) to issue regulations prescribing standards for package labeling, suggested that the question of the agency's general authority under Section 6(g) to do so was open. The report noted that the "authority of the Commission to issue trade regulation rules * * * has never been passed on in the courts." H.R. Rep. No. 2076, 89th Cong., 2d Sess., 22 (1966). The Senate Committee report did not touch on the issue directly, instead focusing on the question whether stronger procedural safeguards than were guaranteed by the Administrative **[697]** Procedure Act should be enacted in the standards-setting section. S. Rep. No. 1186, 89th Cong., 2d Sess., 17 (1966). But the dissenting members argued that the bill's provision of rule-making authority was redundant and that the rule-making provision merely served to "make the [Commission's] authority apparent." *Id.* at 40. As we suggested earlier, imputing congressional ratification to a disputed administrative construction of its powers is, in the words of the Supreme Court, "shaky business," *Power Reactor Development Co.* v. *Int. Union of Elec., Radio & Machine Wkrs., supra*, 367 U.S. at 409, 81 S.Ct. 1529. Where there is solid reason, as there plainly is here, to believe that Congress, in fact, has not wholeheartedly accepted the agency's viewpoint and instead enacted legislation out of caution and to eliminate the kind of disputes that invariably attend statutory ambiguity, we believe that relying on the *de facto* ratification argument is unwise. In such circumstances, we must perform our customary task of coming to an independent judgment as to the statute's meaning, confident that if Congress believes that its creature, the Commission, thus exercises too much power, it will repeal the grant.[40]

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[38] *See, e.g.*, 86 Cong.Rec. (Part 10) 11320 (1940), where Congressman Case, in discussing the Wool Products Labeling Act's provision for rule-making and the opposition to granting such power to the agency, said:

"The second argument * * * is that the evils of false labeling are being curbed and gradually cured by the Federal Trade Commission. If that were so the Federal Trade Commission itself would not be on record in favor of the passage of the bill and the Federal Trade Commission did testify in favor of the bill. It testified that something like this was needed to put teeth into their recommendations to the trade."

[39] *See* Hearings on H.R. 15440, *supra* note 29, at 990 (statement of Chairman Dixon).

VII

[12] In sum, we must respectfully register our disagreement with the District Court's painstaking opinion. Its result would render the Commission ineffective to do the job assigned it by Congress. Such a result is not required **[698]** by the legislative history of the Act. We rely, therefore, on the plain language of Section 6(g) which gives the Commission the authority to "make rules and regulations for the purpose of carrying out the provisions of [Section 5]." *See Mourning* v. *Family Publications Service, Inc., supra.* We hold that under the terms of its governing statute, 15 U.S.C. § 41 *et seq.*, and under Section 6(g), 15 U.S.C. § 46(g), in particular, the Federal Trade Commission is authorized to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent. Thus we must reverse the District Court's judgment and remand this case for further proceedings.

It is so ordered.

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[40] We are aware, of course, that in both the just concluded 92nd Congress and the current 93rd Congress legislation granting the FTC limited substantive rule-making power in the area of "unfair and deceptive practices" has been under consideration. One such bill, S. 986 92d Cong., 1st Sess. (1971), was passed by the Senate, 117 Cong.Rec. S. 17887 (daily ed. Nov. 8, 1971), but did not come to a vote in the House. It is also true that in the Senate debate on S. 986 comments were made by various Senators to the effect that the Commission currently lacked the power to issue rules defining either unfair methods of competition or unfair or deceptive acts or practices, which rules would be enforceable in cease and desist proceedings. *See id.* at 17843–17848 (statement of Sen. Hruska); *id.* at 17849 (statement of Sen. Cook); *id.* at 17873 (statement of Sen. Cotton), but no such statement was made by the bill's sponsor, Sen. Magnuson, who pointed out, "For years the argument has been going on about the Federal Trade Commission not having the authority it should have. We tried to fashion a bill. I, myself, had some doubts about the rule-making authority, but I think the bill covers it very well." *Id.* at 17858. The bill that passed the Senate not only gave the FTC power "to issue legislative rules defining with specificity acts or practices which are unfair or deceptive to consumers and which section 5(a)(1) of this Act proscribes," S. 986, *supra,* § 206, but it also provided that procedures available in adjudication under the Administrative Procedure Act, 5 U.S.C. §§ 556, 557 (1970), should be employed and judicial review should employ the substantial evidence rule. *Ibid.* Moreover, such rules would only become effective in the event neither the House of Representatives nor the Senate disapproved them within 60 calendar days while in session. *Ibid.* If this legislation had actually been enacted, of course, the Commission would not have *all* the power it assumes today, since the proposed rule-making section in S. 986 repealed § 6(g), as passed in 1914, and substituted a provision allowing only rules and regulations "as are specifically provided for hereinafter," thus nullifying any argument that rules might be promulgated to define "unfair methods of competition." On the other hand, but for the statements on the Senate floor quoted above, it is possible to interpret S. 986 as an indication of senatorial intent to narrow what the legislators felt was presently an overbroad rule-making power under the current statute. In any event, the legislation did not pass, and we take its reintroduction in the current session in substantially similar form, S. 356, 93d Cong., 1st Sess. (1973), as an indication that the questions of FTC rule-making power, its scope, and the safeguards surrounding the promulgation of such rules, are under close study and nothing more. In the event Congress decides that the scope of rule-making power that we find to be implied in the 1914 Act is too broad or lacks sufficient safeguards, surely it appears in a prime position to make the required changes.

APPENDIX

THE 1914 CONGRESSIONAL DEBATES INVOLVING TRADE COMMISSION RULE-MAKING POWER

The result we reach in this case might be different if we were convinced that the legislators who worked out the details of the Federal Trade Commission Act had carefully focused on the implications of rule-making power and given a clear indication that they rejected its use except for purely procedural purposes. We have examined the legislative history—the debates and reports—with considerable care and have analyzed appellees' arguments based on that history. We find that on the question of rule-making the leading proponents of the legislation in both Houses spoke ambiguously. The scope of the Commission's power to make rules was not a central issue in the lengthy debate, and the occasional comments to which we are referred by appellees as demonstrating a firm contrary intent on the part of those most familiar with the details of the legislation turn out, on close inspection, to be most sensibly interpreted in ways other than those urged on us.

I. *Consideration in the House of President Wilson's 1914 Proposal*

Two days after President Wilson's 1914 message to Congress, the Administration's plan for a trade commission was introduced in both Houses of Congress. Sponsored by Congressman Clayton of Alabama and Senator Newlands, the bill[1] essentially provided for an investigatory commission, clothed with power to compel reports on corporations and business and financial practices and to recommend prosecution under the antitrust laws. The proposed agency lacked any independent power to order a halt to business practices involving a violation of law. The agency did have the power, upon the initiative of the Attorney General, to assist him in framing antitrust settlements and, upon the request of federal judges trying antitrust cases, to make findings involving questions in pending litigation as well as to assist in framing decrees. The Clayton-Newlands bill was modified somewhat in the House Committee on Interstate and Foreign Commerce. The bill reported out, drafted by Congressman Covington,[2] deleted the authority contained in the original proposal to allow the commission to recommend antitrust prosecutions, but otherwise was closely similar to the bill originally proposed. The Committee majority explicitly rejected "the establishment of a commission having powers of regulation or control of prices, or the power directly to issue orders controlling the lawful operations of industrial business in this country."[3]

The Covington bill did, however, include a section granting the commission authority to "make rules and regulations **[699]** and classifications of corporations" in order to carry out the bill's other provisions, but it was agreed that this merely gave the commission power to elaborate in detail which businesses would be subject to its reporting requirements. *See* 51 Cong.Rec. (Part 9) 8842–8844 (1914) (statement of Congressman Covington); *id.* at 9047–9048 (statement of Congressman Towner of Iowa).[4]

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[1] H.R. 12120, S. 4160, 63d Cong., 2d Sess. (1914). *See* 51 Cong.Rec. (Part 3) 2142–2144 (1914).

[2] H.R. 15613, 63d Cong., 2d Sess. (1914), reported out at 51 Cong.Rec. (Part 9) 8840 (1914).

[3] H.R.Rep. No. 533, 63d Cong., 2d Sess., 2 (1914).

[4] *See also* H.R.Rep. No. 533, *supra* note 3, at 3–4.

Little that occurred in the House debate up to the passage on June 5 of the Covington bill, still formally backed by the President, bears directly on the issue before us. The proposed commission was given no power to approve or disapprove particular business practices according to a legal standard, and thus the question of utilizing substantive rulemaking in aid of adjudication was submerged under the broader question whether the commission should have any independent enforcement authority at all.

This is not to say that the House wholly ignored the question of independent enforcement authority for the commission. Five Republican members of the Committee, while accepting the Covington bill, noted pointedly that it did not follow the approach of the 1912 GOP platform, which had proposed having the commission assume some of the antitrust functions currently exercised by the courts, an undoubted reference to plans that the agency should have power to bring cases, hear evidence, make findings, and promulgate orders enforceable in federal courts. Representative Stevens of New Hampshire dissented from the majority on the Committee and berated the Covington bill for failing to give the commission "general power to prevent unfair competitive practices" in order to correct what he saw as the "disappointing" results of relying wholly on Justice Department prosecutions in the federal courts, which he characterized as a "slow, costly process."[5] Stevens' own proposal to give the commission independent adjudicatory power, H.R. 15660, 63d Cong., 2d Sess. (1914), did not appear to contemplate use of substantive rules promulgated separately from the hearings he proposed to order corporations to halt practices constituting "unfair or oppressive competition." Instead, he viewed "unfair or oppressive competition" as a "question of fact to be decided by the commission the same way [on a case-by-case basis] that the Interstate Commerce Commission decides what rates and practices of the railroads are unreasonable and unfair."[6] When Stevens attempted to bring his bill to the floor, he was ruled out of order. 51 Cong.Rec. (Part 9) at 9062. An even stronger amendment introduced by Representative Murdock of Kansas not only gave the commission power to halt "unfair or oppressive competition," but also provided a list of practices defining the term and authorized the commission, in some circumstances, to assume price-fixing power to halt monopoly. *Id.* at 9050–9051. This proposal, too, was rejected. *Id.* at 9055.

The question whether the commission should have power to define rules of business conduct through nonadjudicatory proceedings also surfaced, but proposals to give the commission such power were rejected.[7] The debate on such

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[5] *Id.*, Part 2, at 1.

[6] *Id.* at 2.

[7] Congressman Morgan of Okla. proposed to amend the Covington bill to give the commission power to declare rules to prevent corporations subject to the commission's jurisdiction "from engaging in any practice or from using any method or system, or from pursuing any policy or from resorting to any device, scheme, or contrivance that constitutes unfair competition or unjust discrimination as between competitors, individuals, or communities." 51 Cong.Rec. (Part 9) at 9047. This amendment was quickly rejected. *Id.* at 9050. A similar proposal was made by Cong. Dillon of S. Dak., *id.* at 9056, but his plan would have specifically granted the commission adjudicatory power too. *Ibid.* It was rejected. *Id.* at 9057. This proposal, in turn, was similar to one made by Cong. Lafferty of Ore. in a report dissenting from the Commerce Committee's recommendation of the Covington bill. Lafferty's plan would have granted the commission adjudicatory *and* substantive rulemaking authority to prevent "unfair or oppressive competition or unfair trade practices," and authority once a violation had been found, not only to issue a restraining order, but also, in the event of a finding of substantial monopoly" and "exhorbitant prices," a

[700] plans was perfunctory, probably because it was clear that the majority of the House supported the concept of a weak commission without any enforcement or independent rule-making authority. At this early stage in the deliberations, it seemed to make little difference to the majority behind the Covington bill that some opponents, like Stevens, backed a commission with purely adjudicatory powers and others, principally Progressives like Murdock and Lafferty, preferred an agency relying on a combination of adjudication and substantive rule-making. Thus, while we occasionally give weight to positive rejections of amendments by Congress, *see e.g., National Automatic Laundry & Cleaning Council* v. *Shultz,* 143 U.S.App.D.C. 274, 291, 443 F.2d 689, 706 (1971), we believe we are justified here in concluding that the rejection of rule-making proposals did not necessarily represent a rejection of rule-making as a distinctive technique of agency regulation, but could just as easily, if not more persuasively, be interpreted as a broader rejection of a commission with any independent enforcement power. *Cf. United States* v. *Wise,* 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962).

For our purposes, it is enough to note that opponents of the President's initial plan who argued for a stronger commission agreed broadly that continued reliance on the courts for adjudication of cases involving anticompetitive practices was an inadequate solution. Representative Dillon of South Dakota, for example, proposed that a commission have power to make rules regulating "future conduct" and enforcement power to issue orders against breaches of such rules as well as breaches of a broad standard of "any misconduct, unfair methods, unfair competition, acts of oppression, or acts of deception." 51 Cong. Rec. (Part 9) at 9056. His proposal would seem on its face to contemplate a commission utilizing rule-making to specify standards of improper conduct under a broad standard and then adjudication as a mode of enforcing such standards in cases where they applied. He went so far as to reject almost all further judicial participation in the task of restoring free competition, arguing in accustomed terms:

> The attempt to control the corporations through the judiciary will fail. The judiciary with its delays, its technicalities, and uncertainties is wholly inadequate to regulate or control the trusts and combinations. The legislative department of government does not need the aid of the courts in regulating legislative or administrative matters. * * *

Ibid.

II. *Consideration in the Senate of President Wilson's Revised Proposal.*

After the Covington bill passed the House, it went to the Senate Committee on Interstate Commerce whose chairman, Senator Newlands, had been an original sponsor of the President's trade commission plan. Within a few days of the House vote, however, the President radically altered his view as to the proper extent of the commission's powers. No longer did he support the Covington bill's conception of a commission without **[701]** independent enforcement power. In a turnabout, he now backed legislation giving the agency power to

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limited price-fixing remedial power, as well as power to eliminate "substantial monopoly" by an "order * * * specifying such changes in the organization, conduct, or management of its property * * * as * * * will most effectively and promptly terminate such monopolistic power, while at the same time safeguarding property rights and business efficiency." H.R. Rep. No. 533, *supra* note 3, Part 3, 19–26. The final amendment to add significant powers to the Covington bill's commission was made, again, by Cong. Morgan. It provided for adjudicatory and price-fixing powers, 51 Cong.Rec. (Part 9) at 9066, and was quickly rejected, *id.* at 9067.

order a halt to unfair competition practices after holding a hearing and making findings.[8] Historians[9] are broadly agreed on the rationale for the President's switch of position. As part of his package of economic reform legislation, which included the plan for a weak trade commission, the President was supporting legislation to make more specific the antitrust laws' prohibitions. This latter bill was introduced by Congressman Clayton of Alabama and ultimately became the Clayton Act.[10] In its original form, the Clayton bill laid out a series of new prohibitions on anticompetitive behavior, provided for Justice Department enforcement of the new rules, and provided criminal penalties for violation.[11] This bill passed the House on June 5, the same day as the Covington bill providing for a new trade commission.[12] But the Clayton bill received widespread criticism, not only from businessmen and their legislative backers who resented the provisions for criminal penalties, but also from those supporting tightening of the rules of antitrust. The reformers' argument was that the task of defining in statutory terms all possible restraints of trade injurious to competition was essentially Sisyphean, that businessmen were sufficiently clever to invent new forms of trade restraint that would escape the coverage of the Clayton bill's provisions.[13] The President was appar[**702**]ently receptive to this criticism of the Clayton bill. Moreover, he was also apparently receptive to criticism of the traditional practice of relying exclusively on the Justice Department and the courts for antitrust enforcement. Thus he dealt with these two types of criticism by radically changing and expanding the role he had originally planned for the commission. Now it would be given independent authority to enforce through adjudicatory proceedings a broad standard of illegality that, unlike the specific terms of the Clayton bill, could be adapted to the variety of business practices with anticompetitive effects.[14]

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[8] Wilson's change of mind is discussed in A. Link, Wilson: The New Freedom 434–438 (paper ed. 1965); R. Cushman, The Independent Regulatory Commissions 186–187 (1941); G. Henderson, The Federal Trade Commission: A Study in Administrative Law and Procedure 26–27 (1924).

[9] *See* note 8 *supra*.

[10] Act of Oct. 15, 1914, c. 323, 38 Stat. 730 *et seq.*, as amended, 15 U.S.C. §§ 12–27 (1970). As finally enacted, a few weeks after the Trade Commission Act was passed, the Clayton Act gave the FTC the power to enforce its substantive provisions aimed at price discrimination, § 2, as amended, 15 U.S.C. § 13, exclusive dealing and tying arrangements, § 3, 15 U.S.C. § 14, anticompetitive mergers, § 7, as amended, 15 U.S.C. § 18, and interlocking directorates, § 8, as amended, 15 U.S.C. § 19. The FTC's enforcement of these provisions would occur in adjudicatory proceedings reviewable in the Courts of Appeals, similar to the proceedings carried on under § 5 of the Trade Commission Act. *See* § 21 of the Clayton Act, as amended, 15 U.S.C. § 21.

[11] H.R. 15657, 63d Cong., 2d Sess. (1914).

[12] *See* 51 Cong. Rec. (Part 10) 9910–9911 (1914).

[13] *See* sources cited in note 8 *supra*. The Senate Committee on Interstate Commerce report endorsing the new version of the commission bill made this point explicitly:

"One of the most important provisions of the bill is that which declares unfair competition in commerce to be unlawful, and empowers the commission to prevent corporations from using unfair methods of competition in commerce by orders issued after hearing, restraining, and prohibiting unfair methods of competition, which orders are enforceable in the courts.

"The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

"It may be stated that representatives of the National Implement and Vehicle Manufacturers' Association, the Ohio Manufacturers' Association, and the Illinois Manufacturers' Association approved the passage of a trade commission bill and a provision regarding the inquiry into and condemnation of unfair practices in trade.

"It is believed that the term 'unfair competition' has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition."

S.Rep. No. 597, 63d Cong., 2d Sess., 13 (1914). *See also* 51 Cong.Rec. (Part 11) 11084 (Statement of Senator Newlands, chairman of the Commerce Committee).

The leadership of the Senate Commerce Committee was informed of the President's change of heart and promptly pushed through the Committee onto the floor legislation embodying the new plan. But the bill reported out clearly did not embrace the exercise of substantive rule-making power. The bill that passed the House had a separate section giving the commission power to make rules and regulations to define the scope of its investigatory authority.[15] But the new bill reported out of the Commerce Committee by Senator Newlands which gave the commission, at the behest of the President, new enforcement authority contained no grant of any rule-making power.[16] What the Committee apparently had in mind was a *quasi*-judicial agency, elaborating the Committee bill's statutory standard of illegality—"unfair competition"—on a purely case-by-case basis. This view of the bill that emerged on the Senate floor after the Administration decided to support a commission with expanded power is amply supported by statements by the bill's proponents on the Senate floor, *see* 51 Cong.Rec. (Part 11) 11178 (1914) (statement of Senator Hollis); 51 Cong.Rec. (Part 13) 12916–12917 (1914) (statement of Senator Cummins); 51 Cong.Rec. (Part 13) at 13317 (statement of Senator Walsh), as well as statements by critics of the bill, *see* 51 Cong.Rec. **[703]** (Part 11) at 11181 (statement of Senator Thomas). *See also* S. Rep. No. 597, 63d Cong., 2d Sess., 13 (1914).

In other words, we believe the Commission's position can draw no support from the Senate's deliberations over the bill granting the Commission enforcement power that emerged from the Senate Commerce Committee following President Wilson's change of heart. The bill that emerged from the Committee contained no provision even remotely supporting the exercise of commission rule-making power to define the statutory standard of illegality contained in the section of the bill granting the agency adjudicatory authority. Moreover, during the debate over the Commerce Committee's bill Senator Newlands, Committee chairman and the bill's floor manager, argued that the legislation before the Senate encompassed "no powers except those conferred by this bill," 51 Cong.Rec. (Part 12) at 11602, further supporting our view of this aspect of the deliberations. To be sure, the bill that emerged from the Senate Commerce Committee was amended in a few respects on the Senate floor prior to passage and submission to a House-Senate conference committee. But none of these amendments can be read as supporting rule-making power.[17]

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[14] *See* A. Link, *op. cit. supra* note 8, at 435–439.

[15] *See* H.R. 15613, *supra* note 2, § 8. The House-passed bill is printed at H.R. Rep. No. 1142, 63d Cong., 2d Sess., 10–13 (1914).

[16] There may be reason to believe that this deletion of rule-making authority in the Senate bill was merely a linguistic alteration of the Covington bill. The Covington bill's rule-making power was meant to permit the commission to designate which corporations with gross receipts of less than $5 million would be required to file annual reports. 51 Cong.Rec. (Part 9) at 8845–8846. There was some dispute over whether this power extended to allow the commission to impose on corporations subject to its reporting requirements a uniform system of accounting and an amendment was offered by Cong. Towner of Iowa to grant the commission this power explicitly, *id.* at 9047, but it was quickly rejected, *id.* at 9049. The bill that emerged from the Senate Commerce Committee, *see* S. 4160, § 3(c), printed at S.Rep. No. 597, *supra* note 13, at 1–5, appeared to give the commission discretionary power, without terming this power rule-making authority, to require corporate reports from any firm as well as the power to require a uniform system of annual reports, which might be viewed as tantamount to a uniform accounting requirement. And this provision was unchanged in the bill that passed the Senate. *See* H.R. Rep. No. 1142, *supra* note 15, at 15. Thus it would seem that the discretion given the commission in the House bill in the exercise of its power to compel corporate reporting remained in the Senate bill, but was simply phrased differently and no longer termed the power to "make rules and regulations and classifications of corporations."

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[17] The Senate did accept an important substitute proposed by Senator Cummins, 51 Cong. Rec. (Part 13) at 13109, for the version of § 5 reported out of the Senate Committee on Interstate Commerce. This substitute, printed at 51 Cong.Rec. (Part 13) at 13045, gave defendants found liable in commission proceedings the explicit right to bring suit in the District Courts for review of the commission's orders. No such provision was contained in the bill reported by the Senate Committee. *See* S. 4160, 63d Cong., 2d Sess., § 5 (1914), printed in S.Rep. No. 597, 63d Cong., 2d Sess., 3–4 (1914). Moreover, the Cummins substitute also made clear that the District Courts would apply the same standard of review to commission orders as was applied to orders of the Interstate Commerce Commission, at least in cases of review sought by defendants before the agency. The bill reported from the Commerce Committee did not make clear what standard of review the courts would apply to the commission's orders. It merely stated: "Whenever the commission, after the issuance of such order, shall find that such corporation has not complied therewith, the commission may petition the district court of the United States, within any district where the method in question was used or where such corporation is located or carries on business, praying the court to issue an injunction to enforce such order of the commission; and the court is hereby authorized to issue such injunction." *See S.Rep.* No. 597, *supra,* at 4. Because this provision suggested no actual standard of review, it was criticized by Senator Cummins on the ground that it might be construed so as to preclude any review of the commission's actions and to require the courts to issue rubber-stamp injunctions. As such, it was felt, the bill might be held unconstitutional for want of due process. *See* 51 Cong.Rec. (Part 13) at 13007; *id.* at 13049–13050. *See also id.* at 13053 (statement of Senator Walsh). Cummins' substitute also made a slight linguistic change in the first few sentences of § 5, sentences enunciating the commission's enforcement powers. The Committee's bill said:

> "Sec. 5. That unfair competition in commerce is hereby declared unlawful.
>
> "The commission is hereby empowered and directed to prevent corporations from using unfair methods of competition in commerce."

S.Rep. No. 597, *supra* note 13, at 3. The remainder of the section detailed the procedures by which the commission would act to prevent unfair competition and provided for judicial enforcement, as discussed above. In addition to altering the judicial review procedures, the first two sentences in his substitute revised the Committee's version slightly to read:

> "Sec. 5. That unfair competition in commerce is hereby declared unlawful.
>
> "The commission shall have authority to prevent such unfair competition in commerce *in the manner following, to wit:* * * *"

51 Cong.Rec. (Part 13) at 13045. (Emphasis added.) It is tempting, of course, to conclude that the addition of the italicized language in the substitute demonstrates a senatorial purpose to make clear, by the use of arguably limiting language, that only through adjudication would the standard of illegality be clarified to cover specific business practices. But this language was not discussed on the floor and it really adds nothing to our pre-existent view of the Senate deliberations on the bill that emerged from the Commerce Committee, since no provision granting rule-making power was inserted to start with. Of course, had this language stayed in the legislation as it was ultimately passed by both Houses and signed by the President, we would have to deal with its implications. But it was removed in the conference committee, again without any discussion.

[704] III. *The Conference Committee Deliberations and Final Floor Debates.*

Because the Senate bill lacked any rule-making provision and the House bill did not give the commission power to enforce a statutory standard of legality, the most important aspect of the legislative debate for our purposes occurred after the conference committee met and composed the differences between the two bills. It was only at this point that a rule-making provision was inserted which might justify the promulgation of rules defining the kinds of practices that breached the bill's standard of illegality. As we have pointed out, the House bill included a rule-making provision, but granted the commission no power to enforce a standard of legality. The Senate bill, by contrast, had no rule-making provision, but did include a standard of legality to be enforced by the commission. The conference bill put both types of provisions together in a single bill. We believe the rule-making provision, Section 6(g), justifies promulgation of standards defining with specificity the meaning of the statutory standard of legality in Section 5, a standard enforceable in subsequent agency adjudications.

Appellees insist that, since neither bill prior to conference granted the commission power to issue rules defining the statutory standard of illegality, the conference committee was barred by rules of congressional procedure from inserting this supplemental power. The leader of the House conferees, Congressman Covington, told the House that the bill produced by the conference was "within the limits of conference." 51 Cong. Rec. (Part 15) 14925 (1914). Senator Newlands, his Senate counterpart, pointed out, likewise, that the conference product was "entirely within the range of difference between the Senate and the House." *Id.* at 14769. Thus we have the leaders of the House and Senate conferees assuring the Congress that the conference bill complied with conference limitations and the Congress accepting that assurance. More important, the assurance given the Congress by Covington and Newlands appears well founded. The original House bill contained a rule-making provision granting authority roughly commensurate with the powers of investigations the commission was then designed to have. While the Senate bill deleted any such authority, we believe it can be persuasively argued that by reinserting a rule-making provision into the stronger commission bill all the conference did was reinstate the principle of the House bill as to rule-making—that is, permitting the commission to exercise authority roughly commensurate with its other powers, great or small. In this sense, the insertion of Section 6(g), as interpreted here, does no violence to the principle limiting the authority of the conference. Moreover, while this general principle of germaneness as to the powers of a conference may bind Congress, it has never bound the courts, which have frequently faced the problem of interpreting legislation in light of conference changes. *Cf. St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 221–222, 82 S.Ct. 289, 7 L.Ed. 2d 240 (1961).

Unfortunately, the crucial debates and reports on the bill produced by the conference, passed by both Houses, signed into law by the President, and continuing as the agency's basic organic statute today do not illuminate the meaning of Section 6(g). The House conference committee report does not mention the provision. *See* H.R. Rep. No. 1142, 63d Cong., 2d Sess. (1914). It is true, as appellees suggest, that the statement of **[705]** the House managers in the conference report contains some remarks that might be interpreted to limit the commission to adjudication in working out the meaning and applicability of the statutory standard. But we do not read their comments involving application of the Section 5 prohibition against unfair competition to "particular business situations" or their comment that the unfairness of any particular practice "generally depends upon the surrounding circumstances of the particular case" as necessarily foreclosing the use of rulemaking to confine issues to be adjudicated and to give specificity to the standard of illegality. *Id.* at 19.

In our judgment, such comments should be interpreted in light of the managers' argument that, in framing a broad standard of unfairness rather than making an item-by-item listing of impermissible practices, the conference felt that such detailed legislative definitions would not "fit business of every sort in every part of this country." *Ibid.* To us, this means that Congress, at the time, felt that different practices in different industries or even similar practices in different industries would often warrant varying treatment by the commission. This is hardly tantamount to saying that practices of individual firms within the same industry necessarily warrant distinctive, individualized treatment, as appellees would have it. To say this, of course, is to suggest by implication that individual adjudications warrant only minimal precedential value and there is ample reason to believe that the legislators felt otherwise. As the bill's leading proponent, Senator Newlands, said: "We will build up through this commission a system of administrative law that will be as well and thoroughly accepted as to trade as are the decisions of our Interstate Commerce Commission regarding transportation, and we will bring peace and security to the business world." 51 Cong. Rec. (Part 11) at 11086.

In our view, the House managers' comments do not foreclose promulgation of substantive rules applicable to practices in a sector of an industry, throughout an industry, or in several industries at large. Rather, they suggest that the commission should administer any rules it might promulgate in much the same way that courts have ordinarily required other agencies to administer rules that operate to modify a regulated party's rights to a full hearing involving application of a statutory standard broader than the rule to his own particular circumstances. That is, some opportunity must be given for a defendant in a Section 5 proceeding to demonstrate that the special circumstances of his case warrant waiving the rule's applicability, as where the rationale of the rule does not appear to apply to his own situation or a compelling case of hardship can be made out. *See* text of the opinion at pages 691–692 *supra* and cases and materials cited therein. So long as the FTC makes available a "safety valve procedure" of this sort, in other words, we cannot see any conflict between the use of substantive rule-making and the concerns evidenced in the House managers' conference report that the commission should not treat varying business practices or defendants in a fashion that fails to appreciate relevant distinctions among them. This question of when waiver is appropriate or what procedures for waiver are required is not here before us. We have only the question of rule-making power *vel non* under the 1914 Act, but we do not believe the House managers' statements preclude the Commission's power to grant waivers of substantive rules under particularized circumstances.

The comparative print prepared by Senator Newlands to illustrate the differences and changes among the three bills—one passed in the House, one in the Senate, and one produced by the conference—is also cryptic on the rule-making question, but assuredly it does not support appellees' arguments. Indeed, it undercuts them seriously. First, the print suggests that the conference bill deleted the rule-making authority grant**[706]**ed in Section 8 of the House bill which, as we have seen, pertained to the characteristics of corporations that would be required to submit reports to the commission. S.Doc., Comparative

Print, 63d Cong., 2d Sess., 15 (1914). This suggests that Section 6(g) was entirely new and thus can be assumed to have a different, broader scope than the House bill's provision, particularly since there is no cross reference from Section 6(g) to the authority granted in the House bill. *Id.* at 12. Support for giving Section 6(g) a broad reading may also be derived from the committee's deletion of the "to wit" language in Section 5 in the sentence immediately preceding specification of the hearing, findings, and cease and desist procedure. Since "to wit" came before the procedures spelled out and at the end of a sentence mandating the commission to prevent "unfair competition" in the Senate bill, it can be argued that, by deleting the phrase, the conferees meant that the task of elaborating the statutory standard might be accomplished by means other than adjudication alone.

But it would be a mistake to press these inferences too far. They show only that evidence of clear congressional rejection or approval of substantive rule-making is scanty on both sides and not compelling. The same conclusion applies to the paucity of comments arguably pertaining to the scope of the agency's rule-making power that occurred in the debates in both Houses prior to final passage. As we read the legislative record, including the comments cited to us by both parties, it seems clear to us that the question of promulgating rules to elaborate the statutory standard and then relying on them in subsequent adjudications was a practice that simply failed to preoccupy those engaging in the post-conference debates. The Senate debates were brief, largely focusing on the question whether the conference committee had made any serious changes in the Senate-passed bill. The floor managers, perhaps seeking to speed passage, argued that only two changes of any moment were made: first, altering the statutory standard from "unfair competition" to "unfair methods of competition," which was said by Senator Cummins of Iowa, a leading proponent of the bill and a member of the conference, to make no difference in the scope of the commission's authority; and second, expanding the scope of judicial review of agency orders from that contemplated in the Senate bill. 51 Cong.Rec. (Part 15) at 14768. While such comments would obviously cut against the Commission's claim here, it is clear that the Senators did not entirely agree on this limited characterization of the conference's work. Indeed, Senator Thomas of Colorado argued that it "in many respects is an entirely new bill." *Ibid.* And one early commentator, a lawyer for the National Association of Manufacturers, suggested that Section 6(g) might well be viewed as a mandate for broad rule-making authority, commenting that while he felt the commission lacked power to "draft a code" of business behavior, there was a "prevalent notion to the contrary." J. Emery, A Handbook of the Federal Trade Commission Act (pamphlet, 1915, on file at FTC).

The District Court's opinion and appellees place considerable reliance on a series of comments made on the House floor during the final debate.[18] But we have examined these remarks carefully [**707**] and must reject the conclusion that they demonstrate a clear intent to preclude substantive rule-making. To us, they seem addressed to the issue whether the commission might have price-fixing power, a proposal that had been offered earlier in the initial House debates on the Covington bill and rejected. In the final debates Congressman Covington, the conference bill's floor manager, described "unfair methods of competition," the statutory standard, as a "vital, elastic principle," and suggested that it would be "expanded" much in the same manner as the law of negligence, fraud, and restraint of trade had been. However, he did not suggest that adjudication alone was the only means by which the commission would do so. *See* 51 Cong.Rec. (Part 15) at 14928.

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[18] As do those commentators who have concluded that the Act's legislative history does not support an assertion of legislative type rule-making power. *See* Weston, Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor, 24 Fed.B.J. 548, 570 (1964); Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv.L.Rev. 921, 960 (1965); Burrus & Teter, Antitrust: Rulemaking v. Adjudication in the FTC, 54 Geo.L.J. 1106, 1125 (1966); Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform, 118 U.Pa.L.Rev. 485, 490 (1970). One commentator who endorses the FTC's claim finds the legislative history considerably more ambiguous. *See* Wegman, Cigarettes and Health: A Legal Analysis, 51 Corn.L.Q. 678, 742–746 (1966). *See also* Note, FTC Substantive Rulemaking: An Evaluation of Past Practice and Proposed Legislation, 48 N.Y.U.L.Rev. 135, 139–142 (1973).

But appellees argue that his subsequent comments demonstrate that this is clearly what he meant. True, in discussing the scope of judicial review of the commission's orders, he carefully differentiated the FTC's power to issue cease and desist orders from the ICC's power to order new railroad rates, suggesting that limited judicial review was appropriate in the latter case, but not in the former, since it was unquestioned at the time that the ICC, in prescribing rates, was performing an essentially "legislative" task, with immediate effect, while the FTC's essentially prohibitive orders followed adjudicatory proceedings and thus warranted more stringent review. In a quote relied upon by appellees, he went on to say:

> The Federal trade commission will have no power to prescribe the methods of competition to be used in future. In issuing its orders it will not be exercising power of a legislative nature. The basis, therefore, upon which the validity of the 'narrow' court review provided by the Hepburn Act rests will be lacking.
>
> The function of the Federal trade commission will be to determine whether an existing method of competition is unfair, and, if it finds it to be unfair, to order the discontinuance of its use. In doing this it will exercise power of a judicial nature. Under the Constitution power to act finally in a judicial capacity can be conferred only upon a court. * * *

Id at 14932.

We do not believe this quote forecloses the Commission's claim here. For the power to frame substantive rules, in the context of the FTC, is hardly tantamount to the ICC's power to issue *orders* specifying the prices railroads must thereafter charge. The rules the FTC proposes to issue are not ICC-type orders operating immediately on a designated class of parties at all. They are merely norms which, in the absence of agency-brought proceedings to enforce them, have no legal effect whatever. This is not even a case where the rule alone is determinative of a business' rights without more, as in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 108 (1956), where applicability of the rule meant that rights to a hearing on additional television licenses might well be cut off. Nor is this a case where a party is penalized in the event he loses at either the FTC or the appellate review level. At this point he may comply and avoid further liability. In other words, there is ample opportunity to test the rule in advance of penalty proceedings. *Compare Oklahoma Operating Co.* v. *Love*, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596 (1920); *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Here, the practical efficacy of the rule depends on further Commission action through a complaint, hearing, findings, and order, and then judicial review. Thus, while the kind of rules the FTC may issue may properly be denominated "legislative" in the sense that once they are approved by reviewing courts they [**708**] state binding propositions of law, they are not exercises of "power of a legislative nature" in the ICC sense in which Congressman Covington was plainly speaking.

This view of Congressman Covington's remarks is buttressed by a reading of one of the cases on which he relied to rebut arguments that the grant of power to the commission to enforce and elaborate the standard of illegality was an unconstitutional delegation of legislative power. *United States* v. *Grimaud*, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911), upheld a criminal prosecution for a violation of regulations promulgated by the Secretary of Agriculture under the Forest Reserve Act. Entrusted with the duty under the statute of safeguarding the public forest reserves, the Secretary was empowered by the statute to make regulations controlling access to the reserves and activities carried on in them, violations of which were to be criminally punishable. Although the power to declare what amounted to substantive criminal law was plainly unusual, the Supreme Court upheld the regulations, pointedly arguing that they were to be considered "administrative" rather than "legislative" and thus lawful:

> That "Congress cannot delegate legislative power [to the President] is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." Field v. Clark, 143 U.S. 649, 692 [12 S.Ct. 495, 36 L.Ed. 294, 309] But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.
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> * * * * * * *
>
> The Secretary of Agriculture could not make rules and regulations for any and every purpose. * * * [A]ll relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. * * *

220 U.S. at 521–522, 31 S.Ct. at 484–485. *See also Union Bridge Co.* v. *United States*, 204 U.S. 364, 385–387, 27 S.Ct. 367, 51 L.Ed. 523 (1907) (upholding authorization to Secretary of War to order bridge improvements under the 1899 Rivers and Harbors Act and criminal prosecution for refusal to obey his order). These cases, on which Covington relied in his discussion distinguishing the FTC from the ICC, *see* 51 Cong.Rec. (Part 15) at 14932–14933, indicate clearly that, to the extent the FTC might have rule-making power, a specific question to which he did not address himself, this power would certainly be categorized in the parlance of the time as "administrative" rather than "legislative," a rubric whose meaning at the time was confined to the rate-making function. *See Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226–227, 29 S.Ct. 67, 53 L.Ed. 15 (1908), another case noted in Covington's discussion. 51 Cong.Rec. (Part 15) at 14932–14933. Thus we believe we are on solid ground in concluding that Covington's remarks, when understood in light of the legal assumptions that clearly bound him, should not be read as either an implicit or an explicit denial of the kind of substantive rule-making power at issue before us.

Appellees also rely heavily on a colloquy between Congressman Sherley of Kentucky and Congressman Stevens of Minnesota, reprinted in the footnote below.[19]

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[19] Mr. STEVENS of Minnesota. * * * The Supreme Court has held that the Interstate Commerce Commission does exercise the right of determining whether a rate in existence is unreasonable or unjust. That is a quasi-judicial act and the decision of the commission on that point is reviewable by the courts, because it is a review of a legal decision upon a given state of facts. But when the commission goes further and decides what must be a reasonable rate or practice for the future, of course that is a legislative act which must not and can not be reviewed by the courts any more than could an act of Congress be so reviewed. There is that distinction, and we have carried that distinction into this bill. Whenever the trade commission decides that a certain act is an act of unfair method of competition, the decision on that point as a question of law is, and ought to be, reviewable by the courts. The facts themselves are found by the commission. Its finding as to the facts is conclusive. Its opinion as to whether that state of facts constitutes an act violating the law is its

Their discussion seems most accurately interpreted much as we have interpreted Congressman Covington's. In both cases the reference point of comparison was the ICC's power to issue affirmative orders specifying future rates. **[709]** As we said earlier, substantive rules of the kind at issue here are not to be compared with definitely binding ICC rate orders. They are merely preliminary guidelines for business behavior on the basis of which, after the facts are found and no basis for waiver is established, the Commission may issue prohibitory cease and desist orders. While it is true that the Administrative Procedure Act today lumps together the kinds of rules the FTC proposes to issue and "the approval or prescription for the future of rates" under the denomination "rule," 5 U.S.C. § 551 (4) (1970), it is clear that the understanding of those who focused on the question in 1914 saw a clear distinction between them. Thus we decline to conclude that the clear references in the final House floor debate to the ICC's rate-making power should be extrapolated to cover the issuance of substantive rules enforceable only in agency adjudication. The utterly unhelpful quality of the floor comments is underscored by Congressman Stevens' remarks. If one ignores the "legislative"—"administrative" technical distinction which influenced Covington and utilizes a more practical, broader conception of "legislative" type activity prevalent today, they can be read to support substantive rule-making of the kind asserted by the agency:

> This measure, for the first time in this country, attempts an administrative regulation of commerce itself. We have regulated the instrumentalities such as transportation and finance, but here we attempt to rule and help commerce. An executive alone with power of enforcement merely, or even a wise discretion, could not do it. The courts under their ruling could not wisely and liberally accomplish the needed results. *The legislative branch can only prescribe rules for the future. It requires a combination of all those powers in one organization, with the highest obtainable talent well and thoroughly to work out the difficult problems which will be met.* Because it is in a sense permanent and without partisanship, and can lay down a policy which can be pursued or changed as may be wise and necessary, without the charge of personal or political advantage, must this important commission perform such work.

51 Cong.Rec. (Part 15) at 14939. (Emphasis added.)

Thus the history of the pertinent 1914 debates leaves us with a few affirmative indications that Section 6(g) encompassed substantive rule-making and a few cryptic indications that this is not so. As a consequence, the need to rely on the section's language is obvious.

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judgment of law upon the facts and its judgment is and ought to be reviewed and it is so provided by this bill.

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Mr. SHERLEY. If the gentleman will permit, the Federal trade commission differs from the Interstate Commerce Commission in that it has no affirmative power to say what shall be done in the future?

Mr. STEVENS of Minnesota. Certainly.

Mr. SHERLEY. In other words, it exercises in no sense a legislative function such as is exercised by the Interstate Commerce Commission?

Mr. STEVENS of Minnesota. Yes. The gentleman is entirely right. We desired clearly to exclude that authority from the power of the commission. We did not know as we could grant it anyway. But the time has not arrived to consider or discuss such a question. 51 Cong.Rec. (Part 15) 14938 (1914).

NORMAN J. FOUCHA, ET AL. v. F.T.C.*

Civ. A. No. 73-640. F.T.C. Docket 8865

(United States District Court, Northern District of Alabama, Southern Division, July 9, 1973)

Before POINTER, *District Judge.*

ORDER ON MOTION TO STAY

This cause came on to be heard at 3:00 p.m. on July 9, 1973, on plaintiffs' motion for stay of an order issued in *Federal Trade Commission* v. *Foucha*, C.A. 72–1060 on March 16, 1973, requiring plaintiffs to comply with subpoenas returnable before the Federal Trade Commission on July 10, 1973. The cause of action in which this motion is made is under F.R.C.P. 60(b) and is in the nature of a proceeding in equity collateral to C.A. 72–1060. Upon due consideration of the complaint, the motion and the memorandums and arguments of counsel, the court concludes that there is no adequate basis shown for the relief sought for that there is no strong showing that the plaintiffs will likely succeed on the merits of their case. The court is of the opinion that there are three alternative barriers to plaintiffs' success on the merits, any one of which makes the granting of this motion improper:

(1) The cause of action stated is improperly brought under the F.R.C.P. 60(b) in that it fails to meet the criteria set out in that rule.

(2) The statutes on which plaintiffs rely to show that governmental immunity was not properly given in this case, 5 U.S.C. §§ 3346–3348, which limit certain temporary authority to 30 days, do not apply to the filling of a vacancy in an Assistant Attorney General's office in that he is not an "officer of a *bureau* of an Executive department."

(3) The Attorney General has been given authority to delegate his power to grant immunity under 18 U.S.C. § 6004 by 28 U.S.C. § 510 and under such authority need not have delegated the power to an Assistant Attorney General but might have delegated it to a Deputy Assistant Attorney General who need not have presidential appointment and senatorial approval. The chain of delegation set up by regulations promulgated by the Attorney General is not dependent on the officer's being appointed by the

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*Not otherwise reported. See also p. 605 herein.

President and confirmed by the Senate and therefore the 30-day limitation in 5 U.S.C. § 3348 does not affect authority delegated through this chain.

Based on these conclusions, it is ORDERED, ADJUDGED and DECREED that plaintiffs' motion for stay be, and the same hereby is denied.

SUNSHINE ART STUDIOS, INC., ET AL. v. FEDERAL TRADE COMMISSION*

No. 73-1037 F.T.C. Docket 8825

(United States Court of Appeals, First Circuit, July 23, 1973)

1. PETITIONERS WERE NOT DEPRIVED OF DUE PROCESS RIGHT TO BE INFORMED OF CHARGES, WHERE SUBSTANTIAL EVIDENCE IN RECORD AS A WHOLE JUSTIFIED F.T.C.'S TREATMENT OF PETITIONERS AS SINGLE ECONOMIC ENTITY.

[1171] Where substantial evidence in the record as a whole justified Federal Trade Commission's treatment of petitioners as a single economic entity and there was no indication in the record that form of complaint for unfair and deceptive practices precluded petitioners from understanding the charges or from preparing and presenting their defense, petitioners were not deprived of their due process right to be informed of the charges against them on claim that complaint, in spite of their individual identities, treated all of them as a single economic entity and failed to specify which was allegedly responsible for each of the alleged violations.

2. F.T.C.'S FINDING THAT ALL SHIPMENTS FOLLOWING THE INITIAL ONE CONSTITUTED UNORDERED MERCHANDISE WAS PROPER.

Based upon conclusion that ambiguous language of order coupons did not place customers on notice that they had ordered additional consignments, Federal Trade Commission's finding that all shipments following the initial one constituted unordered merchandise was proper in view of youthful and often inexperienced nature of the clientele and testimony of several dealers that they thought they were ordering a single shipment.

3. USE OF FICTITIOUS COLLECTION AGENCY TO COERCE PAYMENT IS AN UNFAIR AND DECEPTIVE PRACTICE.

Use of what is in effect a fictitious collection agency to coerce payment is an unfair and deceptive practice prohibited by provision of Federal Trade Commission Act.

4. F.T.C.'S FINDING AS TO FALSE REPRESENTATION THAT DELINQUENT ACCOUNTS WERE TRANSFERRED TO BONA FIDE INDEPENDENT COLLECTION AGENCY HAD SUBSTANTIAL RECORD SUPPORT.

[1172] Federal Trade Commission's finding as to false representation that delinquent accounts were transferred to bona fide independent collection agency had substantial record support, and mere fact that collection agency was separately incorporated and duly licensed as a collection agency under the laws of Massachusetts could not in the light of the evidence of its absolute domination, justify a different result.

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*Reported in 481 F.2d 1171 (1973). For case before the Commission, see 81 F.T.C. 836

5. FINDING OF FAILURE TO OFFER REFUNDS FOR NONDELIVERY OF GOODS AS ORDERED WAS BASED ON UNDISPUTED EVIDENCE.

Finding of failure to offer refunds for nondelivery of goods as ordered was based upon undisputed evidence, and conclusion that caveat did not adequately apprise consumers of their rights regarding non-conforming merchandise was clearly within discretion of Federal Trade Commission.

6. F.T.C.'S CONCLUSION THAT CLAIM REPRESENTING "FREE" IMPRINTING OF NAME ON CARDS WAS MISLEADING WAS SUPPORTED BY RECORD AS A WHOLE.

Federal Trade Commission's conclusion, that representation that purchasers' names were imprinted "free" on cards they ordered was misleading, was supported by record as a whole.

7. IN FORMULATING REMEDIAL ORDERS, F.T.C. IS VESTED WITH BROAD DISCRETION.

Federal Trade Commission is vested with broad discretion in formulating remedial orders and, only where no reasonable relation between remedy selected and violations found exists, will an order be set aside.

8. F.T.C. DID NOT ABUSE ITS DISCRETION IN ISSUING AN ORDER RUNNING AGAINST ALL OF THE PETITIONERS UPON FINDING THAT THEY OPERATED AS A SINGLE ECONOMIC ENTITY.

In light of finding that petitioners operated as a single economic entity, Federal Trade Commission did not abuse its discretion on complaint for unfair and deceptive practices in issuing an order running against all of them, and inclusion of individual petitioner, a stockholder, officer and director of the corporation, was also appropriate and terms of order were sufficiently clear and appropriate to warrant enforcement.

(Syllabus, with substituted captions, taken from 481 F. 2d 1171)

On petition to review, court held that petitioners were not deprived of their due process rights, that F.T.C.'s findings were proper and that Commission's order was not erroneous or overbroad.

Petition to review denied and order enforced.

Edward J. Barry, Springfield, Mass., with whom *Robinson, Donovan, Madden & Barry*, Springfield, Mass., was on brief, for petitioners.

Vincent Tricarico, Atty., Federal Trade Commission, with whom *Ronald M. Dietrich*, Gen. Counsel, *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, and *Miles J. Brown*, Atty., Washington, D.C., were on brief, for respondent.

Before COFFIN, *Chief Judge*, MCENTEE and CAMPBELL, *Circuit Judges*.

MCENTEE, *Circuit Judge*.

This is a petition to review a cease and desist order issued by the Federal Trade Commission against Sunshine Art Studios, Inc. (Sunshine), Junior Sales Club of America, Inc. (J.S.C.), Sales Leadership Club, Inc. (S.L.C.), Guardian Collection Agency, Inc. (Guardian), and Ryland E. Robbins, as an individual and officer of these corporations. Three of the four corporate petitioners, Sunshine, J.S.C., and S.L.C., are engaged in the mail-order business of selling greeting cards to wholesalers, groups, and individuals, primarily housewives and children, on a national basis. Guardian acts as a collection agency for Sunshine and J.S.C. All four corporations are owned and controlled by the Robbins family and Ryland E. Robbins is described as the "general manager of the entire operation." Following an administrative hearing and review, the Commission found that petitioners had engaged in the following unfair and deceptive practices in violation of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1970): (a) Sunshine sent out and attempted to obtain payment for unordered merchandise; (b) Sunshine and J.S.C. falsely represented that delinquent accounts were transferred to a **[1173]** bona fide independent collection agency; (c) S.L.C. failed to offer refunds for its non-delivery of merchandise as ordered; and (d) S.L.C. falsely represented that imprinting names of purchasers on cards was provided free of charge. In the instant proceeding petitioners challenge the validity of the Commission's complaint, the sufficiency of its proof, and the scope of its order.

[1] Turning first to the question of the validity of the pleadings, petitioners argue that they have been deprived of their due process right to be informed of the charges against them because the complaint, in spite to their individual identities, treats all of them as a single economic entity and fails to specify which is allegedly responsible for each of the alleged violations. This contention is not persuasive for at least two reasons. In the first place, substantial evidence in the record as a whole justifies the Commission's treatment of petitioners as a single economic entity. The record indicates, for example, that almost all of the officers and boards of directors of the corporate petitioners are identical, that corporate formalities are not observed, and that dealings between the various corporate petitioners are not conducted at arm's length.[1] Second, there is no indication in the record that the form of the complaint precluded petitioners from understanding the charges or from preparing and presenting their defense.

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[1] By way of further example, the record shows that director and shareholder meetings were infrequently held and that corporate minutes were never kept; that individuals who were nominally employed by one corporation often performed work for others; that all employees were paid from a single consolidated account; that supplies were ordered on a consolidated basis; that Sunshine's trademark appeared on the back of J.S.C. and S.L.C. cards; that Sunshine paid the utilities and maintained separate general ledgers for the other corporations; and that all were located in the same building, used the same address, and were served by the same switchboard.

Since the complaint specifies in at least five instances which petitioner was involved with a particular charge and since evidence concerning all of the charges was presented during the Commission's case in chief, petitioners were unquestionably fully appraised of the nature and details of each allegation. *See Golden Grain Macaroni* v. *FTC*, 472 F.2d 882, 885–86 (7th Cir. 1972) and cases cited. Under these circumstances, no constitutional privation occurred.

[2] Petitioners' challenges to the Commission's unfair trade practice findings are similarly unavailing. First, the finding that Sunshine shipped unordered merchandise and made improper attempts to collect payment for these shipments is based upon undisputed evidence. Following receipt of one of its order coupons, Sunshine regularly sent shipments in addition to the initial selection of cards to the consumer. Based upon its conclusion that the ambiguous language of the order coupons did not place customers on notice that they had ordered these additional consignments,[2] the Commission held that all shipments following the initial one constituted unordered merchandise. In light of the youthful and often inexperienced nature of Sunshine's clientele and the testimony of several Sunshine dealers that they "thought they were ordering a single shipment and did not understand that they were committing themselves to re**[1174]**ceive successive shipments and to return or pay for them," this conclusion is unimpeachable. *Cf. Independent Directory Corp.* v. *FTC*, 188 F.2d 468 (2d Cir. 1951). Moreover, given the propriety of this holding, Sunshine's rejoinder that subsequent shipments were made pursuant to valid agreements which arose from the purchaser's submission of these order coupons is clearly wide of the mark.

[3, 4] The Commission's finding regarding Sunshine's and J.S.C.'s use of Guardian to pursue allegedly delinquent accounts also has substantial record support. While the letters sent out on Guardian stationery clearly created the impression that it was an independent collection agency, in point of fact Guardian had no employees of its own and was wholly owned, staffed, and controlled by Sunshine. Guardian's letters also intimated that if the amount due was not forthcoming, legal proceedings would be initiated. As is clear from the

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[2] Prior to December 1968 the typical coupon in use stated:

"Rush my Free 'Nationally Famous' Christmas Card Assortment, Free Christmas Card Catalog, Free Personalized Card Album, and box assortments on approval."

After December 1968 the coupons were revised so that they typically read:

"I want to join the unbeatables. Please send me Free Pendant, Free Catalogue, Sales Kit and All-Occasion Sample Boxes on approval. Also other seasonal samples on approval, as they are available."

The Commission found the last clause and last sentence of these two forms, which petitioners relied upon to justify sending shipments in addition to the initial one, to be ambiguous.

record, however, no such action was ever taken. Since it is settled that the use of what is in effect a fictitious collection agency to coerce payment is an unfair and deceptive practice prohibited by § 5 of the Act, *see Wm. H. Wise Company* v. *FTC*, 101 U.S.App.D.C. 15, 246 F.2d 702 (D.C. Cir.), *cert. denied* 355 U.S. 856, 78 S.Ct. 84, 2 L.Ed.2d 64 (1957), the appropriateness of the Commission's finding on this question is clear. The mere fact that Guardian is separately incorporated and duly licensed as a collection agency under the laws of Massachusetts cannot, in light of the evidence of its absolute domination, justify a different result.

[5] The Commission's further finding that S.L.C. failed to offer refunds for the non-delivery of goods are as ordered is also based upon undisputed evidence. In 1969, finding that it was unable to fulfill all of its orders for name imprinted cards, S.L.C. used nonimprinted shipments to fill between 15,000 and 30,000 orders. Rather than explicitly informing purchasers of their right to refuse these cards and to obtain a refund, however, S.L.C. urged customers to give these cards a personal touch by signing them and went on to state:

> we want to emphasize that we are sincere in our willingness to stand behind our guarantee to give you complete satisfaction.

The Commission's conclusion that this caveat did not adequately apprise consumers of their rights regarding this nonconforming merchandise was clearly within its discretion and seems appropriate. *See Double Eagle Lubricants, Incorporated* v. *FTC*, 360 F.2d 268, 270 (10th Cir. 1965). Moreover, petitioners' contention that those individuals who accepted these cards and did not seek refunds were not deceived by this statement is refuted by the testimony of three purchasers that neither they nor a substantial number of their customers understood that S.L.C. was offering to refund their money.

[6] Finally, the Commission's conclusion that S.L.C.'s representation that purchasers' names were imprinted "free" on the cards they ordered was misleading is also supported by the record as a whole. As is clear from S.L.C.'s sundry promotional materials, no real effort was made to merchandise nonimprinted cards. Rather, every advertisement and piece of promotional literature stressed the sale of imprinted cards and that this service would be rendered without charge. Additionally it is undisputed that S.L.C. always sold both imprinted and nonimprinted cards for the same price and never established a separate price for the nonimprinted variety. Under these circumstances, it seems clear that the Commission was justified in concluding that customers who bought nonimprinted cards received merchandise

of a lesser value and that S.L.C. was not rendering the imprinting service free of charge but rather was marketing cards at a price which included the cost of adding this feature. Since similar misleading uses of the word "free" have been held to be violative of § 5 of the Act, *see FTC* v. *Mary Carter Paint Co.*, 382 U.S. 46, 86 **[1175]** S.Ct. 219, 15 L.Ed.2d 128 (1972); *FTC* v. *Standard Education Society*, 302 U.S. 112, 115–117, 58 S.Ct. 113, 82 L.Ed 141 (1937), this finding may stand.

[7, 8] Petitioners' final contention is that the Commission's order is erroneous and overbroad because it prohibits each of them from engaging in conduct which only one of them may have performed, because it includes within its coverage the individual petitioner Robbins, and because it is cast in either vague or expansive language. As an initial matter, we note that the Commission is vested with broad discretion in formulating remedial orders. *See FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965). Only where no reasonable relation between the remedy selected and the violations found exists will an order be set aside. *See Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 613, 66 S.Ct. 758, 90 L.Ed. 888 (1946). Mindful of these guidelines, we conclude, particularly in light of the finding that petitioners operate as a single economic entity, that the Commission did not abuse its discretion in issuing an order running against all of them. *See, e.g., Delaware Watch Co.* v. *FTC*, 332 F.2d 745 (2d Cir. 1964). The inclusion of Robbins was also appropriate given the hearing examiner's finding that as a stockholder, officer, and director, he was "deeply involved in the important business affairs of all the corporate [petitioners]." Finally, the wording of the order gives us little pause. Other than to note that paragraphs 6 and 8 [3] will not prohibit petitioners from engaging in lawful collection activities in the future, because, should they begin referring their delinquent accounts to an independent collection agency or to an attorney, a petition to amend or modify the order to reflect these changes would lie under 16 CFR § 3.72(b) (1973), we find the terms of the order to be sufficiently clear and appropriate to warrant enforcement.

The petition to review is denied and the order may be enforced.

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[3] "6. Representing, directly or by implication, that delinquent accounts will be, or have been, turned over to an independent, bona fide collection agency.

"8. Representing, directly or by implication, that delinquent accounts will be referred to an attorney if payment is not received."

GLENN W. TURNER, ET AL. v. LEWIS ENGMAN, ET AL.*

Civ. A. No. 978-73. FTC Docket 8888

(United States District Court for the District of Columbia, August 24, 1973)

Court denies injunction to enjoin F.T.C. from continuing its proceedings on the grounds that plaintiffs cannot properly prepare their defenses before the F.T.C. when, at the same time, they are preparing their defense in a criminal proceeding in the State of Florida.

Jerris Leonard, Wash., D.C. for the plaintiffs.

Robert M. Werdig, Jr., Wash., D.C. for the defendants.

Before CORCORAN, *District Judge*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I

FINDINGS OF FACT

CORCORAN, D. J.: 1. Plaintiff Glenn W. Turner, is a resident of the state of Florida and the principal stockholder of the corporate plaintiffs herein.

2. Plaintiff Glenn W. Turner Enterprises Inc. is a corporation organized and doing business under the laws of the state of Florida.

3. Plaintiff Dare To Be Great, Incorporated is a corporation organized and doing business under the laws of the state of Florida.

4. Plaintiff Koscot Interplanetary, Incorporated is a corporation organized and doing business under the laws of the state of Florida.

5. Defendants are officers and employees of the United States Government each being sued for actions arising out of their official responsibilities and duties.

6. Plaintiffs, corporate and individual, are currently the subject of investigations and proceedings by the offices and agencies of defendants.

7. Of particular significance to the present motion for a preliminary injunction, plaintiffs are respondents in a proceeding before the Federal Trade Commission designated Docket No. 8888.

8. Plaintiffs, and particularly their counsel, seek an injunction to enjoin the Federal Trade Commission from continuing the proceedings in the aforementioned Docket No. 8888.

9. Plaintiffs, and particularly their counsel, allege they cannot properly prepare their defenses before the Federal Trade Commission

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 74,677 at 94,969 (1973-2 Trade Cases).

when, at the same time, they are preparing their defense in a criminal proceeding in the state of Florida.

10. Docket No. 8888 was initiated by the signing of an administrative complaint on May 24, 1972.

11. Hearings in Docket No. 8888 commenced on July 30, 1973.

12. The aforementioned hearings shall continue through to and including August 24, 1973.

13. The proceeding now taking place involves only the presentation of the agency's case in chief.

14. It has been represented to the Court by the Government and not contradicted by plaintiffs that there shall be a respite in the Commission proceeding until after the commencement of the criminal proceedings in Florida.

15. The criminal proceedings in the state of Florida are the result of an indictment returned by a Federal grand jury for the Middle District of Florida, Orlando Division, on May 18, 1973.

16. Trial in the criminal matter, Criminal No. 73–71 ORL–CR, is to commence on September 10, 1973.

17. Counsel for plaintiffs herein who is serving as counsel for plaintiffs in their status as respondents in the Federal Trade Commission proceeding has indicated in open Court, although he is general counsel for plaintiffs, he has not entered an appearance in their behalf as defendants in the Florida criminal action.

18. Plaintiffs have not shown the Court they will not be irreparably injured should an injunction not issue.

19. Plaintiffs have not established to the satisfaction of this Court there is a substantial likelihood of their prevailing on the merits of their claim.

20. Plaintiffs have not established other interested parties will not suffer substantial injury.

21. Plaintiffs have not established the public interest would be served should an injunction be granted.

II

CONCLUSIONS OF LAW

1. This Court is bound in this matter by Virginia Petroleum Jobbers Association v. F.P.C., 104 U.S. App. D.C. 106, 259 F.2d 921 (1958) which requires, before an injunction be issued staying administrative action, the following conditions be met: the petitioner indicates it is likely to prevail on the merits, that without a stay it will suffer irreparable harm, there will be no substantial harm to other persons and the public interest will not be harmed.

2. Plaintiffs herein have failed to meet a single condition established by Virginia Petroleum Jobbers, supra.

3. Plaintiffs are not entitled to a preliminary injunction.

ORDER

This matter having come before the Court on August 16, 1973 for hearing on the motion of plaintiffs for a preliminary injunction; upon consideration of the complaint; the motion of plaintiffs for a preliminary injunction; the memoranda of points and authorities and exhibits in support thereof and in opposition thereto; the arguments of counsel and upon the basis of the Findings of Fact and Conclusions of Law filed herewith, it is by the Court this 24th day of August, 1973.

Ordered that the motion of plaintiffs for a preliminary injunction be, and the same is hereby, denied.

GENERAL FOODS CORP. v. F.T.C.*

Civ. A. A. No. K–1–73–CA. F.T.C. Docket 8883

(United States District Court, Western District of Michigan, Southern Division, August 31, 1973)

In an action for declaratory and injunctive relief in a collateral action, court held that it lacked jurisdiction over the subject matter. In so ruling, the court took the unusual step (and "not normally desirable practice") of expressly adopting by reference sixteen pages of the legal memorandum supporting the Commission's motion to dismiss.

Before ENGEL, *District Judge*.

OPINION AND ORDER

This matter has come on to be heard upon the motion of the defendant Federal Trade Commission to dismiss the action on the grounds that the court lacks jurisdiction over the subject matter and for the further grounds that the complaint filed herein fails to state a claim on which relief can be granted.

The court has reviewed the entire file and all of the records submitted at the time of hearing, it being understood that the matter might be decided upon the merits in the event the court's ruling on defendant's motion was not dispositive of the case.

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*Not otherwise reported. See also, p. 571 herein.

Upon careful consideration the court is of the opinion that the defendant's motion to dismiss on the grounds that the court lacks jurisdiction over the subject matter is well taken. While recognizing that it is not normally a desirable practice, in the interests of time, and because it fairly and accurately describes both the facts and the issues before the court and their proper resolution, the court adopts by reference so much of the memorandum of the points and authorities filed by the defendant on February 5, 1973, being docket entry No. 6 in the file and records of this case as pertains to the defendant's motion to dismiss, that is, the first sixteen pages of the memorandum. Under the circumstances, therefore, it is unnecessary for the court to determine whether or not plaintiff's complaint, as claimed by the motion, fails to state a claim upon which relief may be granted.

The court, in reaching the decision, has placed particular reliance upon *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41 (1938), *FCC* v. *Schreiber*, 381 U.S. 279 (1965).

Accordingly, plaintiff's complaint herein is DISMISSED.

It is so ordered.

PUROLATOR PRODUCTS, INC. v. F.T.C.*

No. 14,704 F.T.C. Docket 7850

(United States Court of Appeals, Seventh Circuit, September 11, 1973)

In an action requesting the court to construe an FTC cease and desist order, court held that it lacked jurisdiction and dismissed plaintiff's motion. The court further dismissed Commission's petition for an order requiring plaintiff to report its compliance with the cease and desist order. Petitions dismissed.

Before FAIRCHILD, PELL, JR., and STEVENS, *Circuit Judges.*

ORDER

This case has been currently brought before the court on the motion of Purolator Products, Inc. (Purolator), seeking to have this court construe its earlier decree enforcing a cease and desist order of the Federal Trade Commission (FTC) and further to construe the cease and desist order itself. Prior to any ruling on the motion, the court has also been presented the following additional motions:

(a) Motion of Purolator for stay pending review; and

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*Not otherwise reported. For case before the Commission, see 65 F.T.C. 8; *aff'd:* 352 F.2d 874 (7th Cir. 1965), *cert. denied:* 389 U.S. 1045 (1968); 7 S&D 1364.

(b) Petition of FTC for an order requiring Purolator to report its compliance with the court's decree of enforcement.

In *Purolator Products, Inc.* v. *Federal Trade Commission*, 352 F.2d 874 (7th Cir. 1965), *cert. denied*, 389 U.S. (1968), this court affirmed and ordered enforced a cease and desist order of the FTC following administrative proceedings upon a complaint charging Purolator with violating Section 2(a) of the Clayton Act, as amended, 15 U.S.C. § 13(a), price discrimination under the Robinson-Patman Act, 49 Stat. 1526 (1936). The proceedings before the FTC and the opinion of this court enforcing the order dealt with Purolator's pricing in distributing replacement filters manufactured by it. That pricing system was found to be unacceptable under the statute.

However, in addition to denying that its pricing structure violated the Act, Purolator also contended that the Commission's order was too broad, vague and indefinite. Admittedly, the order paraphrases § 2(a) in that Purolator was ordered to cease and desist from:

> Discriminating, directly or indirectly, in the price of such products of like grade and quality: By selling to any direct or indirect purchaser at net prices higher than the net prices charged to any other purchaser, direct or indirect, who in fact competes with the purchaser paying the higher price in the resale and distribution of respondent's replacement filters.

This court rejected Purolator's contention that the order should be narrowed to the specific practice and price system found to be illegal. Noting that the order was quite similar to that upheld in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952), Chief Judge Hastings speaking for the court quoted from *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F.2d 152, 156 (7th Cir. 1957), *cert. denied*, 355 U.S. 941 (1958):

> The order encompasses only the specific means by which petitioner has discriminated in the past and is broad enough to prohibit variances which would accomplish the same result. The Commission is not required to confine its order to the narrow area transgressed by petitioner, it must be permitted sufficient leeway so that its order may not be reduced to a nullity by technical, but not actual, compliance.

Subsequent to the denial of certiorari in the case, Purolator filed a compliance report with the Compliance Division of the Commission's Bureau of Restraint of Trade. In the correspondence that followed it became clear that Purolator was manufacturing private-brand filters for various major oil companies and automobile manufacturers. These filters were sold at a price below that which Purolator charged its warehouse distributors for the purchase of its own advertised name-brand Purolator filters. The FTC took the position that this sort of price discrimination was potentially within the ambit of those activities forbidden under the cease and desist order. It, therefore, requested information relating to those private brand sales. Purolator, on the other hand, insisted that the order "could not be construed to apply to price differentials between Purolator brand and private-brand filters, since that subject would be completely foreign to anything dealt with in the complaint, hearings and findings." Purolator, according to the FTC has failed to supply the information requested. The FTC accordingly has rejected the compliance report.

In the light of this controversy and Purolator's desire not to be subject either to a contempt proceeding in this court or to a civil penalty suit, Purolator filed its motion to construe the prior opinion of this court. The FTC opposes the motion on the ground that there is no appropriate ground for the exercise of jurisdiction by this court.

Initially, we note that, insofar as the scope of the order is concerned, we decline any invitation in Purolator's motion and brief to change "the law of the case" and hold that the order originally entered by the FTC was overly broad. That issue was litigated to finality and is not subject to our review on this proceeding. We have not purported to review this issue but have merely adhered to the doctrine of *res judicata.* We are, thus, left with the question of whether or not we can or should participate in these preliminary joustings between Purolator and the FTC in the compliance proceedings.

Similar petitions have been rejected by other circuits. In *Rettinger* v. *Federal Trade Commission*, 392 F.2d 454 (2d Cir. 1968), the petitioner contended that the FTC had changed its interpretation of what constituted compliance with a prior consent order and that such a change constituted a reopening of prior proceedings before the Commission providing jurisdiction for review in the Court of Appeals. The court rejected the plea holding that the Commission's change of interpretation could not be characterized as a reopening under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b). The court also rejected the ancillary claim that review was appropriate under the Administrative Procedure Act, holding that the APA did not contemplate review from the court of appeals in the first instance. Accordingly, the court dismissed the petition for review for lack of jurisdiction, without prejudice to the petitioner's seeking relief in the district court. We agree with the reasoning in *Rettinger* and hold that we have no jurisdiction under 15 U.S.C. § 45(b) to review the Commission's action at this time. Nor do we think, as Purolator has contended, that the APA is applicable as a jurisdictional basis for initial review in this court.

But even in the broader case in which the FTC's construction of a cease and desist order has not been changed, we would agree with the Fourth Circuit that the courts of appeals lack initial jurisdiction to entertain petitions for what amounts to intervention in incomplete compliance proceedings. The present proceedings have evolved almost no factual basis for decision. *Robertson* v. *Federal Trade Commission*, 415 F.2d 49 (7th Cir. 1969). Section 5 of the Act provides no such authority.

Moreover, in *Red & White Corporation* v. *Federal Trade Commission*, No. 15545 (7th Cir., filed April 12, 1966), this court was presented with a petition for an order clarifying and construing the final decree of this court, to review and set aside the ruling of the Federal Trade Commission. The case arose from *Modern Marketing Service, Inc.* v. *Federal Trade Commission*, 149 F.2d 970 (7th Cir. 1945), where, as in the initial *Purolator* case, the court denied the petition to set aside and vacate the Commission's cease and desist order and granted the cross-petition for enforcement of an order concerning violations of the Robinson-Patman Act. When, some 20 years later, Red & White Corporation, a party to the original action, petitioned for an order construing the court's opinion, the petition was dismissed for lack of jurisdiction. Purolator attempts to distinguish this case on the ground that Red & White was asking the court to review an advisory opinion of the FTC relative to proposed future conduct. But the nature of the case makes it applicable here since it arose from the FTC's interpretation of its own cease and desist order, most likely under 16 CFR § 3.26, now 16 CFR § 3.61 (d) & (e). Red & White was in a position virtually indistinguishable from Purolator's since if it acted in a manner contrary to the advisory opinion, it would almost certainly subject itself to suit or contempt proceedings. We think that the lack of jurisdiction apparent to the court in *Red & White* is equally clear in the present case.

We also reject Purolator's contention that Circuit Rule 28, relating to the use as precedent of unpublished orders, has any impact on the validity of *Red & White*. Circuit Rule 28 was prospective only and has no effect on the use of orders handed down by this court prior to its effective date.

Purolator, in its reply brief relies heavily on *Floersheim* v. *Weinberger*, 346 F. Supp. 950 (D.D.C. 1972). In that case, the FTC had rejected the compliance report of Floersheim and had also given an advisory opinion under 16 CFR § 3.61(e) that the new forms there involved violated the cease and desist order. The court found that it had jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 704, to review the rejection of the compliance report, but not the advisory opinion. The court in dicta indicated that it felt that the preferable course for review of a rejection of a compliance report was in "the jurisdiction which originally reviewed the cease and desist order," *i.e.*, the court of appeals. 346 F. Supp. at 956. However, despite the view expressed in the obiter it was the district court which proceeded to review the merits of the rejection and rule in favor of the FTC. Also, the district court's dicta makes no reference to the contrary views expressed in *Rettinger* v. *Federal Trade Commission*, *supra*, and *Robertson* v. *Federal Trade Commission*, *supra*.

But most significantly we feel that the reasoning of the *Floersheim* opinion itself would lead to the result of denying review in the present case. The court in that case held that the rejection of the compliance report constituted final agency action not subject to any other adequate review, thus allowing review under 5 U.S.C. § 704. It distinguished the advisory opinion issued pursuant to 16 CFR § 3.61(c) on the basis that "[i]t would be improper for this court to review advisory opinions in such a context [where there had been neither hearings nor more than written submissions of record] for it would be compelled to undertake the exhaustive efforts reserved for administrative energies and expertise." 346 F. Supp. at 956. In the present case, Purolator's compliance report was not rejected on its merits. The FTC asked for more information on which it could then make a decision as to whether the pricing policy violated the cease and desist order. At most, we have in the record before us some unsworn letters and an affidavit. Thus, even if we had some way to assert jurisdiction in the present petition, which has not been shown to us, we would still hold that the matter is not "ripe." We feel that the present case is closer to the type described in *Toilet Goods Association, Inc.* v. *Gardner*, 387 U.S. 158 (1967), than to *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). As in *Toilet Goods Association*, although the rejection of the compliance report may be "final," it is unclear exactly how or if the FTC will act on its rejection of the compliance report. The specific factual situation is as yet undeveloped. The lack of a factual record is particularly troublesome for this court since we are ill-equipped to hear evidence as to the nature of the practice which the FTC seeks to investigate.

Purolator also relies on the inherent power of a court of equity to modify its own decrees. *American Chain & Cable Co., Inc.* v. *Federal Trade Commission*, 142 F. 2d 909, 912–13 (4th Cir. 1944); *Century Metalcraft Corp.* v. *Federal Trade Commission*, 112 F. 2d 443, 446–47 (7th Cir. 1940); *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. 2d 182, 184 (2d Cir. 1932). All three cases dealt with the discretionary power of a court to modify its decree upon a showing of changed circumstances. Purolator has shown no such change. Rather the case is closer, factually, to *Rettinger*, *supra*, in which the Second Circuit said that the change in the FTC's interpretation of a cease and desist order was not a modification justifying a new review in the court of appeals. Similarly, the controversy in interpretation is not sufficient, we believe, to invoke our jurisdiction to modify the order enforcing the cease and desist order.

Finally, it seems highly inappropriate for this court to reach out for jurisdiction in these preliminary phases involving compliance with FTC cease and desist orders which have been ordered enforced. The presumptive administrative expertise to which we must show deference would indeed have difficulty in demonstrating its potential if piecemeal interlocutory judicial intervention is permitted. Without saying that circumstances could not exist for such intervention, we do not deem the present case to call for such action.

Purolator understandably is alarmed at the magnitude of possible civil penalties if ultimately it should be determined that its position on the merits of the issue of construction of the original enforced order should prove not to be correct. Every litigant, however, would doubtless be pleased to avoid the perils of litigation by asking for and receiving advisory judicial opinions prior to exposure to the risks of the courts.

The merits of this controversy may ultimately be before this court for decision. They are not here now.

For the reasons given hereinbefore, Purolator's motion to construe the cease and desist order and this court's decree of enforcement is dismissed for lack of jurisdiction.

The Commission's cease and desist order, *inter alia*, required Purolator to file a written report setting forth in detail the manner and form in which Purolator has complied with the order to cease and desist. This court affirmed and ordered enforced the Commission's order "in all respects." 352 F. 2d 886. Upon denial of certiorari, the Commission's order became final under the statute, 15 U.S.C. § 21(g).

The FTC concedes that it has available enforcement procedures but has requested this court to issue an order requiring Purolator to report its compliance, arguing that "[a]n order from this Court directing Purolator to file a compliance report would completely settle the matter." The matter could not be any more settled than it is without our construing the order which we have declined to do at Purolator's request. Such construction would, we think, be more appropriately made in an enforcement proceeding, testing whether the communications from Purolator to the FTC comply with the Commission's final order.

Accordingly, the FTC's petition for an order requiring respondent to report its compliance with the Commission's final order is dismissed.

PETITIONS DISMISSED.

UNITED STATES v. ITT CONTINENTAL BAKING COMPANY*

Nos. 72-1072, 72-1073. F.T.C. Docket 7880.

(United States Court of Appeals, Tenth Circuit, September 24, 1973)

1. **Even Though Sales Agreement Did Not Involve Any "Loan," Option Agreement, or Outright Payment, There Was Violation of Commission Order Where First Baking Company and Second Baking Company Entered Into "Sales Agreement" Whereby Second Company Ceased Producing Bread Upon Becoming Distributor of First Company.**

[17] Where first baking company and second baking company entered into a "sales agreement" with understanding that second company would cease production of bread upon becoming a distributor of first company, and thereafter second company stopped producing its own bread and began distributing that of first company over same routes, to same customers, and in substantially the same quantities, there was a violation of Federal Trade Commission order directing first company to cease and desist from acquiring bakeries for a ten-year period, even though sales agreement did not involve any "loan," nor option agreement, nor outright payment.

2. **Scope of F.T.C. Cease and Desist Order Must Be Construed as Written and Discerned Within its "Four Corners."**

Scope of a Federal Trade Commission consent cease and desist order must be discerned within its "four corners," and must be construed as it is written.

3. **F.T.C. Cease and Desist Order Did Not Extend to Holding of Assets Acquired Contrary to Order, and Thus Each Violation Was Not a Continuing One Subject to Penalties for Daily Violation.**

Federal Trade Commission order directing baking company for a ten-year period to cease and desist from acquiring the whole or any part of stock, share capital, or assets of any concern engaged in production or sale of bread except with permission of the commission did not extend to holding of assets acquired contrary to the order, or to the consequences thereof, and thus each violation was not a continuing one subject to penalties for daily violation.

4. **Extent of Penalties Was Within Discretion of Trial Court.**

Extent of penalties for violation of Federal Trade Commission consent cease and desist order relating to acquisition of bakeries was within discretion of trial court which had jurisdiction to order divestiture or equitable remedies generally.

(Syllabus, with substituted captions, was taken from 485 F.2d 16)

On appeal, court held there was a violation of the F.T.C. order to cease acquiring bakeries for a ten-year period even though sales agreement did not involve any "loan," option agreement, or outright pay-

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*Reported in 485 F. 2d 16 (1973); *cert. granted*, Apr. 29, 1974, 420 U.S. 223, 95 S. Ct. 926 (1975), p. 1189 herein. For case before the Commission, see 60 F.T.C. 1183. See also p. 306 herein.

ment, and that the order did not extend the holding of assets acquired contrary to the order, and thus, each violation not a continuing one subject to penalties for daily violation.

Affirmed and remanded. WILLIAM E. DOYLE, *Circuit Judge*, concurred and filed opinion.

George Edelstein, Atty., Dept. of Justice (*Thomas E. Kauper*, Asst. Atty. Gen., *Howard E. Shapiro*, Atty., Dept. of Justice, of Counsel, *Joseph J. Gercke* and *James E. Corkey*, Attys., Federal Trade Commission, with him on the brief), for appellant.

John H. Schafer, of *Covington & Burling*, Wash., D.C., (*Robert F. Welborn*, of *Welborn, Dufford, Cook, Phipps & Brown*, Denver, Colo., and *Gerald P. Norton*, Wash., D.C., of Counsel, with him on the brief), for appellee.

Before SETH, *Circuit Judge*, LARAMORE, *Senior Judge*, United States Court of Claims,* and DOYLE, *Circuit Judge*.

SETH, *Circuit Judge*.

[18] This is an appeal from the judgment of the District Court for the District of Colorado in a suit brought by the United States under the Clayton Act [15 U.S.C. § 21(*l*)], and the Federal Trade Commission Act [15 U.S.C. § 45(*l*)] against ITT Continental Baking Company. The Government sued to recover civil penalties and for injunctive relief for three asserted violations of a Federal Trade Commission consent cease and desist order relating to the acquisition of bakeries.

The case was tried on a stipulation of facts. The court ruled that two of the three challenged acquisitions were prohibited by the FTC's order, and the third was not. The court ruled also that each prohibited acquisition was a single violation of the order and did not commence a continuing violation. The maximum single penalty of $5,000.00 for each of the two violations was imposed. The court further held that the FTC's order, which had initially been applied to Continental Baking Company was also applicable to ITT Continental Baking Company and that ITT Continental was liable for the penalties. The court did not order ITT Continental to divest itself of the assets acquired in violation of the order, but did order ITT Continental to comply with the terms of the FTC order until that order expired.

The Government appeals from the court's judgment insofar as it held that the third transaction was not an "acquisition" in violation of the FTC order, that each violation was not a continuing one subject to penalties for daily violation, and insofar as the court did not order ITT Continental to divest itself of the three acquisitions. ITT Continental cross-appeals from the judgment, in its entirety, of the district court.

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*Sitting by Designation.

In May 1960, the FTC issued a complaint against Continental Baking Company, charging that Continental's acquisition of several baking companies engaged in the production and sale of bread from 1952 through 1958 violated section 7 of the Clayton Act [15 U.S.C. § 18], and section 5 of the Federal Trade Commission Act [15 U.S.C. § 45]. While the administrative proceedings were still in the hearing stage on this complaint, the parties negotiated a consent cease and desist order. The relevant part of the order provided:

> IT IS FURTHER ORDERED that for a period of ten (10) years from the date of issuance of this order by the Federal Trade Commission respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or non-corporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order, permits such an acquisition by respondent, said modification to be within the sole and final discretion of the Federal Trade Commission.

This consent order is the basis for this action, and must be construed as to the nature of several transactions asserted by the Government to be in violation of its provisions, and as to the imposition of penalties if a violation has taken place. This should be done in accordance with the standards laid down in *United States* v. *Armour & Co.*, 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed.2d 256, and in *Hughes* v. *United States*, 342 U.S. 353, 72 S.Ct. 306, 96 L.Ed. 394. In the Armour case the Court said, after mentioning the negotiation and reasons for a consent decree:

> For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it, * * * the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

[**19**] The consent order here concerned originated in a situation similar to a consent decree, and the reasons exist for application of the method of construction used in Armour. The order here is somewhat different in that it expressly permits or suggests reference to the complaint as an aid in construction. The result reached by the trial court in construing the order is not too restrictive nor unreasonable. It is one which may be arrived at by reference to the complaint, and by use of the method indicated in the Armour case. We will follow such a construction under these circumstances.

To consider the consent order "within its four corners," the wording is directed to the acquisition of businesses engaged in bread making, directly or indirectly. The only reference in the order is to the "acquiring" of such businesses. The complaint refers to the acquisition of bakeries as a course of conduct by Continental Bakeries. The order prohibits acquisition for a ten-year period. It is apparent from the record that it is upon the event of acquisition by the defendant that the local bakery is out of the bread making business. The acquisition itself, and not the *method* of operation thereafter, is the critical factor, and this is the event or incident to which the complaint and the order were directed.

This consideration of the order leads us to agree with the trial court as to whether the violations found were continuing or not, and also to agree as to the two particular acquisitions found by the trial court to be violations of the order.

As to the violations the record shows that in 1965 Continental and Bon Ton, Inc., of Missoula, Montana, entered into a sales agreement. Bon Ton, Inc. was engaged in the production of bakery products, including bread. These were sold at wholesale over thirteen routes in western Montana. Under the agreement, Bon Ton became an exclusive distributor of bread produced by Continental. Also, in the language of the parties' stipulation of fact, the "* * * understanding was that Bon Ton would cease production of bread * * * before it became a distributor of Continental's bread." On July 10, 1965, Bon Ton stopped producing bread and on the following Monday, began to distribute bread produced by Continental over the same routes and to the same customers as theretofore. On July 12, 1965, Bon Ton's president and owner of the vast majority of its stock deposited in the Bon Ton bakery account a Continental check drawn in his favor in the amount of $37,500.00. ITT Continental has described this amount as a "loan" to enable Bon Ton to meet Continental's credit requirements. However, Bon Ton gave to Continental an option to purchase the distributorship for the same amount. Continental acquired Bon Ton's accounts receivable, route books, customer lists, trademarks, trucks, and all but approximately $1,800.00 of its bank account. At this time, Bon Ton's "president" and its drivers became employees, on a salaried basis, of Continental. In consideration of the transfer Continental cancelled all outstanding invoices for products sold to Bon Ton and also cancelled the $37,500.00 "loan."

In April 1966 Continental and the Wyoming Baking Company entered into a "sales agreement," which was, in all relevant aspects, the same as the agreement entered into between Continental and Bon Ton. The same "understanding" existed as to Wyoming Baking's discontinuance of its own production of bread. In accordance with this "understanding," Wyoming Baking had ceased its own production of bread and began distributing Continental's products over the same routes and to the same customers. The sales agreement also provided that Continental would have an option to purchase the distributorship under certain circumstances. Some disagreement arose and the distributorship was sold, through the assistance of Continental, to another distributor from Idaho. This new ownership lasted about a year, at which time Continental itself acquired **[20]** the ownership for a cancellation of its debts and $15,000.00.

What is herein considered the third incident concerned the Sheppard Baking Company. This arrangement was not considered by the trial court to be a violation of the order while the above two were held to be in violation.

In August 1966 Continental and Sheppard Baking Company, of Durango, Colorado, entered into a "sales agreement" which was in all relevant aspects, virtually identical to the agreements entered into between Continental, and Bon Ton and Wyoming Baking. Prior to this time Sheppard Baking had been engaged in the production and sale of bakery products, including bread and bread-type rolls, which were sold over routes in southwestern Colorado. As with Bon Ton and Wyoming Baking, the "understanding" between Continental and Sheppard Baking was that Sheppard would cease production of bread upon becoming a Continental distributor. In mid-October 1966, Sheppard stopped producing its own bread and began distributing that of Continental over the same routes, to the same customers, and in substantially the same quantities as it had formerly sold and distributed similar products produced at its own plant prior to that date. However, unlike the transactions concerning Bon Ton and Wyoming Baking, the sales agreement between Continental and Sheppard Baking did not involve any "loan," nor option agreement, nor an outright payment. The following specific covenant appears in the "sales agreement" between Continental and Sheppard Baking:

> Dealer covenants and agrees as follows:
>
> * * * * * * *
>
> To keep and maintain route books containing the name, address, and weekly purchases of each account in Dealer's territory. These route books shall be deemed an asset of the dealership and shall be transferred with the dealership in accordance with the provisions of this agreement.

The same provision, in exactly the same language, also appears in the sales agreements that Continental entered into with Bon Ton and Wyoming Baking, respectively.

[1] Under these circumstances, we must hold that all three agreements accomplished the same purpose, which was to acquire indirectly such an interest or control in the business or the assets of the local baker so as to have him cease production. As to Sheppard Baking

Company, there was no cash paid, and the dealership as such was not purchased, but the consideration for the exclusive arrangement was sufficient, and was effective to induce the owner to close the local bakery. This was an indirect acquisition prohibited by the order and a "payment" of money was not necessary to constitute a violation. The market and the volume was so acquired, and this was a principal asset of the bakery. There was a violation of the order in the arrangement with Sheppard Baking Company. See *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y.1960).

The trial court found that ITT Continental Baking Company "* * * is a successor of Continental Baking Company and that it assumed the liabilities of Continental Baking Company including the liabilities under the Federal Trade Commission consent order." ITT Continental concedes that it is liable for any violations of the FTC order that Continental incurred *prior* to the date of the merger between ITT and Continental, and the violations here concerned were such. *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 65 S.Ct. 478, 89 L.Ed. 661, is sufficient authority for this position under the facts before us.

As to the issue of a continuing violation for penalty purposes, the trial court found that the terms of the consent order "proscribe only the act of acquisition and that the violations of the consent order found as to Bon Ton and Wy**[21]**oming Baking did not constitute a 'continuing failure or neglect to obey' said order. Accordingly the government's demand for imposition of daily penalties under 15 U.S.C. §§ 21(*l*) and 45(*l*) is denied. Once these two acquisitions were accomplished, the violations were complete."

Counsel for both parties have cited no cases directly in point, nor has our own independent research disclosed any such cases, dealing with what constitutes a "continuing failure or neglect to obey" a consent order of the type here in question for the purposes of imposing daily penalties for violation. 15 U.S.C. §§ 21(*l*), 45(*l*).

ITT Continental argues that the FTC order in this case does not proscribe the "holding of assets," but merely the acquisition thereof, and therefore there can be no continuing failure to obey the order by virtue of ITT Continental's holding of the dealership assets once they were initially acquired.

The Government, on the other hand, asserts that because a ban on acquisitions has been construed as a ban on the relationship such acquisitions create, see *United States* v. *du Pont & Co.*, 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957); *Gottesman* v. *General Motors Corp.*, 414 F.2d 956 (2d Cir.), the parties in this case intended to prohibit, by the consent order, the relationship created by such acquisitions in the same or similar manner that section 7 of the Clayton

Act, 15 U.S.C. § 18, prohibits such relationship or effects. See *United States* v. *du Pont & Co.*, 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957).

[2] As we have recognized above, the scope of a consent decree must be discerned within its "four corners," *United States* v. *Armour & Co.*, 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed.2d 256, and must be construed "as it is written."

[3] The "consequences" argument is significant as to penalties to be assessed for violation of the order; that is, whether the order was directed to the acquisition or to the acquisition and retention of assets or interests. We have indicated above that we agree with the determination of this issue by the trial court. This was an interpretation of the consent order, and the result is in accordance with the prevailing standards. This court has determined that the three acquisitions were in violation of the order. The imposition of the penalties does not insulate the consequences of the acquisition from further proceedings which remain available to the Government. The defendant has taken the position that the order did not extend to the holding of assets acquired contrary to the order, or to the consequences thereof. The trial court so held and we have affirmed on this point. Thus the consequences of holding have been held to be outside the order, and outside the penalties, and outside of this action.

[4] Divestiture as a remedy was advocated and advanced by the Government, but the trial court did not include it in its order. The extent of the penalties is within the discretion of the trial court. The trial court had jurisdiction to order divestiture or equitable remedies generally.

The case is remanded only for the imposition of a penalty by the trial court for the violation of the order in the Sheppard Baking Company acquisition as a single violation, in whatever amount the court sees fit within the statutory limits. Otherwise, the case is affirmed.

WILLIAM E. DOYLE, *Circuit Judge*, (concurring).

While I concur in the court's opinion, it is with reluctance that I approve of the remedy which has been imposed. Considering the frequency and magnitude of defendant-appellant's transgressions in this case, the mere imposition of a fine falls far short of a satisfactory outcome. Ordinarily a divestiture of the wrongfully acquired businesses would be the proper remedy, both to fulfill the objective of the antitrust laws, and to deter the defendant-appellant and other similarly-situated entities from commit**[22]**ting such abuses in the future. *Ford Motor Co.* v. *United States*, 405 U.S. 562, 573, 92 S.Ct. 1142, 31 L.Ed.2d 492 (1972); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 84

S.Ct. 1044, 12 L.Ed.2d 12 (1964); *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 328–335, 81 S.Ct. 1243, 6 L.Ed. 2d 318 (1961); *Schine Chain Theatres* v. *United States*, 334 U.S. 110, 128, 68 S.Ct. 947, 92 L.Ed. 1245 (1948); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189, 65 S.Ct. 254, 89 L.Ed. 160 (1944); *United States* v. *Beatrice Foods Co.*, 351 F. Supp. 969 (D.Minn.1972). However, I have concluded that because of deficiencies in the consent decree and other factual characteristics of this case, the result reached, while weak, is within the range of remedies the trial court may impose. On this basis I agree with the result.

F.T.C. v. JULIO R. GALLO*

Civ. A. No. 653-73. FTC File No. 99-144.

(United States District Court for the District of Columbia, October 9, 1973)

In a proceeding seeking enforcement of an investigatory subpoena, the court required the petitioner to file affidavits addressing themselves to particular questions of bad faith raised by the respondent in its counterclaim attacking the legality of the F.T.C.'s subpoenas and seeking reversal of the Commission's denial of motions; and deferred determination of sufficiency of counterclaim and merits of request for discovery on issue of harassment until after receipt of the affidavits.

Harold H. Titus, Jr., U.S. Atty., *Arnold T. Aikens* and *Thomas G. Corcoran*, Asst. U.S. Attys., *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, and *Gerald Harwood*, Atty., for petitioner.

Elliot S. Kaplan, of *Robins, Davis & Lyons*, Minneapolis, Minn., *William D. McKee*, of *Orrick, Herrington, Rowley & Sutcliffe*, San Francisco, Calif., and *Jacob A. Stein*, of *Stein, Mitchell & Mezines*, Wash., D.C., for respondent.

Before Parker, *District Judge.*

MEMORANDUM OPINION AND ORDER

Parker, D. J.: This is a petition by the Federal Trade Commission (Commission or FTC) for an order requiring respondent, Julio R. Gallo, President, E. & J. Gallo Winery, to produce records and documents in compliance with a subpoena *duces tecum* issued by petitioner in the course of an investigation of respondent.

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 74,740, at 95,241 (1973-2 Trade Cases). See also p. 806, herein.

By resolution dated May 31, 1972 the FTC began an investigation to determine whether Gallo and other parties were engaged in unfair methods of competition and discriminatory acts and practices in violation of the laws administered by the Commission. Pursuant to the resolution a subpoena *duces tecum* was issued and served on respondent, and subsequent subpoenas were served on respondent's advertising agencies, Erwin Massey, Inc. and Young & Rubicam. Motions to quash these subpoenas were denied by the agency. A motion for a protective order filed by respondent to halt the issuance of any subpoenas to its distributors was similarly denied. Respondent thereupon advised the Commission that it considered the rulings on its motions to have been erroneous and would not produce the subpoenaed documents. This action was brought by the Commission pursuant to 15 U.S.C. § 49 [1] to compel compliance with its subpoena.[2]

Respondent answered the FTC petition and included a counterclaim in which it attacked the legality of the Commission subpoenas and sought review and reversal of the denial by the Commission of its motions and of the motions filed by its advertising agencies. The counterclaim prayed for an order quashing the subpoena served on respondent and enjoining the enforcement of subpoenas served on its advertising agencies or any other persons in connection with the FTC investigation.

Of the several theories presented in support of the relief requested in the counterclaim,[3] the one which gives the Court concern is the allegation that members of the Commission staff engaged in deceit and harassment in order to obtain information from respondent, and used this information as a basis for issuing the resolution which authorized the instant investigation and subpoena. In order to prove the assertions of misconduct in its counterclaim respondent has attempted to use the discovery process and has served three commission staff attorneys with a notice of taking depositions and subpoenas *duces tecum*. The Commission has requested a protective order prohibiting all discovery in this proceeding, and moved for dismissal of respondent's counterclaim, or in the alternative, for summary judgment. The Commission urges that respondent's claim that information was improperly obtained is not material to the issue before the Court, which is whether to enforce subpoenas issued pursuant to a lawful FTC investigation. Rather, the Commission would have respondent raise its claim if and when the allegedly "tainted" information is ever sought to be used against respondent in an adjudicatory proceeding. And since the matters to which Gallo's discovery is directed are not material to this proceeding, the Commission argues that discovery should be denied.

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[1] 15 U.S.C. § 49 provides in pertinent part:

"[I]n case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

[2] In a companion action, *Federal Trade Commission* v. *Sidney Marshall*, Civil Action No. 654–73, brought to enforce the subpoena *duces tecum* issued to Young & Rubicam, an order enforcing the subpoena was signed on May 11, 1973.

[3] Respondent also argues that the subpoena should be quashed because the matters sought to be investigated by the Commission are not within the scope of its authority, the subpoena was not issued in compliance with Section 9 of the Federal Trade Commission Act, and the subpoena does not provide for sufficient confidentiality for the demanded documents. These contentions are found to be without merit. First, the Commission's power to investigate possible anti-competitive by Gallo is conferred by Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Sections 2, 3 and 10 of the Clayton Act, 15 U.S.C. §§ 13, 14 and 21. There is no authority which holds that the Commission is specifically preempted from investigating the alcoholic beverage industry. Second, although the subpoena in this instance was signed by a Commission staff attorney and not by a member of the Commission, the

It is clear that a proceeding to enforce an administrative subpoena, because of the important governmental interest in the expeditious investigation of possible unlawful activity, is summary in nature and that the scope of issues which may be aired in such a proceeding will be limited accordingly. *United States* v. *Powell*, 379 U.S. 48, 57–58 (1964); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652–53 (1949); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 216–18 (1946). The party on whom the subpeona is served is entitled to an adversary hearing at which he may challenge the subpeona on any appropriate ground. *Reisman* v. *Caplin*, 375 U.S. 440, 449. The focus of the enforcement proceedings generally will be on whether the inquiry is within the statutory authority of the agency, the demand not too indefinite, and the information sought reasonably relevant to the inquiry. Because the Courts are cautious to avoid undue and premature interference with administrative investigations, the subpoenaed party ordinarily will not be permitted to expand the scope of legitimate issues which may be raised in an enforcement proceeding, particularly where he is not immediately adversely affected and will have future avenues of administrative relief and judicial review open to him.

Court finds that this practice is in compliance with Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, following the ruling in *Federal Trade Commission* v. *Gibson*, 460 F.2d 605 (5th Cir. 1972). Third, as to the confidentiality of the subpoenaed documents, respondent acknowledges that it is the policy of the Federal Trade Commission Act, the courts, and the Commission itself to provide for the confidentiality of subpoenaed information. It is presumed that information of this nature will not be disclosed. At such time as there is reason to believe otherwise, respondent then may seek additional protection.

But dispite the summary nature of the proceedings, the exercise of the judicial power to enforce an administrative subpoena is discretionary and may be withheld where enforcement would involve an abuse of the court's process. *Powell*, *supra*, at 58; *Walling*, *supra*, at 216; *United States* v. *Newman*, 441 F.2d 165, 169–170 (1971); *United States* v. *Roundtree*, 420 F.2d 845, 851 (1969).

> Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass [the subpoenaed party] or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. *Powell*, *supra*, at 58.

Moreover, when a party seeks to invoke the equitable powers of the Court, inquiry may be made, upon proper cause shown, as to whether the party seeking relief has come into court with "clean hands."

Respondent raises three points which challenge the Commission's good faith in actions related to its request for enforcement of the subpoena. First, it is asserted that during the pendency before the Commission of respondent's motion to quash the subpoena, FTC staff attorneys demanded that respondent immediately begin producing the subpoenaed documents. The FTC attorneys allegedly threatened that if respondent did not comply, notwithstanding the pendency of the motion to quash, a new subpoena would be prepared which would be much broader than the one previously served; that the Commission would renege on an agreement entered into between counsel and the Commission staff concerning the filing of the motion to quash and the production of certain documents; that, contrary to prior representations by the Commission, Julio R. Gallo would be required to appear personally in Washington, D.C., on the return date of the subpoena; and that the Commission staff would begin to conduct expansive field investigations which the staff was certain Gallo would not like to have proceed.[4] Second, it is contended that the Commission deceived respondent into voluntarily supplying information upon an agreement that it would be used only in connection with an investigation of Gallo's competitors when in fact the Commission sought to use this data for an investigation of Gallo, which, unknown to respondent, was already in progress.[5] This action is claimed to have been in violation of an FTC rule [6] which requires that a person under investigation who is requested to furnish information be advised of the purpose and scope of the investigation. Finally, the Commission is charged with further violating its agreement with respondent by using the information furnished as a basis for its resolution initiating the formal investigation of Gallo. This belief is based on the allegations that an FTC attorney who was involved in the investigation of Gallo's competitors and who had access to the data supplied by Gallo for that purpose, was also involved in the formal investigation of Gallo; and that another FTC attorney who participated in the Gallo investigation made reference to the nature of the information which respondent furnished in confidence.

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[4] Supplemental Affidavit of Elliot S. Kaplan at 3–6.

[5] Supplemental Affidavit of Ernest Gallo.

[6] Rule § 2.6 of the Federal Trade Commission Rules of Practice provides:

"Any person under investigation compelled or requested to furnish information or documentary evidence shall be advised with respect to the purpose and scope of the investigation."

The state of facts proposed by respondent, if true, would not establish a direct attempt by the Commission to misuse the Court's process, for it has not been shown that the subpoena itself was issued to harass respondent or that the investigation has been conducted for an improper purpose. The facts do tend to show, however, that the present investigation of Gallo is the product of conduct by the Commission which may be categorized as unfair and which raises a substantial question as to whether it would be equitable to grant the Commission the relief which it is seeking. Consequently, before proceeding any further in this case, the Court will require petitioner to prepare detailed affidavits, from those persons having personal and immediate knowledge, which address themselves to the questions of bad faith raised by respondent. Specifically, the affidavits should state whether any form of harassment was used to secure compliance with the subpoena issued to respondent, whether any information was improperly obtained from respondent, and whether such information was employed in the initiation of the investigation of respondent. The Court will defer determination of the sufficiency of respondent's counterclaim and the merits of its request for discovery until after receipt of the affidavits from the Commission.

Accordingly, it is, this 9th day of October, 1973,

Ordered that on or before October 31, 1973, petitioner will file affidavits in conformance with this opinion.

IN THE MATTER OF

KOSCOT INTERPLANETARY, INC., Debtor.*

Bankruptcy Proceedings No. 73-179-ORL-P. FTC Docket 8888.

(United States District Court for the Middle District of Florida, Orlando Division, October 12, 1973)

On application for an injunction to stop F.T.C. administrative hearings, the court held that the Bankruptcy Court lacks power to enjoin the F.T.C. because of the principle of sovereign immunity.

Before PASKAY, *Bankruptcy Judge*.

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*Not otherwise reported. For case before the Commission, see 86 F.T.C. 1106, *modified* 87 F.T.C. 75, *clarified* 87 F.T.C. 419. See also pp. 791, 805 herein.

ORDER ON APPLICATION FOR INJUNCTION AGAINST THE FEDERAL TRADE COMMISSION

The matter under consideration presents a seemingly irreconcilable conflict between the purpose and the well established policy of a relief chapter of the Bankruptcy Act and the doctrine of sovereign immunity. The matter is brought before this Court by Koscot Interplanetary, hereinafter referred to as Koscot, the debtor involved in this arrangement proceeding. The particular relief sought by Koscot is a temporary injunction against the Federal Trade Commission, hereinafter referred to as FTC, an agency of the United States Government, which agency scheduled a hearing for October 16, 1973, a proceeding in which Koscot is one of the respondents.

The operating factors germane to this controversy are largely without dispute. Although the initial response filed by the FTC to the debtors application raised numerous issues, none of them are really relevant and the matter is controlled by the applicability *vel non* of the doctrine of sovereign immunity. Only the resolution of this question is determinative of the issues involved.

The power of the Bankruptcy Court to enjoin and restrain the Commission or the continuing of any action against the debtor involved in an arrangement proceeding is based on an express grant by Congress. Sections 2(a)(15); 11; 314; and 372 of the National Bankruptcy Act.

This injunctive power was obviously granted to the Bankruptcy Court in order to assure and extend the fullest and broadest possible protection to debtors and, or course, in order to effectuate the overall policy aims of the Chapter which is rehabilitation of financially embarrassed debtors. Since an arrangement proceeding is remedial in nature the protective measures available must be liberally construed in favor of the debtor and the injunctive relief sought here would ordinarily be granted without any further comment if sought against a private litigant. The fact of the matter is such a general restraining order and injunction has already been entered at the commencement of the proceeding. The difficulty of the matter under consideration stems from the undeniable fact that the relief sought by the debtor is not against a private litigant, but against a non-proprietary agency of the United States which is in fact the United States of America. *Sprouse* v. *Federal Prison Industries, Inc.*, 480 F.2d 1 (1973). This fact immediately brings into play the doctrine of sovereign immunity which may or may not govern this controversy. Thus whether or not the injunction sought is against a commission qua commission or against the administrative judge in charge of the case pending before the Commission or against the prosecuting counsel, the injunction if issued would be in reality an injunction against the United States.

The proposition that the United States cannot be sued without its consent is so well established that it needs no elaborate discussion. *Dugan* v. *Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); *State of Hawaii* v. *Gordon*, 373 U.S. 57, 83 S.Ct. 1052, 10 L.Ed.2d 191 (1963); *Robinson* v. *Parkhurst* 289 F. Supp. 528 (1968). It is equally well established that the protection granted to the Government by the doctrine of sovereign immunity is not limited solely to suits which are either in personam or in rem but includes actions for injunctive relief. *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 60 S.Ct. 488, 84 L.Ed. 724 (1940); *in re Townsend* 348 F. Supp. 1284 (1972).

Thus unless in this particular instance it appears that the Government waived its immunity either expressly or by implication the relief sought is clearly within the protective reach of the doctrine and cannot be granted.

It is now uniformly established that the "to sue or to be sued" clause frequently used by Congress in statutes creating the various government agencies is tantamount to a waiver of immunity unless the statute which created the agency in question limits the waiver by express language. For instance the Circuit Court in the case of *United States* v. *Mel's Lockers, Inc.*, 326 F.2d 168 (10th Cir. 1965), expressly held that the Bankruptcy Court lacked jurisdiction to issue an injunction against the Small Business Administration because of the applicability of the doctrine of sovereign immunity. While it is true that in that case the statute which created the agency contained the clause "to sue or to be sued" 15 U.S.C. 634(b) it also expressly prohibited the issuance of any attachment, injunction or garnishment against the agency. Accordingly in absence of such restriction an agency could be sued if the statute which created it provides that it may sue or be sued and the Bankruptcy Court in such instances does possess the power to issue in an appropriate case an injunction against the agency. For instance, in the case of *In re Townsend*, *supra*, an injunction by the Bankruptcy Court was found to be proper against the Veteran's Administration since the statute which created that agency contained the clause "to sue or to be sued", 38 U.S.C. 1820, and unlike the statute which created the Small Business Administration did not limit the extent of the waiver, 15 U.S.C. 631(a) 634(b). See also *Federal Housing Administration* v. *Burr*, *supra*, a case which involved a suit against the F.H.A. where the injunction was found to be proper because of the "to sue or to be sued" clause in the statute. *Act of August 23, 1935, c.614, 49 Stat. 684, 722.* The statute which created the Federal Trade Commission, 15 U.S.C. para. 41 et seq. is totally silent in respect and has no provision for any suits either by or against the Commission. Accordingly the Commission is protected by the doctrine unless a consent to be sued could be found elsewhere by implication. This is precisely the position of the debtor who urges that inasmuch as there is no statute which expressly prohibits the issuance of an injunction against the Commssion, a prohibition which was the controlling factor in *United States* v. *Mel's Lockers, Inc., supra*, the injunctive provisions of the Bankruptcy Act are available and could be used against the Commission in order to carry out the purpose of this chapter. While this argument may appear to be persuasive at first blush, it does not bear a close analysis and is contrary to the controlling case laws as enunciated by the Courts. *Sprouse* v. *Federal Prison Industries, Inc., supra.* The proceeding now pending before the Commission no doubt seriously effects the debtor. To require the debtor to proceed to participate and to defend its interest before the Commission would certainly seriously hamper its efforts to obtain rehabilitation before this Court and may very well be instrumental in the ultimate demise of the debtor if the proceeding before the Commission will continue. The evidence presented indicates that there will be at least two weeks of additional hearings before the Commission concludes its presentation of its case in chief. If the debtor is compelled to proceed as scheduled before the Commission it will require the retention of counsel and it will incur a minimum of $30,000 in legal fees and expenses that the debtor can hardly afford at this time, when all its resources should be concentrated on matters which pertain to the arrangement proceeding. In this connection it should be pointed out that according to the evidence presented the chief executive of the debtor will have to actively participate in the proceeding before the Commission for the purpose of assisting counsel and his absence will certainly place an additional and heavy burden on the debtor. There were more than 450 law suits filed against the debtor prior to the institution of this proceeding by private litigants and by various attorney generals filed on behalf of their respective states. All those actions are restrained and enjoined. The conclusion and holding set forth herein shall no way be construed to effect those actions or to modify to any extent the general restraining order and injunction. This is so because the protection of the doctrine of sovereign immunity is limited in its application to the United States of America and this Court clearly does possess the power to restrain and enjoin pursuant to the specific grant by Congress any and all actions including actions filed by various states of the Union.

The nature of the proceeding before the Commission is primarily directed to establish that the debtor in selling distributorships was guilty of deceptive trade practices in violation of 15 U.S.C. Section 45, guilty of vertical price fixing and illegal restraint of trade, *Robinson-Patman amendment* to § 2(b) *Clayton Act* 15 U.S.C. § 13. Thus the primary if not the sole purpose of the proceedings before the Commission is to stop Koscot from continuing this allegedly fraudulent practice. To that extent the proceedings before the Commission are nothing but an exercise in futility since Koscot no longer sells distributorships. Koscot now operates under the aegis and control and supervision of this Court. The authority granted to Koscot to operate its business did not and does not include the authority to sell distributorships. On the contrary Koscot is expressly prohibited by this Court to engage any further sales of distributorships or pyramid sales. Koscot is permitted and engaged in the selling of cosmetics through its distributorships already established. Whether or not Koscot is in this activity violating any provisions of the law which prohibits vertical price fixing or illegal restraint of trade are matters properly within the jurisdiction of the Commission. It must be kept in mind, however, that the debtor merely seeks a temporary respite and does not contend that its entitled to a permanent injunction. The fact of the matter is that the debtor did agree to enter a consent decree and did sign such a consent decree prepared by the government which however was ultimately rejected. Thus the proceeding seems to serve no other purpose at this time except maybe to beat a dying horse. This is so because the alledged purpose of the Commission to proceed with the matter is to protect the interest of the public, an interest which is not threatened by the debtor at this time at all. As noted above the power of the Commission to issue a cease and desist order against Koscot is well established if the charges are proven. The Commission also has the statutory power to order a restitution. However to the extent such a relief is contemplated the decree of restitution will be meaningless unless the parties in whose favor of restitution is ordered properly filed a proof of claim with this Court within the time provided by the Act and further provided that the claims are ultimately allowed. This is so because the Bankruptcy Court is the only forum where claims may be presented against the debtor involved in an arrangement proceeding. It is also clear that claims not duly filed and allowed will be rendered unenforceable if the debtor obtains confirmation unless such claims are removed from the protective provisions of the discharge by a favorable consideration by this Court of a timely complaint filed pursuant to Section 17c of the Act.

It is unfortunate indeed that in light of the foregoing the Commission insists to proceed with the hearing as scheduled unless enjoined by this Court. Having considered the respective interests of the parties the nature and the purpose of the proceeding before the Commission, the respective benefits and detriments resulting from the proceeding this Court is satisfied that all equities are in favor of the debtor and the relief prayed for is badly needed and if granted would be well deserved. However, having considered the controlling authorities this Court is constrained to conclude that the Commission is protected by the doctrine of sovereign immunity and the injunctive power otherwise possessed by this Court cannot reach the Commission. For this reason the debtor's application for injunction must be denied.

In accordance with the foregoing it is ORDERED, ADJUDGED and DECREED:

That the debtors application for preliminary injunction be and the same is hereby denied.

UNITED STATES OF AMERICA v. KOSCOT INTERPLANETARY, INC., ETC., ET AL.*

No. 73-71-Orl-Cr. FTC Docket 8888.

(United States District Court for the Middle District of Florida, Orlando Division, October 17, 1973)

On the ground that the right of the defendants and the United States to receive a fair and impartial trial would be seriously jeopardized, the court issued an order preventing parties and witnesses in the criminal case from making statements in any other forum concerning the issues of the case.

Before Tjoflat, *District Judge.*

ORDER

It is apparent to the Court that the right of the defendants and the United States to receive a fair and impartial trial in this case will be seriously jeopardized, if not foreclosed, if the parties and material witnesses are caused to appear in other forums or places and make statements or give testimony, which might reflect on any of the issues or parties here on trial.

The Court takes judicial notice that the trial of this case commenced in a background of publicity of such magnitude that the selection of a fair and impartial jury, free from the bias and influence of such publicity, was made difficult and painstaking. It required

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*Not otherwise reported. For case before the Commission, see 86 F.T.C. 1106, *modified* 87 F.T.C. 75, *clarified* 87 F.T.C. 419. See also pp. 786, 805 herein.

the summoning of approximately 225 veniremen to obtain what the Court deems a fair and impartial jury.

When the jury was sworn the Court and parties anticipated that the trial would be protracted because of the vast number of witnesses who would be called to testify and because the complex evidentiary issues involved in the case were expected to produce intermittent delays. For this reason it was decided that sequestration of the jury would work an undue hardship on the jurors and their families and would create an atmosphere in which justice would be difficult to accomplish. Thus the jury has been free during non-working hours under strict instructions to avoid news releases and other publicity about the case and the parties thereto.

The Court has now been made aware of litigation in various parts of the United States that may well be the subject of widespread publicity if the parties and material witnesses in this case are required to appear or testify in such causes. If past events are any indicator, it is expected that the publicity would be sufficiently intense and prolonged as to be likely to reach the jury in this case notwithstanding this Court's instructions to them and the caution they may exercise.

It is to avoid a mistrial that such publicity could produce and to insure the continued maintenance of a fair and impartial trial that the Court on its own initiative hereby ORDERS that the parties and witnesses under subpoena in this case shall make no statements whatever, in any form whether under process of law or otherwise, which might reflect on any of the issues or parties in this case.

BROWN AUTO STABILIZER CO. v. F.T.C.*

No. 73-1073. F.T.C. Docket 8863.

(United State Court of Appeals, Fifth Circuit, October 19, 1973)

On petition for review of an order of the Federal Trade Commission, Court enforced the order.

William L. Eagan, Orlando, Fla., for appellants.

C. Powers Dorsett, Atlanta, Ga., *William E. Mumford*, Wash., D.C., *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, *Karl H. Buschmann*, Atty., Wash., D.C., for appellee.

Before TUTTLE, BELL, and GOLDBERG, *Circuit Judges*.

PER CURIAM: Enforced. See Local Rule 21.[1]

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*Reported in 485 F. 2d 685. Reported in Trade Reg. Rep. ¶ 74, 741, at 95,244 (1973-2 Trade Cases). For case before the Commission, see 81 F.T.C. 745.

LA SALLE EXTENSION UNIVERSITY v. F.T.C.*

No. 71-1648 F.T.C. Docket 5907

(United States Court of Appeals, Seventh Circuit, October 23, 1973)

On petition to review, court held that Commission order requiring petitioner to disclose, in advertising, that its courses in law are not acceptable to qualify an individual for admission to practice law was not an abuse of Commission discretion. Affirmed and enforced.

Before FAIRCHILD, CUMMINGS and STEVENS, *Circuit Judges.*

ORDER

Petitioner, La Salle Extension University, is a proprietary institution, providing instruction by correspondence. In 1969, 10% of its 100,000 students were taking courses in the field of law. Its gross receipts were $50,000,000, those from sale of its complete law courses $3,300,000. In 1954 a Commission order had required petitioner to cease "representing, directly or by implication, that recipients of [petitioner's] purported academic degrees in law or others satisfactorily completing respondent's course of study through correspondence will be admitted to or are otherwise eligible to participate in bar examinations * * *" except for some four states where correspondence study was then acceptable.

The Commission reopened the proceeding in 1970. An examiner heard evidence tending to show that individuals who relied upon petitioner's advertising concluded that completion of petitioner's law course would be an acceptable educational prerequisite for admission to the bar. The examiner and subsequently the Commission (by a three to two vote) rejected the staff proposal that petitioner be prohibited from offering a law degree, but an order, unanimously adopted, entered June 24, 1971, required petitioner in substance, "clearly and conspicuously to disclose, in type the same size and appearance as the advertising claims appearing thereon: (a) in any advertisement of written offer to sell; (b) on the front page or cover of promotional material or descriptive brochure wherein respondent's law course or law degrees are mentioned and in said promotional material or descriptive brochure on each page on which respondent's law courses or law degrees are mentioned; (c) in each enrollment form, application form, sales contract or similar document; that said courses are not recognized or accepted as sufficient education or legal training

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*Not otherwise reported; *reh. denied* Nov. 14, 1973; *cert. denied* 417 U.S. 909 (1974), 94 S. Ct. 2606. For case before the Commission, see 50 F.T.C. 1083; *modified* 78 F.T.C. 1272.

to qualify the student to become a candidate for admission to the profession of law. * * *", except for appropriate qualification as to any state which will accept such courses. The disclosure in the form petitioner intends to use is: "No state accepts any law home study course, including La Salle's, as sufficient education to qualify for admission to practice law."

(1) Petitioner now says it is willing to abandon offering a law degree, takes the position that any possible misunderstanding which might require the disclosure results from the offering of a law degree, and proposes that we modify the order so as to require disclosure only so long as petitioner offers a law degree. Petitioner's material, however, repetitively emphasizes and promotes with seeming effectiveness the advantages of the "study of law" and "law training." Dropping the references to a law degree would, we think, change the tone very little. We are far from able to say, as a matter of law, that the probability of misunderstanding would be materially reduced if there were no promise of a degree. The two commissioners who felt that dropping the degree should be part of the solution, supported the requirement of disclosure in any event.

(2) Petitioner challenges the requirement that the disclosure appear on each page of promotional material or descriptive brochure on which law courses or law degrees are mentioned. It argues that such frequency is unreasonable. The Commission considered the argument and said that it "might be persuasive if we had reason to believe that prospective purchasers generally read each page of [petitioner's] promotional literature before purchasing." It concluded, however, that the each-page requirement was necessary to protect "the 'ignorant, the unthinking and the credulous,' who may base their decision to purchase on a cursory perusal of the literature at hand."

It is well-established that deference must be accorded to the expertise of an administrative agency, particularly with respect to the appropriateness of remedies.

The Supreme Court has stated "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Industries Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413 (1958). In each case, the court must determine whether the remedy bears "no reasonable relation to the unlawful practices found to exist," *Jacob Siegal Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613 (1946), or whether it is too restrictive, forbidding activities other than those "which if continued would directly aid in perpetuating the same old unlawful practices." *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 727 (1948). See *L. G.*

Balfour Company v. *F.T.C.*, 442 F.2d 1 (7th Cir., 1971); *Spiegel, Inc.* v. *F.T.C.*, 411 F.2d 481 (7th Cir., 1969). We are unable to say that the Commission's decision as to frequency of disclosure was outside the range of reasonableness.

(3) The most difficult problem is posed by the requirement that the disclosure must not only be clear and conspicuous, but "in type the same size and appearance as the advertising claims." Evidently this means the same size and appearance as the largest type used for any word of an advertising claim. The compliance staff so interprets it, and the Commission said, in its opinion, "We note that in certain promotional material, [petitioner's] practice is to use the word "LAW" in large letters with the text of the ad in much smaller letters. Surely a prospective purchaser is entitled to be informed that the course will not qualify him to take the bar examination in letters equally as large as the letters which we find, on the basis of the record, convey this meaning."

Although petitioner argues that the requirement that the disclosure be clear and conspicuous is enough, we have no doubt that the Commission may properly particularize that requirement as to size and appearance of type. See *Parker Pen Co.* v. *Federal Trade Commission*, 159 F.2d 509, 512 (7th Cir., 1946); and *Gimbel Bros.* v. *Federal Trade Commission*, 116 F.2d 578, 580 (2d Cir. 1941).

Petitioner points out that it would be impossible, in some instances, and extremely awkward in others, to print the 20 word disclosure in the same size type as the word "law" or other emphasized word as it appears in its present advertising. The solution offered in the Commission opinion was that petitioner could alter the layout of its material. So put, the requirement is that in laying out each page of material, the designer must select the largest size type he considers appropriate for the disclosure and then design the balance so that no word of an advertising claim will be in larger or more distinctive type than the disclosure.

It would seem possible to design a page of advertising so that the disclosure would attract attention even though larger type were used for some portion of the other material. On the other hand, testimony of record indicates that part of the problem before the Commission arose from deceptive oral promotional efforts by respondent's sales representatives. Bluntly obvious disclosure in the printed matter may be needed to render oral deception more difficult. On balance, a majority of this division of the court concludes that the Commission's choice was not outside the range of reasonableness.

(4) Another problem arises out of the fact that petitioner offers two types of course of study in law. The language of the order is broad enough to cover both.

One type of course of study in law results, when successfully completed, in conferral of an L.L.B. degree. Petitioner also offers specialized courses such as insurance law, claim adjusting law, law for trust officers, law for appellate conferees (I.R.S.), and law for police officers. The order applies "in connection with advertisements or promotion of respondent's courses of study in law or of its law degress [sic]."

Petitioner contends here that the problem before the Commission arose out of offerings of the general courses and that the disclosure will accomplish nothing when made in material concerning the offerings of the specialized courses. It does seem fair to say that the proceeding was mainly directed at promotion of the general courses, although counsel for the Commission points out the difficulty of making a distinction in the order, valid in the future as well as presently, between offerings where deception with respect to eligibility for bar admission will be a problem and those where it will not.

In any event petitioner raised no such question before the Commission, even incorporating the broad language in a form of order proposed by petitioner. Ordinarily a reviewing court should not set aside an administrative order upon a ground not raised before the agency. 3 Davis, Administrative Law § 20.06. The circumstances do not call for a departure from that principle.

The order of the Commission is affirmed and will be enforced.

ASH GROVE CEMENT CO. v. F.T.C. ET. AL.*

Civ. A. No. 1298–71. F.T.C. Docket 8785.

(United States District Court for the District of Columbia,
October 24, 1973)

In suit seeking discovery on allegation that F.T.C. had prejudged and decided in advance its adjudicative complaint, court determined that defendants must be required to produce some, but not all, of the documents requested for the court's *in camera* inspection.

David J. McKean and *Robert L. Williams*, Wash., D.C., for the plaintiff.

Harold H. Titus, Jr., U.S. Atty., *Arnold T. Aikens*, Asst. U.S. Atty., *James T. Halverson*, Actg. Gen. Counsel, F.T.C., *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, F.T.C., and *Karl H. Buschmann*, Atty., F.T.C., for the defendants.

Before RICHEY, *District Judge*.

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 74, 746 at 95,258 (1973-2 Trade Cases). For case before the Commission, see 85 F.T.C. 1123. See also pp. 565, 815, 1321, 1371, 1533 herein.

MEMORANDUM OPINION

I. BACKGROUND

RICHEY, D. J.: This cause came before the Court for hearing on plaintiff Ash Grove Cement Company's Motion for Entry of a Third Memorandum Order, which would require defendant Federal Trade Commission to produce for *in camera* inspection and pursuant to the Freedom of Information Act certain documents in the FTC's possession, and for hearing on Defendants' Renewed Motion for Summary Judgment, which would have the effect of precluding the *in camera* inspection and production of said documents. Plaintiff is currently the respondent in an FTC adjudicative proceeding relating to Plaintiff's possible violation of the antitrust laws. In that proceeding, Plaintiff has asserted the defense that the Commission had illegally prejudged and decided in advance all of the allegations of the adjudicative complaint. Plaintiff further asserts that the documents sought in the instant lawsuit are necessary to substantiate that defense. This Court has already entered two Memorandum Orders directing that certain steps be taken by Defendants with regard to the documents in question.[1] Upon consideration of the instant Motion, the Court has determined that Defendants must be required to produce some but, not all, of the documents requested for the Court's *in camera* inspection.

II. ISSUES

There are four categories of documents being sought by the Plaintiff. These categories consist of: (1) internal memoranda of the FTC; (2) FTC investigative files; (3) directive-type minutes from members of the Commission to members of the Commission staff; and (4) "chronological minutes", which are essentially accounts of the Commission's executive meetings and the deliberations of the Commission. Defendants have identified and Plaintiff has specified with particularity 42 documents sought in the first category, 4 in the second and 17 in the third. The particular documents sought in the fourth category have not been delineated by either party. The sole issue with respect to all of these documents is whether they fall within one of the nine exemptions listed in the Freedom of Information Act, 5 U.S.C. § 552(b).

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[1] *Ash Grove Cement Company* v. *FTC*, Civil Action No. 1298–71, Memorandum Order and Second Memorandum Order, both filed February 22, 1973.

III. DISCUSSION

A. The Commission Has Described Its Internal Memoranda With Sufficient Particularity To Demonstrate Exemption From Production Under The FOIA.

Under its prior Orders, the Court requested the Commission attempt a review, deletion and disclosure with respect to documents previously listed by the Commission as intra-agency memoranda for which it had claimed exemption under the FOIA, 5 U.S.C. § 552(b)(5).[2] Many of those documents were later released to the Plaintiff's counsel for their inspection. Those memoranda which the Commission still believes to be confidential under the fifth statutory exemption and relevant case law, and which the Commission has refused to produce, have been listed and described in an affidavit filed by Charles H. Koch, an attorney in the Commission's Office of General Counsel.[3] Out of this group, Plaintiff has narrowed its request to 42 documents.

Since the oral hearing, the Court has again carefully reviewed the affidavit containing the description of these documents. Both parties agree that the documents are correctly categorized as inter- or intra-agency memoranda, but Plaintiff contends that they must nonetheless be produced under the rationale that the Commission may have relied upon the documents in determining policies and interpretations which became in effect "secret law". Documents constituting such "secret law" must be produced under the case law developed by the Court of Appeals for the District of Columbia.[4] Moreover, Plaintiff contends that the description of the documents contained in the Koch affidavit are so conclusory as to prevent the Court's accurate determination of their nature without first conducting an *in camera* inspection.

The Supreme Court in *Environmental Protection Agency* v. *Mink* held that *in camera* inspection of agency documents need not be automatic if the agency can demonstrate through affidavit that the documents sought are exempt under the FOIA.[5] In the instant case, the affidavit submitted on behalf of the Commission lists each document and describes in general terms its content. These descriptions are more than mere conclusions. They provide the Court with enough information to enable it to determine which division of the agency (and in many instances which individual within the agency) authored the memo, to which division (or individual) the memo was sent, and the particular areas of policy or other matters which were discussed. The Court is of the opinion that these descriptions are sufficiently detailed to demonstrate that the memos are in fact expressions of opinions and internal discussions of policy. It is exactly these types of memoranda which the fifth exemption was designed to protect from disclosure.[6] The Court believes that to require a more detailed affidavit from the Defendants would be tantamount to requiring full disclosure of the substance of the documents.[7] Therefore, unless these documents contain "secret law", they are exempt.

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[2] 5 U.S.C. § 552(b)(5) provides that an agency is not required to make its records available for inspection if such records consist of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency".

[3] Affidavit of Charles H. Koch, Jr., Office of the General Counsel, FTC, filed March 22, 1973.

[4] *Sterling Drug* v. *FTC*, 450 F.2d 698 (C.A.D.C. 1971); *American Mail Line, Ltd.* v. *Gulick*, 411 F.2d 696 (C.A.D.C. 1968).

[5] *EPA* v. *Mink*, 410 U.S. 73 (1973)

As to whether the memos constitute the basis for or contain "secret law", the Court starts with the assertion in Mr. Koch's affidavit that "none of the documents reveal 'secret law' which is binding on the agency, and none of them constitutes the basis for Commission decisions".[8] While this assertion might not of itself be sufficient to preclude further examination, there are other factors which support the truth of this statement. The most important of these is that *none of the memoranda sought under this category were issued by the Commission itself*. Rather, the memos were for the most part communications between staff members, staff members and the Commission, and individual Commissioners and the Commission. There is no indication in the record that any one or more of the memos sought by Plaintiff were used to formulate or contain "secret law", and indeed, the Court discerns no likelihood that such is the case in view of the fact that none of these memoranda were issued by the Commission. If the Commission has in fact developed any "secret law", it would in all probability have been developed through study of a multitude of sources, no one of which would constitute an accurate picture of the final result. Moreover, in the event that an examination of other Commission documents reveals that the memos in this category do contain "secret law", the Court can at that time inspect the memo or memos to which reference has been made. This was the general procedure set forth by the Court of Appeals in the *Sterling* case, and the Court believes that such a procedure is both appropriate and applicable here.[9] Accordingly, the Court will not at this time require the production of documents listed in category one for *in camera* inspection.[10]

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[6] *Sterling Drug, Inc.* v. *FTC, supra* at 705–08; *Bristol-Meyers Co.* v. *FTC*, 424 F.2d 935, 939, *cert. denied*, 400 U.S. 824 (1970); *American Mail Line, Ltd.* v. *Gulick, supra* at 703.

[7] In *Vaughn* v. *Rosen*, 42 U.S.L. Week 2137 (C.A.D.C. August 20, 1973), the Court stated: "An analysis sufficiently detailed would not have to contain factual descriptions that if made public would compromise the secret nature of the information but could ordinarily be composed without excessive reference to the actual language of the document."

[8] *Koch Affidavit, supra* at 2.

[9] *Sterling Drug, Inc. v. FTC, supra* at 706–07.

B. The Court Will Require the FTC To Produce For In Camera Inspection Those Memoranda Which It Has Labelled As Investigatory Files.

The Freedom of Information Act, 5 U.S.C. § 552(b)(7), exempts from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency". The Defendants claim that this portion of the statute creates a blanket exemption for all memoranda and documents listed as "investigatory files" in the Koch affidavit.

While there is no doubt that Plaintiff is currently the subject of a pending proceeding before the Commission, the Court is not content with the simple listing of documents under the heading of investigatory files, without a more thorough explanation of the substance of those documents. A more detailed examination is required in order to determine whether those documents contain any materials which might be discoverable by a person "charged with violations of federal criminal law".[11] The Court will accordingly conduct an *in camera* inspection of the four memoranda sought by Plaintiff and listed by the Defendants as investigatory files.

C. The Court Will Require The FTC To Produce For In Camera Inspection Those Commission Minutes Which Constitute Staff Directives.

In its Second Memorandum Order, the Court recognized two types of Commission minutes, both of which types were being sought by the Plaintiff. One of these types consists of "directives by the Commission and communications of policy between the Commission and its staff",[12] and may be named "blue minutes" because they are printed in blue mimeograph lettering. The Defendants contend that these memoranda are exempt under the fifth exemption of the FOIA. The Court requested review, deletion and disclosure similar to that to be conducted for other documents for which exemption was claimed under 5 U.S.C. § 552(b)(5).

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[10] The Court notes that a very small proportion of the documents sought may contain factual and statistical data which may be separable from the opinions and discussions contained in such documents, although Defendants' affidavit asserts that this is not the case. While such factual information would normally be subject to disclosure. Plaintiff does not appear to be concerned with this type of information, and accordingly, the Court will not undertake the process of filtering it out of the documents.

[11] *Bristol-Meyers Company* v. *FTC, supra* at 939.

[12] *Koch Affidavit, supra* at 2.

While the Koch affidavit filed in response to the Court's request lists and describes in some detail those memoranda, the Court is nonetheless of the opinion that the 17 memos still being sought by Plaintiff should be produced for *in camera* inspection. The reason for this is obvious, for if any of the documents sought demonstrate the existence of "secret law", it would appear in the Commission's directives to its staff and/or communications of policy between the Commission and its staff.

D. The Commission's "Chronological Minutes" Are Exempt From Disclosure Under The Fifth Exemption Of The Freedom Of Information Act.

The second type of minutes sought by Plaintiff are called "chronological minutes" by the Commission. These minutes have been identified as: [13]

> [A]ccounts of the Commission's executive meetings and conferences * * * the deliberations of the Commission such as exchange of opinions between individual Commissioners, their recommendations, motions, discussions and statements. They also contain staff recommendations and involve pending cases, internal reorganization procedures, personnel actions, policy determinations and generally reflect the Commission's decision making process.

In its Second Memorandum Order, the Court requested Defendants to treat these chronological minutes in the same manner they were to treat other documents claimed to be exempt under 5 U.S.C. § 552 (b) (5). In response to this request, the Defendants, rather than listing and describing this group of documents, reasserted their contention that they are exempted pursuant to § 552(b) (5) without the necessity of *in camera* inspection or a description with particularity. Plaintiff, while apparently accepting the characterization of chronological minutes as set forth above, argues that these documents may contain evidence of "secret law" and as such must be produced, at least for *in camera* inspection.

Upon further consideration of this issue, the Court does not believe that Plaintiff's assertion that an examination of the Commission's chronological minutes will uncover evidence of "secret law" is sufficient in this case to overcome the need to preserve the free flow of ideas between Commissioners. In this regard, the Court is in full agreement with the majority in the *Sterling Drug* case, wherein the Court of Appeals stated: [14]

> In most agencies the exchange of views between Commissioners or Board members is considered perhaps the most essential element in the decisional process.

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[13] *Second Memorandum Order, supra* at 2-3.

[14] *Sterling Drug, Inc.* v. *FTC, supra* at 708.

> Thus, continual expression of ideas and strong advocacy of positions are to be encouraged to the fullest at this level. In our opinion any attempt to separate a Commissiioner' statements as to the basis for a past decision from his views regarding the disposition of a current case and to disclose the former might well infringe upon these essential communications.

Accordingly, the Court will not require Defendants to do any more than has already been done with respect to the Commission's chronological minutes, and no *in camera* inspection will be required. In the event that an examination of the Commission's "blue minutes" reveals that its chronological minutes do contain evidence of "secret law", the Court can at that time inspect the memo or memos to which reference has been made.

IV. CONCLUSION

In conclusion, the Court will deny Defendants' Motion for Summary Judgment pending an *in camera* inspection of those investigatory files and Commission staff directives specified by the plaintiff. No *in camera* inspection of those memoranda discussed in Section III. A. of this Opinion, or of those memoranda labelled as chronological minutes of the Commission will be required or undertaken at this time.

BORDEN, INC. v. F.T.C.*

Civ. A. No. 73 C 1187. FTC Docket 8866.

(United States District Court for the Northern District of Illinois, Eastern Division, October 29, 1973)

In an action for declaratory judgment determining the jurisdiction of the F.T.C., court was not persuaded that F.T.C.'s jurisdiction was so clearly lacking that plaintiff should not have to exhaust its administrative remedies.

Before McLAREN, *District Judge.*

MEMORANDUM OPINION AND ORDER

This matter is before the Court on defendant's motion to dismiss Count II of the complaint.[1] The motion is granted.

The complaint alleges that the Federal Trade Commission ("FTC") filed a complaint against Borden, Count III of which charges Borden and A&P with an illegal combination, the effect of which was price stabilization. It is further alleged that counsel for the FTC have

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*Not otherwise reported. For case before the Commission, see *In the Matter of the Great Atlantic & Pacific Tea Company, Inc., et al.*, 87 F.T.C. 962. See pp. 688, 931 herein for rulings as to Count I.

chosen 1964 through 1968 as the relevant period of proof for purposes of its complaint against Borden. The issuance of the FTC's complaint was preceded by an FTC investigation of Borden's sale of private label fluid milk products to A&P stores in the Chicago area. This investigation was commenced some time prior to March 1967 and Borden was informed that the purpose and scope of this investigation was to determine whether Borden's sale of milk in Chicago involved illegal price discrimination in violation of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), or sales at unreasonably low prices or at prices below costs for the purpose of eliminating or lessening competition in violation of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. It is also alleged that in October 1969 Borden was informed that the FTC authorized by formal resolution an investigation of Borden with respect to possible discriminatory pricing practices.

Borden further alleges that it first received notice of the FTC's intent to charge it with illegal combination on June 1, 1971. It is also alleged that the private label negotiations between Borden and A&P allegedly occurred in 1964 and 1965 and that discovery conducted since the issuance of the FTC complaint has revealed that substantial information for the 1964–1968 period is no longer available.

The FTC's investigation of this matter and its failure to give timely notice allegedly breached the FTC's statutory duty of expeditious proceeding, as imposed by the Administrative Procedure Act, 5 U.S.C. §§ 551–559. It is also alleged that the FTC has been guilty of laches and has substantially impaired Borden's ability to present a full and adequate defense, in violation of the Administrative Procedure Act, 5 U.S.C. § 556(d), and the Due Process Clause of the Fifth Amendment to the United States Constitution. Based on the foregoing, Borden contends that the FTC is without authority to proceed under its complaint and that any subsequent action thereon is null and void.

Borden raised these same contentions in a motion to dismiss filed before the FTC on October 26, 1972. On February 13, 1973, the motion was denied by an administrative law judge, who, on April 24, 1973, also denied Borden's motion for reconsideration or, in the alternative, certification to the FTC. The order dated April 24, 1973, was based in large part on the opinion expressed by the Commission when it denied A&P's motion to dismiss that raised these same contentions: the question of inability to defend the action could not be answered until the conclusion of the hearings.

Borden agrees that the question of the denial of an adequate opportunity to defend can be raised again at the conclusion of the hearings and that the issue here is whether it is required to exhaust administrative remedies. As noted in this Court's opinion dated June 7, 1973 at 6: "* * * the exhaustion doctrine relates to the timing of, rather than the power to, review, and rests, at least in part, on general equity principles. *Bannercraft Clothing Co.* v. *Renegotiation Bd.*, 466 F.2d 345, 355–59 (D.C.Cir. 1972)."

One of the equitable principles to be considered is whether the party will experience irreparable injury. Borden naturally expresses confidence that it will prevail on the merits of its constitutional claims. The irreparable injury it alleges is that it will be subjected to the costs of the administrative proceedings. The general rule appears to be that unless the jurisdiction of the administrative agency is clearly lacking, the cost and inconvenience of defending against the agency action is not sufficient to invoke this Court's equitable powers. *Petroleum Exploration, Inc.* v. *Public Serv. Comm'n*, 304 U.S. 209, 221 (1938); compare *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U.S. 456, 469 (1943). This Court is not persuaded that the FTC's jurisdiction over this matter is so clearly lacking that Borden should not have to exhaust its administrative remedies.

It is so ordered.

F.T.C. v. ROBERT E. SHELDON, BEVERLEE SHELDON, ALSO KNOWN AS BEVERLEE CHOATE, AND TERRY LEE ARMAS, III, DOING BUSINESS AS REJUVENATION CENTER LTD.*

Civ. A. No. SA-73-CA-83. Crim. Ac. No. SA-73-CR-149. FTC File No. 99-148.

(United States District Court for the Western District of Texas, San Antonio Division, November 6, 1973)

Before SUTTLE, *District Judge.*

ORDER GRANTING MOTION FOR JUDGMENT OF ACQUITTAL

On this 6th day of November, 1973, came on the above numbered and styled proceeding for hearing on motion of petitioners for civil and criminal contempt against the respondents. The Court, having heard the *prima facie* case of petitioner and the motion for judgment for corrected verdict and for judgment of acquittal orally entered by counsel for the respondent, finds that the respondent has abandoned its claim against the defendants for civil contempt, whereupon the Court carried respondent's motion for judgment of acquittal until completion of the case.

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*Not otherwise reported. For case before the Commission, see 83 F.T.C. 676. See also p. 6[illegible] herein.

Upon close of the evidence the respondents reurged their motion for judgment of acquittal. The Court, having heard the remarks of counsel, found that the motion for judgment of acquittal for criminal contempt should be granted because the evidence was insufficient to support a judgment of guilty for criminal contempt whether the test used was proof by a preponderance of the evidence or by proof beyond a reasonable doubt.

It is, accordingly, the judgment of the Court that the defendants, jointly and severally, be acquitted of the charge for criminal contempt growing out of the Court's order of the injunction heretofore entered.

The within Order shall correct the oral statements of the Court entered into the record on November 6, 1973, at the close of the evidence, and the Clerk is directed to correct the clerical mistakes in the oral judgment order or other parts of the record resulting from the Court's oversight and ommissions as stand corrected by the within Order.

UNITED STATES OF AMERICA v. KOSCOT INTERPLANETARY, INC., ETC., ET AL.*

No. 73-71-Orl-Cr. F.T.C. Docket 8888

(United States District Court, Middle District of Florida, Orlando Division, November 9, 1973)

Order directing the Commission to submit, *in camera*, certain documents in response to a subpoena issued at the request of defendant, F. Lee Bailey, in a postal fraud case.

Before SIFLET, *District Judge.*

ORDER

The Court has before it a motion filed October 30, 1973 by the Federal Trade Commission (FTC) and Charles O'Connell to quash a subpoena *duces tecum* issued against them by defendant Bailey. The cause came on for oral argument before the Court on October 31, 1973. Upon due consideration, it is

ORDERED:

1. With regard to specification #1 (as denominated in the FTC memorandum filed with regard to this issue) of the FTC subpoena,

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***Not otherwise reported. For case before the Commission, see 86 F.T.C. 1106, *modified* 87 F.T.C. 75, *clarified* 87 F.T.C. 419. See also pp. 786, 791 herein.**

the FTC shall have 30 days from the date hereof within which to submit to the Court *in camera* all correspondence and memoranda of communications occurring from January 1, 1971 to March 31, 1972 inclusive, between lawyers employed by the FTC and commissioners of the FTC concerning the proposed consent agreement between the FTC and Koscot Interplanetary, Inc. The FTC may indicate my memoranda attached to the submitted materials which items it contends defendants are not entitled to inspect and the reasons therefor.

2. In order for the Court to rule on specification #5 of the FTC subpoena, the FTC shall have 10 days from the date hereof within which to represent to the Court *in camera* what involvement, if any, it had in assisting, through investigation or otherwise, the prosecution in the preparation of this case.

3. Specification #4 of the FTC subpoena calling for its investigative file relating to certain defendants is quashed as being too broad.

4. The Court considers that the FTC has complied with specifications #2 and #3, and that, on the basis of his affidavit filed with the Court, Charles O'Connell has complied with the entire subpoena issued against him.

DONE and ORDERED at Jacksonville, Florida this 9th day of November, 1973.

F.T.C. v. JULIO R. GALLO

President, E. & J. Gallo Winery*

Civ. A. No. 653–73. FTC File No. 99–144.

(United States District Court for the District of Columbia,
November 28, 1973)

In a proceeding seeking enforcement of an investigatory subpoena, after studying affidavits submitted by the FTC in compliance with the court's order, and the response of the respondent, court found that the record did not raise a substantial question as to the good faith of the F.T.C. in pursuing its investigation of the respondent, and enforced the subpoena.

Harold H. Titus, Jr., U.S. Atty., *Arnold T. Aikens* and *Thomas G. Corcoran*, Asst. U.S. Atty., *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, and *Gerald Harwood*, Atty., *Vincent Tricarico*, Washington, D.C., for petitioner.

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶74,804, at 95,592 (1973–2 Trade Cases). See also p. 782, herein.

Elliot S. Kaplan, of *Robbins, Davis & Lyons*, Minneapolis, Minn., *William D. McKee*, of *Orrick, Herrington, Rowley & Sutcliffe*, San Francisco, Calif., and *Jacob A. Stein*, of *Stein, Mitchell & Mezines*, Wash., D.C., for respondent.

Before PARKER, *District Judge.*

MEMORANDUM OPINION AND ORDER

PARKER, D. J.: This Court issued a Memorandum Opinion and Order on October 9, 1973*, requiring the petitioner to file affidavits addressing themselves to particular questions of bad faith raised by the respondent in its counterclaim. A complete statement of the background of the controversy leading to the filing of the affidavits is contained in that opinion. The Court has received and reviewed the petitioner's affidavits, along with the response of the respondent and the prior submissions of the parties, and after careful consideration finds that the record does not raise a substantial question as to the good faith of the Commission in pursuing its investigation of the respondent. In particular, the Court finds that there is no substantial basis to support the respondent's contentions that: (1) the Commission or members of its staff deceived the respondent into supplying information with the intent to use the information against it; (2) information supplied by the respondent upon an agreement that it would be used only in connection with an investigation of other companies was knowingly used to initiate the formal investigation of, and subsequent compulsory process against, the respondent; and (3) the Commission or members of its staff intended to harass the respondent into supplying information.

It is not necessary to decide whether there was in fact a violation of an agreement restricting the use of information provided by the respondent to the Commission, or whether there was a failure to comply with Rule 2.6 of the Federal Trade Commission Rules of Practice because information was solicited from Gallo without it having been advised that it was the subject of an FTC investigation. Those questions are relevant to whether the information obtained by the Commission from Gallo is "tainted" by illegality, and would properly be raised at such time as the respondent is actually prejudiced by the attempted use of the information as evidence in an adjudicatory proceeding. The only material inquiry at this time is whether the record reasonably supports the allegation that the investigation of the respondent is the product of unfair or bad faith conduct by the Commission, so that it would be inequitable to grant it the relief which it is seeking. This inquiry has been answered in the negative. Thus the respondent is entitled to no relief, and its counterclaim will be dismissed and discovery denied. The respondent will be required to comply with the subpoena *duces tecum* issued by the petitioner.

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*See p. 782 herein.

Accordingly, it is this 27th day of November, 1973,

Ordered that the motion of the petitioner to dismiss the respondent's counterclaim, or in the alternative, for summary judgment, be and hereby is granted, and the respondent's counterclaim is dismissed;

Further Ordered that discovery by the respondent be and hereby is denied; and it is

Further Ordered that the respondent shall deliver to the offices of the Federal Trade Commission in Washington, D.C., the records and documents specified in the subpoena *duces tecum* issued by the Commission on June 5, 1972, at such time and to such persons as the Commission shall direct.

UNITED STATES v. ANCORP NATIONAL SERVICES, INC.*

No. 70 Civ. 5770. F.T.C. Docket 7396

(United States District Court, S.D. New York, November 30, 1973)

1. United States Barred by Statute of Limitations From Recovering Penalties for Violations Prior to December 31, 1965.

[1221] United States which brought action on December 31, 1970, to collect civil penalties from newsstand operator for violations of order of Federal Trade Commission prohibiting operator from receiving compensation from suppliers for services furnished in connection with sale of suppliers' products when operator knew the same compensation was not offered to its competitor was barred by statute of limitations from recovering penalties for payments received by newsstand operator prior to December 31, 1965.

2. Court Would Consider Wilfulness of Violations, Total Amount of Payments Received, Harm to Public From Violations and Financial Capacity to Pay Penalties Imposed in Assessing Amount of Penalties to be Imposed.

In assessing amount of penalties to be imposed for violation of order of Federal Trade Commission that newsstand operator cease and desist from receiving compensation from any supplier for services furnished in connection with sale of suppliers' products when operator knows or should know that such compensation is not affirmatively offered by suppliers on proportionately equal terms to all their other customers competing with newsstand operator, court would consider wilfulness of violations, total amounts of payments received by newsstand operator in violation of order, harm to public from the violations and financial capacity of operator to pay whatever penalties were imposed.

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*Reported in 367 F. Supp. 1221 (1973). For case before the Commission, see *In the Matter of American News Company, et al.*, 58 F.T.C. 10; *modified*, 65 F.T.C. 294.

3. $204,200 IN PENALTIES WOULD BE IMPOSED ON DEFENDANT WHERE DEFENDANT NEVER INFORMED SUPPLIERS OF TERMS OF FTC ORDER REQUIRING IT NOT TO ACCEPT COMPENSATION AND $192,762.40 WAS RECEIVED IN COMPENSATION FROM THREE SUPPLIERS AFTER ISSUANCE OF ORDER AND NO HARM RESULTED TO THE PUBLIC.

Where newsstand operator never informed any of its suppliers of terms of Federal Trade Commission order requiring it not to accept compensation from any supplier for services connected with sale of suppliers' products when operator knew such compensation was not offered to its competitors but ignored order and received payments totaling $192,762.40 from three suppliers and violations of order did not result in harm to public, penalties of $2,500 for each of 42 violations, $2,500 for each of 38 violations involving another supplier, and $100 for each of 42 violations involving a third supplier would be imposed on newsstand operator.

4. DEFENDANT WOULD BE ENJOINED FROM FURTHER VIOLATING F.T.C. ORDER.

[1222] Newsstand operator would be enjoined from further violating order of Federal Trade Commission requiring it to cease and desist from receiving compensation from suppliers for services rendered in connection with sale of suppliers' products when operator knew or should have known that same compensation had not been offered to its competitors.

(Syllabus, with substituted captions, taken from 367 F. Supp. 1221)

In suit to collect civil penalties, court held that penalties in amount of $204,200 would be imposed on defendant and that defendant would be enjoined from further violations of F.T.C. order requiring it to cease receiving compensation from suppliers for services furnished when it knew that the same compensation was not offered to its competitors.

Paul J. Curran, U.S. Atty., S.D.N.Y., for plaintiff; *Gerald A. Rosenberg*, *Naomi L. Reice*, New York City, of counsel.

Delson & Gordon, New York City, for defendant; *Eugene Frederick Roth*, *George Halpern*, New York City, of counsel.

OPINION

BONSAL, *District Judge*.

This is a suit by the Untied States to collect civil penalties in the amount of $585,000 from the defendant Ancorp National Services, Inc. ("Ancorp") for allegedly violating a final Cease and Desist Order of the Federal Trade Commission ("FTC") issued on April 13, 1964 ("the FTC Order"). The United States also seeks a permanent injunction. Jurisdiction is alleged under 15 U.S.C. §§ 45(*l*) and 56, and 28 U.S.C. §§ 1337, 1345, and 1355.

On February 5, 1959, the Federal Trade Commission filed an administrative complaint, charging respondents American News Company (now Ancorp) and Union News Company (now a subdivision of Ancorp) with unfair competitive practices. The complaint charged the respondents with having violated section 5 of the Federal Trade Commission Act by inducing and coercing suppliers to make payments or to grant allowances as compensation for services or facilities furnished in connection with the sale of such suppliers' products on respondents' newsstands when respondents knew or should have known that such payments were not being offered or made available on proportionally equal terms to all customers of such suppliers who were in competition with the respondents. On January 10, 1961, after an administrative hearing, the FTC issued a Cease and Desist Order. On February 7, 1962, the Court of Appeals for the Second Circuit modified the FTC Order and affirmed it as modified. *American News Co.* v. *FTC*, 300 F.2d 104 (2d Cir. 1962). On October 8, 1962, the Supreme Court denied respondent's petition for a writ of certiorari. 371 U.S. 824, 83 S.Ct. 44, 9 L.Ed.2d 64 (1962). The FTC Order of April 13, 1964 became final on May 13, 1964, 15 U.S.C. § 45(i), and has been in effect at all times relevant to this action.

The FTC Order as modified provided:

> IT IS ORDERED that the respondents, The American News Company and the Union News Company, corporations, their officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale on newsstands operated by respondents, do forthwith cease and desist from:
>
>> Receiving, or inducing and receiving, or contracting for the receipt of, anything of value from any of their suppliers as compensation or in consideration for display or promotional services or facilities furnished by or through respondents in connection with the processing, handling, sale, or offering for sale of products purchased from any of their suppliers, when respondents know or should know that such compensation or consideration is not affirmatively offered or otherwise made available by such suppliers on proportionally equal terms to all their other customers competing with respondents in the sale and distribution of such suppliers' products.

[**1223**] This action was instituted on December 31, 1970.[1] The complaint alleges that the defendant received "compensation" in varying amounts from three newspapers in New York City (The New York Times, The Daily News, and The Post) in connection with promoting and displaying these newspapers on its newsstands; that the defendant knew or should have known that such compensation was not offered or otherwise made available by the three newspapers on proportionally equal terms to all of their newsstand customers; and that by receiving such compensation, the defendant violated the FTC Order quoted above. The complaint comprises three counts: count 1 relates to The New York Times; count 2, to The Daily News; and count 3, to The Post.

[1] The complaint alleges that these payments began at "some time prior to December 1965" and continued to shortly before the filing of the complaint. Payments allegedly received prior to December 31, 1965, however, are barred by the five-year statute of limitations which applies to civil penalty actions. 28 U.S.C. § 2462.

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[1] There is no dispute that before initiation of this suit the facts which gave rise to it were properly certified by the FTC to the Attorney General of the United States as required by section 16 of the Federal Trade Commission Act, 15 U.S.C. § 56.

On the basis of the testimony of Mr. Ivan Veit, Executive Vice President, and Mr. Thomas McVeigh, Corporate Controller of the Times, and the exhibits received during the trial, the Court finds that each month from January, 1961 to July, 1969 the Union News Company billed the Times for "Rental of Space in Newsstands for New York Times Advertising Signs" and that the Times paid these bills. The payments from January, 1961 to August, 1963 were in the amount of $2,000 per month; they were increased in August, 1963 to $2,587.20 per month ($4.90 per stand for 528 stands).

On the basis of the testimony of Mr. William Carey, Circulation Manager, and Mr. Jack Underwood, Vice President and Director of Sales of The Daily News, and the exhibits received during the trial, the Court finds that each week from June 1, 1964 to March 3, 1969, except for periods—prior to 1966—when the Daily News was not published as a result of a strike, the Union News Company billed the Daily News for "Advertising Service" and that the Daily News paid these bills. The payments were in the amount of $500 per week.

On the basis of the testimony of Mr. Byron Greenberg, Circulation Director of the Post, and the exhibits received during the trial, the Court finds that from July, 1964 to June, 1969 the Union News Company billed the Post for "Advertising Service" and that the Post paid these bills. The payments were in the amount of $50 per month.

On the issue of the defendant's knowledge and intent, the Court received evidence as to payments made by other New York City newspapers to the Union News Company. On the basis of the deposition of Mr. Roy I. Newborn, who was Circulation Director of the now defunct New York Herald Tribune from 1961 to 1964, the Court finds that the Herald Tribune paid fees for advertising services on a monthly basis totalling $12,000 to $15,000 a year. That arrangement lasted until the Herald Tribune ceased publication on April 24, 1966. On the basis of the testimony of Mr. John Potulny, Manager of the field operations group of Dow Jones and Company (which publishes the Wall Street Journal), the Court finds that from the fall of 1965 to January, 1968, the Wall Street Journal made payments to Union News as a "promotional allowance" in the amount of $500 per month.

On the basis of the testimony of Mr. Nathan Goldstein, Mr. Jack Underwood, Mr. William Carey, and Mr. Byron Greenberg, the Court finds that Union News never inquired of the Times, the Daily News, or the Post whether payments were being offered to other news-[**1224**] stand operators in competition with Union News on a proportionally equal basis.[2] And the testimony at trial shows that the three newspapers did not in fact offer to make such payments to competitors.

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[2] Defendant contends that since its stands were better lit, more fully stocked, open for longer hours, staffed by unionized sales employees, occupied more desirable locations, and were subject to more stringent regulations by its landlords (railroads, airports, and bus terminals), it had no competitors to whom proportionally equal terms could have been offered. The evidence, however, established that defendant's stands competed with other retail newspaper dealers in that they purchased the same products from the same suppliers and resold these products unaltered in the same market.

Defendant contends on the basis of the testimony of Mr. William McCollough (President of Ancorp) that the payments received were not true advertising allowances, but rather price allowances, and that they were made as part of an effort to increase Ancorp's profits on the sale of newspapers. However, the invoices sent out to the three newspapers by Union News, which were received in evidence, themselves indicated that they were for advertising services. Moreover, Mr. McCollough acknowledged that the Union News Company received posters from the three newspapers to be displayed on its newsstands.[3]

The proof establishes and the Court finds that the following monthly payments were received by the Union News Company on or after January 1, 1966 in violation of the FTC Order:

From the New York Times (from January 1, 1966 to July 1, 1969)	42
From the Daily News (from January 1, 1966 to March 3, 1969)[4]	38
From the Post (from January 1, 1966 to July 1, 1969)	42
Total number of violations of the Order	[5] 122

Penalties

The United States is seeking to recover the maximum penalty of $5,000 for each violation of the Order (15 U.S.C. § 45(*l*)).

[2] In assessing the amount of penalties to be imposed for each violation, the relevant factors are: the wilfullness of the violations, the total amounts of the payments received by the defendant in violation of the FTC Order, the harm to the public from the violations, and the financial capacity of the defendant to pay whatever penalties are imposed. See *United States* v. *J. B. Williams Co.*, 354 F. Supp. 521, 548 (S.D.N.Y. 1973); *United States* v. *Beatrice Foods Co.*, 351 F. Supp. 969 (D.Minn.1972); *United States* v. *Vitasafe Corp.*, 234 F. Supp. 710 (S.D.N.Y.1964), *aff'd*, 352 F.2d 62 (2d Cir. 1965); *United States* v. *American Greetings Corp.*, 168 F. Supp. 45 (N.D.Ohio 1958), *aff'd* 272 F.2d 935 (6th Cir. 1959).

The evidence at trial indicates that Mr. Henry Garfinkle, President of the Union News Company in 1963, sent a memorandum dated March 8, 1963 to the other officers and executives of Union News informing them of the FTC Order and Instructing them to familiarize themselves with it and to report promptly any information that might indicate a potential violation. There was no evidence, however, of any other action taken by any officer of Union News to assure compliance with the FTC Order. The payments for advertising services, which the evidence indicates that Mr. Garfinkle helped to negotiate with the three newspapers, continued without [**1225**] change from 1961 to 1969, when they were unilaterally cancelled by the newspapers. There was no evidence that Union News ever attempted to inform any of the newspapers from which it was receiving payments of the terms of the FTC Order or to inquire whether proportionally equal terms were offered by them to competitors of Union News. Rather, the evidence indicates that, with the exception of Mr. Garfinkle's memorandum, Union News ignored the FTC Order.[6]

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[3] This issue was presented to the Court of Appeals, which said: "[E]ven if these payments were all no more than disguised price adjustments, as petitioners contend, they would nevertheless violate § 2(d) [of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(d), which] was aimed explicitly at promotional allowances which have the effect of price adjustments." 300 F.2d at 109.

[4] The evidence indicates that payments were made on a weekly basis. The complaint's prayer for relief, however, speaks only in terms of monthly violations. For consistency, the Court adopts the monthly basis for calculating the number of violations.

[5] The government's brief indicates that the total number of violations was 117. The Court's addition, however, is 122.

With respect to the total payments received, the evidence shows that during the period from January 1, 1966 to the termination of the arrangements with the three newspapers in 1969, Union News received payments in violation of the FTC Order totalling $108,662.40 from the Times, $82,000.00 from the Daily News, and $2,100.00 from the Post; combined, these payments total $192,762.40.[7]

There is no evidence that the payments had any effect on the amount of Union newsstands' business nor on the price of newspapers sold to the public. The testimony indicates that Union newsstands sell newspapers within the City of New York at the cover price, as do their competitors. The competition that does exist among newsstands is primarily on the basis of their location and the number of items they carry. Since the evidence is speculative and inconclusive, the Court finds that harm to the public has not been demonstrated.

Ancorp is a conglomerate owning restaurants, snack bars, cafeterias, vending machines, catering facilities, drug stores, tobacco shops, and general merchandise marts as well as newsstands. It also engages in the wholesaling of books, matches, tobacco products, candy, stationery, art supplies, office furniture and equipment, and background music systems. For 1968, its net income was $2,784,054; for 1969, $2,305,026; for 1970, $1,275,847; and for 1971, $83,506. The unaudited Consolidated Statement of Operations and Retained Earnings for the year ending December 29, 1972 shows an operating loss for the year in the amount of $13,672,953. The unaudited Consolidated Balance Sheet shows current liabilities of $51,943,210 against current assets of $27,682,578 and an earned deficit of −$4,576,648. On March 20, 1973, Chapter XI proceedings were instituted by Ancorp, seeking an arrangement with its creditors, which proceedings are presently pending in New York City.

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[6] While defendant contends that it mistakenly believed the Order to apply only to the sale of magazines and not newspapers, the Order's language is inclusive, referring to "products purchased from any of [its] suppliers."

[7] The government contends that the total amount received by Union News from all its newspaper suppliers since January 1, 1966 was $237,094, though the complaint only alleged violations with respect to the Times, the Daily News, and the Post.

[3] On the basis of the factors discussed above, the Court imposes the following penalties on the defendant for the violations of the FTC Order found above:

On count 1: $2,500 for each of 42 violations	$105,000
On count 2: $2,500 for each of 38 violations	95,000
On count 3: $100 for each of 42 violations	4,200
Total penalties	204,200

[4] The United States is entitled to a judgment against the defendant in the amount of $204,200, and costs. In addition, a permanent injunction will be issued enjoining defendant Ancorp from further violations of the FTC Order.

The foregoing constitutes the Court's findings of fact and conclusions of law. F.R.Civ.P. 52(a).

Settle judgment on notice.

F.T.C. v. JEROME BLANK, PRESIDENT, NATIONAL BRANDS, INC., ETC.*

Civ. A. No. 73-1564-Civ.-JE. FTC File No. 99-161.

(United States District Court for the Southern District of Florida, November 30, 1973)

Before Eaton, *District Judge*.

ORDER PURSUANT TO SECTION 9 OF THE FEDERAL TRADE COMMISSION ACT (15. U.S.C. § 49)

Before the Court is the Federal Trade Commission's petition for an order requiring Jerome Blank, President, National Brands, Inc., to appear, testify and produce documentary evidence in a Federal Trade Commission non-public investigation.

Hearing was had on the petition, the respondent, Jerome Blank, having been represented by his counsel, Dwight Sullivan, Esquire. The Court has considered the entire record in the cause and argument of counsel for petitioner and respondent. Therefore having been advised in the premises, it is

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*Not otherwise reported.

Ordered, That respondent, Jerome Blank, shall appear before a duly designated representative of the Federal Trade Commission at a time and place in Miami, Florida to be designated by the Federal Trade Commission upon not less than ten days notice, and then and there to testify and produce the books, records and documents requested in the subpoena duces tecum issued by the Federal Trade Commission to Jerome Blank, President, National Brands, Inc., on November 17, 1972.

ASH GROVE CEMENT CO. v. F.T.C., ET AL.*

Civ. A. No. 1298–71. F.T.C. Docket 8785.

(United States District Court for the District of Columbia, December 22, 1973)

Before Richey, *District Judge*.

Order

The Court has considered *in camera* the seventeen directive-type minutes and the investigatory files submitted for inspection by the Defendant. The Court finds that both are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b) 5 and 7 respectively. The minutes submitted do not contain private transmittals of binding agency opinions and interpretations constituting "secret law" but are solely intra-agency memos reflecting the Commission's decision-making processes. As such they are not discoverable. *Sterling Drug, Inc.* v. *Federal Trade Commission*, 146 U.S. App. D.C. 237, 450 F.2d 698, 708, 709 (1971). The investigatory files are beyond a doubt correctly classified as such. Under *Weissberg* v. *U.S. Department of Justice*, D.C. Cir. No. 71–1026, October 24, 1973, slip. op. at 14–15, such documents are also non-discoverable.

The Court finds that the Defendant has, therefore, complied with the Court's memorandum orders and the Freedom of Information Act, and it is this 22nd day of December, 1973,

Decreed, *Ordered* and *Adjudged* that the Defendant's Renewed Motion for Summary Judgment be and is hereby granted.

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*Not otherwise reported. For case before the Commission, see 85 F.T.C. 1123. See also pp. 565, 796, 1321, 1371, 1533 herein.

STERLING DRUG, INC. v. F.T.C., ET AL.[*]

73 Civ. 3406. F.T.C. Docket 8899.

(United States District Court, Southern District of New York, December 26, 1973)

On request for stay of proceedings, court held that allegations by plaintiff that it would have been irremedially deprived of property rights if proceedings were not stayed and that F.T.C. was acting outside its statutory authority were not reasons for the court to make exception to the general rule requiring exhaustion of administrative remedies before review by court. Fact that another government agency had approved, as true, a statement appearing on plaintiff's product label did not preclude F.T.C. from alleging that plaintiff deceptively misused a scientifically correct statement. Request denied.

Sidney P. Howell, *E. Carrington Boggan*, and *Steve Nacierio*, of *Roger*, *Hoge & Hills*, New York, N.Y., for plaintiff.

Paul J. Curran, U.S. Atty., and *V. Panela Davis*, Asst. U.S. Atty., New York, N.Y., for defendants.

Before Motley, *District Judge:*

Memorandum Opinion and Order

Motley, D. J.: Plaintiff, Sterling Drug Inc., manufacturers of Lysol Brand Disinfectants, asserting jurisdiction under the United States Constitution, Amendment V, the Administrative Procedure Act, 5 U.S.C., § 551 *et seq.*, and 28 U.S.C., §§ 1331, 1337, 1651 and 2201, asked this court to stay certain proceedings of defendant Federal Trade Commission (F.T.C.), scheduled to commence on December 3, 1973, and for other declaratory and injunctive relief. Plaintiff claimed that it would have been irreparably harmed by appearing at the F.T.C. proceedings investigating possibly deceptive advertising of plaintiff's product. Plaintiff further claimed that the F.T.C. was acting *ultra vires* in that the statement in question, to wit Lysol "kills * * * germs on environmental surfaces", having been approved by the Environmental Protection Agency (E.P.A.) as scientifically correct could not thereafter be challenged by the F.T.C.

In response to plaintiff's complaint, defendants moved to dismiss the complaint for lack of subject matter jurisdiction. Upon plaintiff's filing of its motion to stay, defendant renewed its motion to dismiss.

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[*] Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶74,846, at 95,779 (1973-2 Trade Cases). Notice of appeal filed on February 22, 1974, with the 2nd Cir. from so much of the order as dismisses the complaint for lack of subject matter jurisdiction. For case before the Commission, see 84 F.T.C. 547.

Defendant argued that while the accuracy of the package statement was a matter for the E.P.A., the advertising use to which an approved statement is put remains the concern of the F.T.C. Here, the F.T.C. objects to the use of the statement in advertisements which claim that utilizing plaintiff's product will prevent colds, since the current state of the medical art is that colds are generally caused by air borne germs. In addition, defendant points out that plaintiff's resort to the court is premature. Defendant notes that plaintiff can challenge the jurisdiction of the F.T.C. hearing to the F.T.C., that plaintiff would not be harmed by proceeding, and that jurisdictional objections are reviewable after final agency action.

The court grants defendant's motion and denies plaintiff's motion for the reasons which follow.

Under federal statute and established cases, a party invoking the authority of a district court to challenge the proceedings of a federal agency will ordinarily be required to exhaust the available administrative remedies. After exhaustion, interlocutory as well as final determinations are subject to court review. 5 U.S.C., § 704 (formerly Section 10(c) of the Administrative Procedure Act) provides in part that any "preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." More specifically, the Federal Trade Commission Act provides that a party dissatisfied with the results of a F.T.C. determination shall petition the appropriate Circuit Court to "affirm, enforce, modify or set aside orders of the Commission [and that jurisdiction in the Circuit Court] shall be exclusive." 15 U.S.C. 45(d). Furthermore, recent Second Circuit cases have demonstrated the inappropriateness of seeking equitable relief in the district court prior to the completion of the administrative process. *Pepsico, Inc.* v. *FTC*, 472 F. 2d 179, 185 (2d Cir. 1972); *Bristol-Myers Company* v. *FTC*, 469 F. 2d 1116, 1117 (2d Cir. 1972). Thus, under the statutory scheme, plaintiff may object to the jurisdiction of the F.T.C. in this matter before the Commission itself and, if unsuccessful, appeal that decision to the Court of Appeals at the conclusion of Commission proceedings.

The court recognizes the existence of certain narrowly defined exceptions to the exhaustion and ripeness principles outlined above. In particular, plaintiff asks the court to enjoin the F.T.C. hearings on the authority of *Fay* v. *Dowds*, 172 F. 2d 720 (2d Cir. 1949), wherein the irremedial deprivation of property rights was made the basis for permitting injunctive relief. Here plaintiff has failed to demonstrate what harm, if any, it may suffer by complying with the F.T.C.'s directive to proceed to the hearing. Plaintiff's assertion that its good will and market position would be injured by the mere commencement of proceedings was unpersuasive. Since the challenged advertisements had not been used in the last two years, plaintiff could not be heard to complain of damages to its current advertising compaign. Where the only harm to plaintiff is the inconvenience of attending the hearing, the court is without power to grant the extraordinary relief demanded by plaintiff. (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51–52 [1938].) Indeed, the public interest requires an investigation into allegations, made in good faith, of deceptive advertising. Such hearings may result in favor of plaintiff. If they do not, plaintiff may appeal the unfavorable findings as to jurisdiction and substance to the Commission and then, if necessary, to the Court of Appeals.

Plaintiff further sought to bring itself within a second exception to the exhaustion requirement which permits judicial intervention when an agency has acted in a manner clearly contrary to the governing statute. See, *Leedom* v. *Kyne*, 358 U.S. 184 (1958); *Oestereich* v. *Selective Service Local Board No. 16*, 396 U.S. 460 (1970). By alleging that the proposed F.T.C. action overlapped with the authority of the E.P.A., plaintiff attempted to convince the court that the F.T.C. was acting beyond its jurisdiction and that the proposed F.T.C. action was properly a matter for the E.P.A.. However, no such overlap exists. The record indicates that the E.P.A. has made no order respecting the disease prevention claims challenged by theF.T.C. The E.P.A. merely approved a label statement, which while true, the F.T.C. now claims was used in a deceptive manner. The E.P.A. is within its proper authority to investigate *performance* claims of the plaintiff's product, "Lysol", 7 U.S.C., § 135a(a)(1), § 135b(a)(1)(4), and the F.T.C. is apparently within its authority in this case which authority includes the power to investigate deceptive *advertising*, which by definition includes the misleading use of an approved scientifically correct statement, 15 U.S.C. 45(a) and (b).

The plaintiff having failed to demonstrate its inclusion in either of the recognized exceptions to the exhaustion requirement discussed above, the court finds the invocation of judicial authority premature and hereby denies plaintiff's motion to stay the scheduled F.T.C. hearings, and grants defendant's motion, thereby dismissing the complaint for lack of subject matter jurisdiction.

So Ordered.

SYDNEY N. FLOERSHEIM v. LEWIS A. ENGMAN, ET AL.*

No. 72-1622. F.T.C. Docket 8721.

(United States Court of Appeals, District of Columbia Circuit, December 26, 1973)

1. COMPLAINT SEEKING DECLARATION THAT REVISED FORMS CONFORMED TO REQUIREMENTS OF F.T.C. CEASE AND DESIST ORDER FAILED TO RAISE ISSUE APPROPRIATE FOR JUDICIAL REVIEW AND HAD TO BE DISMISSED FOR LACK OF SUBJECT-MATTER JURISDICTION IN THE DISTRICT COURT, THE APPELLATE COURT ORIGINALLY AFFIRMING CEASE AND DESIST ORDER BEING UNIQUELY QUALIFIED TO INTERPRET ITS OWN ORDER.

[950] Complaint of forms seller, which had been ordered by the Federal Trade Commission to cease and desist from certain deceptive practices and to file a report of compliance, seeking a declaration that its revised forms, despite F.T.C.'s determination to the contrary, did conform to the requirements of the cease and desist order failed to raise an issue appropriate for judicial review and had to be dismissed for lack of subject-matter jurisdiction in the district court for the District of Columbia, as judicial consideration in advance of an enforcement sanction is reserved only for a case of exceptional need and unfairness, and as the Ninth Circuit Court of Appeals, which originally affirmed the cease and desist order, was the court uniquely qualified to interpret its own order.

2. SECTION OF F.T.C. ACT PROVIDING FOR REVIEW OF CEASE AND DESIST ORDERS BY THE COURTS OF APPEALS DOES NOT CONTEMPLATE REVIEW OF F.T.C. DETERMINATION THAT A PROPOSED COURSE OF ACTION WILL VIOLATE A CEASE AND DESIST ORDER.

Federal Trade Commission Act section providing for review by the Courts of Appeals of cease and desist orders does not contemplate review of a determination by the FTC that a proposed course of action will violate an outstanding cease and desist order.

3. CRIMINAL CONTEMPT IS ESSENTIALLY RESERVED FOR WILLFUL CONTUMACY.

Criminal contempt is essentially reserved for willful contumacy and not good faith disagreement.

4. EQUITABLE LIMITATIONS INHERENT IN GOVERNMENT'S REMEDIES ARE A SUBSTANTIAL PROTECTION FOR A RESPONDENT WITH REASONABLE AND BONA FIDE CLAIM AS TO UNREASONABLENESS OF THE ORDER.

Equitable limitations inherent in the government's remedies for noncompliance with an order of the Federal Trade Commission are a substantial protection for a respondent with a reasonable and bona fide claim as to the unreasonableness of the order.

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*Reported in 494 F.2d 949 (1973). For case before the Commission, see 73 F.T.C. 134; see also p. 220 herein.

5. A CEASE AND DESIST ORDER OF F.T.C., AS AFFIRMED, IS IN ESSENCE A JUDICIAL DECREE.

A cease and desist order of the Federal Trade Commission, as affirmed, is in essence a judical decree, although the statute grants the major role in enforcement to the FTC.

6. COURT'S INHERENT AUTHORITY TO CONSTRUE ITS MANDATE APPLIES TO JUDGMENT OF FEDERAL COURT OF APPEALS OF THE ORDER OF A FEDERAL ADMINISTRATIVE AGENCY.

A court's inherent authority to construe its mandate applies to the judgment of a federal Court of Appeals entered upon review of the order of a federal administrative agency.

7. SCOPE OF ORDER IS A MATTER TO BE TAKEN UP WITH THE AGENCY BEFORE ANY APPLICATION IS MADE TO THE COURT.

Where court's mandate is entered on the basis of an agency's cease and desist order, the scope of the order is a matter to be taken up with the agency before any application is made to the court.

8. JUDICIAL CLARIFICATION IS APPROPRIATE ONLY IF MANDATE OF AGENCY AND COURT IS GENUINELY UNCLEAR.

Business of supervising compliance with cease and desist orders under the Federal Trade Commission Act is that of the FTC, and only if the mandate of the agency and court is genuinely unclear may judicial clarification be appropriate.

9. DECISION TO ENTERTAIN A PETITION FOR CONSTRUCTION OF CEASE AND DESIST ORDER OF FTC RESTS IN THE SOUND DISCRETION OF THE COURT.

Decision to entertain a petition for construction of a cease and desist order of the Federal Trade Commission rests in the sound discretion of the court and will be permitted only to effectuate the purposes of the Federal Trade Commission Act; and such is a possibility for only the rare and exceptional case.

10. CLAIM THAT F.T.C. WAS TAKING A MORE RIGOROUS VIEW OF THE REQUIREMENTS OF ORDER THAN RESPONDENT CONSIDERED SOUND WAS NOT BASIS FOR ADVANCE JUDICIAL CONSIDERATION FOR SCOPE OF ORDER.

[951] Claim that the Federal Trade Commission was taking a more rigorous view of the requirements of cease and desist order than respondent considered sound was not a basis for advance judicial consideration of the scope of the order.

11. CLARIFICATION OF AN EQUITABLE DECREE IS OBTAINABLE ONLY FROM THE COURT GRANTING IT.

Clarification of an equitable decree can be obtained only from the court granting it.

12. F.T.C. ACT DOES NOT AUTHORIZE ANY DISTRICT COURT ACTION FOR DECLARATORY JUDGMENT.

No district court action for declaratory judgment is authorized by the Federal Trade Commission Act.

13. **WHERE RISK OF PENALTIES IS SO COERCIVE AS TO DENY DUE PROCESS, PERSON MAY HAVE RELIEF IN EQUITY TO AVOID INVALID OFFICIAL ACTION.**

Person may have relief in equity to avoid invalid official action where the risks of penalties, if he is remitted to defense of enforcement actions, is so coercive as to be a denial of due process.

14. **IN SEEKING DECLARATION OF CONFORMITY TO F.T.C. ORDER, EVEN IF PLAINTIFF'S CASE FALLS WITHIN RARE SITUATION OF REQUIRING JUDICIAL INTERPOSITION, COURT WHERE MANDATE WAS ENTERED, *i.e.*, NINTH CIRCUIT, NOT DISTRICT OF COLUMBIA DISTRICT COURT HAD JURISDICTION.**

Even if plaintiff's case, seeking a declaration that it had conformed to the requirements of cease and desist order issued by the Federal Trade Commission, did fall within the rare situation of one that calls for judicial interposition before any enforcement action is begun by the FTC, plaintiff would have to obtain his relief from the ninth circuit whose mandate had been entered on plaintiff's petition for review of the cease and desist order; that court, not the District of Columbia district court, had jurisdiction to grant the relief sought.

(Syllabus, with substituted captions, taken from 494 F.2d 949)

On appeal, the court held that complaint failed to raise an issue appropriate for judicial review and had to be dismissed for lack of subject-matter jurisdiction in the District Court, as advance judicial consideration of enforcement sanction is reserved for case of exceptional need and unfairness, and as the court affirming the cease and desist order was uniquely qualified to interpret its own order.

Order in accordance with opinion.

Marion E. Harrison, Washington, D.C., for appellant.

Richard L. Beizer, Asst. U.S. Atty., and *Robert E. Duncan*, Atty., F.T.C., with whom *Harold H. Titus, Jr.*, U.S. Atty., *John A. Terry*, *J. Michael McGarry, III*, Asst. U.S. Attys., *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, F.T.C., and *Alvin L. Berman*, Atty., Wash., D.C., were on the brief for appellees.

Before WRIGHT, LEVENTHAL, and ROBB, *Circuit Judges*.

LEVENTHAL, *Circuit Judge:*

Appellant sells to creditors and debt-collection agencies certain forms used to trace allegedly delinquent debtors ("skip-tracer forms") and to induce them to pay their debts ("payment demand" forms). The Federal Trade Commission's order of February 5, 1968, required appellant (1) to cease and desist from certain deceptive and misleading practices with respect to the appearance and content of these forms and (2) to file a report of compliance as required by 16 C.F.R. § 3.61. The order was affirmed by the Court of Appeals for the Ninth Circuit. *Floersheim* v. *FTC*, 411 F.2d 874 (9th Cir. 1969), *cert. denied*, 396 U.S. 1002, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970).

[1] Responding to the direction to file a compliance report, appellant submitted a set of revised forms to the Commission on February

10, 1970. On April 10, the FTC determined that the forms did not conform to the terms of the cease and desist order, and consequently rejected them. Appellant then brought an action in the District Court for the District of Columbia, seeking (a) a declaration that the forms did indeed conform to the requirements of the cease and desist order and (b) an injunction restraining the FTC from seeking civil penalties for non-compliance with its order, as provided by 15 U.S.C. §§ 45(*l*) and 56. The District Court granted the FTC's motion for summary judgment on the merits, and Floersheim appealed. We conclude that appellant's complaint fails to raise an issue appropriate for judicial review and must be dismissed for lack of subject-matter ju [**952**] risdiction in the District Court.[1] Such jurisdiction must be based either on the Federal Trade Commission Act itself or the Administrative Procedure Act, and neither law permits this kind of action.

I. REVIEW UNDER THE FTC ACT

[2] The Federal Trade Commission Act does not in terms authorize review of Commission interpretations of cease and desist orders. The only section of the Act that provides for judicial review is section 5(c), 5 U.S.C. § 45(c), providing for review by the courts of appeals of cease and desist orders. Appellant however does not seek review of the FTC's cease and desist order; that order has already been reviewed and held valid, *Floersheim* v. *FTC*, *supra*. He asks the court to review the Commission's determination that his proposed course of action would violate the outstanding order. Such review is not contemplated by section 5. Section 5 deals with judicial review of the cease and desist order; it is not until that review has been completed (or waived) that the order becomes final, see 15 U.S.C. § 45(g), and it is only then that the respondent has the duty of compliance.

Our conclusion in this regard is in accord with the decisions of other courts. In *Robertson* v. *FTC*, 415 F.2d 49 (4th Cir. 1969), petitioner, a member of a board of trade subject to a cease and desist order, sought review of a mode of compliance accepted by the FTC that worked to petitioner's individual detriment. The court dismissed the petition for review for lack of jurisdiction.

In *Rettinger* v. *FTC*, 392 F.2d 454 (2d Cir. 1968), the Commission changed its interpretation of an order ten years after it became final. Petitioner, who had been acting in reliance on the earlier interpretation during the intervening years, sought to reopen the proceedings. The court declined to treat petitioner's action as one to reopen and modify an earlier cease and desist order, as provided by section 5(b) of the FTC Act. Rather, the court held that petitioner was actually seeking review of a changed Commission interpretation of the earlier order. Noting that the equities of petitioner's position were "appealing," the court nonetheless held that it had "no jurisdiction to review under the Federal Trade Commission Act." 392 F.2d at 457.[2]

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[1] FTC failed to file a cross-appeal. However, the question of jurisdiction is one "the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884). See also *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 87 S.Ct. 1199, 18 L.Ed.2d 270 (1967); *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951).

Petitioner complains that inability to obtain expeditious consideration of an unlawful FTC view of the requirements of a cease and desist order places him in an intolerable position. Either he acquiesces in an erroneous and hence unlawful position by the Commission or he faces the prospect of civil penalties of up to $5000 a day, recovered in an action brought by the United States for violation of a cease and desist order of the Commission after it has become final, if he should use the proposed forms. 15 U.S.C. § 45(*l*). Indeed, he is also exposed to criminal contempt for willful disobedience of the court's mandate. 18 U.S.C. § 401.

[3] Petitioner's sketch of an unfairly onerous choice is too darkly drawn by far. Criminal contempt is essentially reserved for willful contumacy and not good faith disagreement, *see In re Floersheim*, 316 F.2d 423 (9th Cir. 1963). And the statutory provision for **[953]** civil recovery of penalties of $5000 a day refers to a maximum, not a minimum. There is room for leniency by the court, if petitioner's view of the meaning of the order is plausible and not defiant.

[4, 5] The equitable limitations inherent in the Government's remedies are a substantial protection for a respondent with a reasonable and bona fide claim. Moreover, that person has some right of access, albeit narrow, to an equitable remedy under the FTC Act. A cease and desist order, as affirmed, is in essence a judicial decree, although the statute grants the major role in enforcement to the FTC, *United States* v. *Morton Salt Co.*, 338 U.S. 632, 643, 70 S.Ct. 357, 94 L.Ed. 401 (1950). We do not think that Congress intended to deny the right generally available to those subject to court order to petition the court for clarification of a genuinely ambiguous decree, under the procedure invoked in *New York* v. *New Jersey*, 296 U.S. 259, 56 S.Ct. 188, 80 L.Ed. 214 (1935).[3]

[6] A court's inherent authority to construe its mandate applies to the judgment of a Federal court of appeals entered upon review of the

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[2] In *Vulcanizd Rubber & Plastics Co.* v. *FTC*, 103 U.S.App.D.C. 384, 258 F.2d 684 (1958), petitioner urged that an FTC cease and desist order, as interpreted, was unlawful. Observing that "this interpretation may be changed or it may never be enforced," we held that there was "no controversy calling for judicial review of the interpretation at the present time."

[3] The Court had enjoined New York City from dumping "any garbage or refuse" into waters off the coast of New Jersey. Failure to comply would have subjected the city to penalties of up to $5000 a day. A dispute arose as to whether "garbage" included sedimentation. New York City petitioned the Court for a clarification of its decree. The Supreme Court granted the petition and held that New York's proposed course of action did not violate the injunction.

order of a Federal administrative agency. This was established in *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 65 S.Ct. 478, 89 L.Ed. 661 (1945). The Supreme Court had before it the issue whether an appellate court's judgment enforcing an NLRB cease and desist order could extend to the petitioner's "successors and assigns." Since no successor or assign was before the Court, it decided not to decide the question in the abstract. It noted, however, that rather than run the risk of contempt of court, parties could

> petition the court granting it [the enforcement order] for a modification or construction of the order. Cf. New Jersey v. New York City, 296 U.S. 259 [56 S.Ct. 188, 80 L.Ed. 214]. While such relief would be in the sound discretion of the court, we think courts would not be apt to withhold a clarification in the light of a concrete situation that left parties or "successors and assigns" in the dark as to their duty toward the court. Enforcement orders are issued to effectuate the purposes of the Act, not for the entrapment of parties, and courts no less than parties desire to avoid unwitting contempts as well as to punish deliberate ones.

324 U.S. at 15, 65 S.Ct. at 482.[4]

[7] These standards should govern the availability of judicial construction of the terms of a cease and desist order, with one modification: Where the court's mandate is entered on the basis of an agency's cease and desist order, the scope of the order is a matter to be taken up with the agency before any application is made to the court.

[8–10] The business of supervising compliance with cease and desist orders under § 5 of the Act is that of the FTC, *United States* v. *Morton Salt*, *supra*. Only if the mandate of the agency and court is genuinely unclear may judicial clarification be appropriate. And as stated in *Regal Knitwear*, *supra*, the decision to entertain a petition for construction of an order rests "in the sound discretion of the court" and would be permitted only to "effectuate the purposes of the Act." This is a possibility for the rare and exceptional case. We do not anticipate a procedure whereby every rejection of proferred compliance would constitute an occasion for review; such an approach would not effectuate the purpose of the Act but confound it, **[954]** for it would provide a technique for delaying indefinitely the enforcement of cease and desist orders[5] and for clogging the courts whose review of orders is part of the statutory scheme. The claim that FTC is taking a more rigorous view of the requirement of the order than the respondent considers sound is not a basis for advance judicial consideration. This is the kind of point that can be raised when an enforcement sanction is pursued (civil penalty or criminal contempt), for there is opportunity there to obtain a softening of penalty for a construction that is bona fide and reasonable even though ultimately rejected. Advance judicial consideration under the doctrine of *Regal Knitwear* is reserved for the case of exceptional need and unfairness.

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[4] Accord, *Empire National Bank of Clarksburg* v. *Penfield Coal & Coke Co.*, 354 F.2d 873 (3d Cir. 1966).

[5] We note also that the policy behind § 5(g) of the Act, setting the time at which the order becomes final, is to "enforce obedience to the Commission's orders to cease and desist. * * *" H.Rep. No. 1613, 75th Cong., 1st Sess., at 4 (1937). Such a policy would be ill-served by introducing into the process an occasion for delay.

[11, 12] Most important for present purposes, clarification of an equitable decree can be obtained only from "the court granting it." *Regal Knitwear* v. *NLRB*, *supra*, 324 U.S. at 15, 65 S.Ct. 478, 89 L.Ed. 661. The court of appeals that originally affirmed the cease and desist order has had the parties and issues before it. It is palpably the court uniquely qualified to interpret its own order, and judicial economy requires that it be the only forum before which questions of interpretation be raised. Appellant's proper course, then, would have been to petition the Court of Appeals for the Ninth Circuit for a clarification of its decree. No district court action for a declaratory judgment is authorized by the Federal Trade Commission Act.

II. REVIEW IN DISTRICT COURT

[13] Appellant has in this case brought an action in district court to review the error of the FTC—naturally, assailed as arbitrary and capricous action—in setting forth the scope of the cease and desist order. It is by now settled doctrine that a person may have relief in equity to avoid invalid official action where the risk of penalties, if he is remitted to defense of enforcement actions, is so coercive as to be a denial of due process. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Equitable doctrine has been advanced with the presumptions of reviewability in the Administrative Procedure Act as to agency regulations or orders that have presently compulsive and coercive effects. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). The doctrine has been extended, with certain limitations, to an agency action that constitutes a general interpretation on the highest level, presenting a controversy fully ripe for review. *National Automatic Laundry & Cleaning Council* v. *Schultz*, 143 U.S.App.D.C. 274, 443 F.2d 689 (1971). The circumstances and equities presented by appellant are of an entirely different, and lesser, order of magnitude, and appellant makes no comparable case for judicial interposition.

[14] If appellant's case does fall within the rare situation of one that calls for judicial interposition before any enforcement action is begun, he must obtain his relief from the Ninth Circuit whose mandate was entered on appellant's petition for review. That court has jurisdiction. *Regal Knitwear* v. *NLRB*, *supra*. It may be unlikely to give relief, but it is open. There is no jurisdiction in the District Court to give the relief sought.

The appeal, which seeks to resist a judgment dismissing the complaint, cannot be sustained. The case is remanded to the District Court with instructions to dismiss the complaint for lack of jurisdiction.

So ordered.

UNITED STATES v. SWINGLINE, INC.*

No. 71-C-1236. F.T.C. Docket No. 8759.

(United States District Court, Eastern District of New York, January 17, 1974)

1. IN CIVIL PENALTY PROCEEDING EVIDENCE DID NOT ESTABLISH IMPOSSIBILITY OF PERFORMANCE; IT MERELY ESTABLISHED THAT COMPLIANCE WOULD HAVE REQUIRED MORE INTENSIVE EFFORT THAN DEFENDANT WAS WILLING TO MAKE

   In Federal Trade Commission's proceeding for civil penalty for failure to comply with divestiture order, evidence at most established that compliance would have been difficult and would have required more intensive effort than defendant was willing to make, and did not establish impossibility of performance.

2. LACK OF DILIGENCE IN ATTEMPTING TO COMPLY WITH DIVESTITURE ORDER, NOT WILLFUL DELAY, PREVENTED AFFIRMATIVE FINDING OF GOOD FAITH

   In Federal Trade Commission's proceeding for civil penalty for failure to comply with divestiture order, evidence permitted finding that delay was not willful, but lack of diligence in attempting to comply prevented affirmative finding of good faith.

3. IMPOSITION OF CIVIL PENALTY DOES NOT DEPEND ON WILLFULNESS

   Civil penalty is somewhat like punishment for civil contempt, in that its imposition does not depend on willfulness.

4. IN SUPPORTING A FINDING OF CIVIL CONTEMPT, LACK OF DILIGENT EFFORT TO COMPLY WITH ORDER IS SIGNIFICANT

   Disobedience of court order need not be willful in order to support finding of civil contempt; while mere negligence may not be enough, lack of diligent effort to comply with order is significant.

5. IF DEFENDANT DOES NOT CREATE HIS OWN INABILITY, THEN INABILITY TO COMPLY WITH COURT ORDER MAY BE DEFENSE TO JUDGMENT OF CONTEMPT

   Inability to comply with court order may be a defense to judgment of contempt, but not if defendant creates his own inability.

6. ARGUMENTS THAT COMPLIANCE WITH DIVESTITURE ORDER WOULD BE DIFFICULT OR IMPOSSIBLE MAY HAVE BEARING ON EXTENT OF PENALTY, BUT ARE NO DEFENSE TO ACTION FOR CIVIL PENALTY

   Arguments that divestiture pursuant to Federal Trade Commission order would be difficult or even impossible are not defense to action for civil penalty, but may have bearing on extent of penalty.

7. LACK OF INTENT TO VIOLATE ORDER IS NOT A DEFENSE TO LIABILITY, ONLY SOMETHING TO BE CONSIDERED IN MITIGATION OF PENALTY

   Lack of intent to violate Federal Trade Commission divestiture order is not [38] defense to liability, but only factor to be considered in mitigation of penalty.

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*Reported in 371 F. Supp. 37 (1974). For case before the Commission, see 76 F.T.C. 407.

8. **FAILURE TO COMPLY WITH F.T.C. ORDER AS WELL AS AFFIRMATIVE ACTS IN VIOLATION OF F.T.C. ORDER MAY SUBJECT DEFENDANT TO IMPOSITION OF PENALTIES**

Penalties may be imposed for failure to comply with Federal Trade Commission divestiture order as well as for affirmative acts in violation of an F.T.C. order.

9. **COMMISSION HAS DISCRETION IN MATTERS RELATING TO THE GRANTING OF EXTENSION OF TIME TO COMPLY WITH ITS ORDER**

Extension of time to comply with order of Federal Trade Commission rests in discretion of Commission.

10. **DENIAL OF EXTENSION OF TIME TO COMPLY WITH ORDER WAS NOT ARBITRARY, AND COMMISSION WAS NOT REQUIRED TO SPELL OUT ITS REASONING, WHERE DEFENDANT WAS SLOW TO START COMPLIANCE, FAILED TO RESPOND TO F.T.C. COMMENTS TO ITS QUARTERLY COMPLIANCE REPORTS AND WARNINGS GIVEN BY THE COMMISSION**

In view of defendant's slow start, failure to respond effectively to Federal Trade Commission's comments on defendant's quarterly compliance reports, warning given to defendant and Commission's acceptance of defendant's excuse that it thought it was entitled to count 60-day appeal period in determining when order became final, denial of extension of time to comply with divestiture order was not arbitrary, and there was no need for Commission to spell out reasons for denying extension.

11. **THERE IS NOT STATUTORY OR REGULATORY REQUIREMENT THAT COMMISSION GIVE NOTICE TO DEFENDANT BEFORE CERTIFYING A CASE TO ATTORNEY GENERAL FOR ENFORCEMENT**

There was no requirement by statute or regulation that Federal Trade Commission give notice before certifying case to Attorney General for proceeding to enforce divestiture order, and where Commission on acquiescing in later deadline than previously imposed stated only that it would not claim penalty if eligible company was presented by December 15, 1970, no further notice of intention to seek penalty was necessary.

12. **NOT TO ENCUMBER WITH OBSTACLES, BUT TO EXPEDITE ENFORCEMENT OF THE CLAYTON ACT IS THE PURPOSE OF THE FINALITY ACT OF 1959**

Purpose of Finality Act of 1959 was to expedite enforcement of Clayton Act, not to cumber it with obstacles.

13. **CERTIFICATION OF FACTS TO ATTORNEY GENERAL TO COMMENCE ENFORCEMENT ACTION IS NECESSARY ONLY TO PROVIDE ATTORNEY GENERAL AUTHORITY TO BRING THE ACTION**

Under statute providing for Federal Trade Commission's certification of facts to Attorney General whenever Commission has reason to believe that any person, partnership or corporation is liable to penalty under certain statutory provisions, certification was necessary only to provide authority for Attorney General to bring the action.

14. **FACTS OF THE CASE DETERMINE AMOUNT OF PENALTIES**

Amount of penalty for failure to comply with order of Federal Trade Commission depends on facts of case.

15. **FINANCIAL ABILITY TO PAY PENALTY, DEGREE OF HARM CAUSED BY DEFENDANT, DEFENDANT'S GOOD OR BAD FAITH, NATURE OF EXCUSES FOR DELAY, AND**

Extent Defendant Had Profited From Failure To Comply Are Factors Considered in Determining Amount of Penalties

Among factors which may be considered in determining amount of civil penalty for failure of compliance with Federal Trade Commission order are financial ability to pay penalty demanded, degree of harm caused by defendant and its good or bad faith, nature of excuses for delay and extent to which defendant has profited by failing or delaying to comply.

16. **Penalty of $150,000 Was Appropriate Under Evidence**

Under evidence, penalty of $150,000 was appropriate for failure of compliance with Federal Trade Commission order of divestiture.

(Syllabus, with substituted captions, taken from 371 F. Supp. 37)

In action for civil penalties for failure to comply with F.T.C. divestiture order, court held that lack of diligence in attempting to comply with the order, not willful delay, prevented a finding of good faith. A penalty of $150,000 was appropriate under the evidence.

Civil penalty fixed; prayer for injunctive relief denied; judgment in accordance with opinion.

Edward J. Boyd, V., Acting U.S. Atty., Brooklyn, N.Y., by *Henry A. Brachtl*, Asst. U.S. Atty., of counsel, for plaintiff.

Chadbourne, Parke, Whiteside & Wolff, New York City, by *Paul G. Pennoyer, Jr.*, New York City, of counsel, for defendant.

JUDD, *District Judge.*

DECISION AND ORDER

[39] This case requires a decision, after a non-jury trial, on the government's right to a civil penalty for delay in complying with a Federal Trade Commission (FTC) divestiture order, and a determination of the amount of any penalty.

Facts

Proceedings were begun in the Federal Trade Commission by the issuance of a complaint against Swingline, Inc. on April 1, 1968 charging violation of Section 7 of the Clayton Act. 15 U.S.C. § 18. The alleged violation resulted from its acquisition in 1965 of Spotnails, Inc. and Speedfast Corporation, both of which had been engaged in manufacture and sale of heavy duty industrial staplers and fasteners and had been in competition with each other.

Swingline paid approximately $3,100,000 for Spotnails and $2,500,000 for Speedfast. The evidence did not disclose how much of the prices was attributable to plants, inventory and physical assets, and how much to good will or other factors.

Swingline manufactures personal and commercial stapling devices, fasteners, and other office equipment, and sells its products throughout the United States. In 1965, Spotnails and Speedfast were two of about seven domestic producers of heavy-duty portable industrial staplers and nailers. This is a field in which Swingline had not been engaged before its acquisition of Spotnails and Speedfast.

After the acquisition of Spotnails and Speedfast, Swingline made many changes in the supervisory personnel of the two corporations; Swingline took over the performance of many important corporate functions, and closed some of the plants which the two companies had operated; there was virtually a complete integration of the assets, operating personnel, and sales facilities of the two corporations, and the Speedfast name was dropped. Thus competition between Speedfast and Spotnails was effectively eliminated.

Swingline filed an answer to the FTC complaint, admitting certain allegations, but denying that it had violated the Clayton Act. After proceedings before a hearing examiner, and lengthy negotiations, the parties agreed on a stipulation of facts, a proposed consent order, and a joint memorandum in support of the order.

Since it would have been extremely difficult to restore competition between Speedfast and Spotnails by requiring Swingline to divest itself of one of the corporations, the FTC directed, in the consent order, that Swingline divest itself of a portion of its business, by disposing of some of the assets it had acquired, and providing knowhow and some assured orders to the company acquiring the divested assets.

The Initial Decision of the Hearing Examiner, dated July 30, 1969, recommended entry of an order that would require Swingline to present to the FTC as soon as practicable, but in no event later than one year after the date the order became final, "a financially sound and eligible company" and a contract with such company. The recommended order required Swingline to assure by such contract that "the eligible company" have adequate manufacturing space, machinery, and working capital, that it have royalty free licenses on Spotnails' knowhow and patent rights, and that Swingline would assign specified amounts of customers' orders to "the eligible company" for a three-year period, and furnish technical assistance and other aid to assure that "the eligible company" would be a viable concern.

The order of the FTC adopting the initial decision of the hearing examiner was issued on October 9, 1969 and served on Swingline on October 17, 1969. In a letter addressed to Swingline on November 7, 1969, the Chief of the Compliance Division described this as a final order and directed that detailed compliance reports be filed within sixty days from the effective date of the order, (Oc**[40]**tober 17, 1969) and every ninety days thereafter, and described the detailed information which should be included.

When compliance efforts lagged, counsel for Swingline wrote the Commission, on September 15, 1970, that he regarded the effective date of the order as being December 15, 1969 instead of October 17, 1969, on the theory that a sixty day appeal period was allowed after the service of the order, even though the order was uncontested. The Secretary of the Commission responded on October 15, 1970 that no action would be taken to enforce compliance, provided that an eligible company was presented to the Commission for approval on or before December 15, 1970, but warned that

> This letter is not to be construed as acceptance of Swingline's compliance efforts to date. . . .
> In the event that compliance with the applicable order requirements is not effected on or before December 15, 1970, the Commission specifically preserves its right to seek civil penalties. . . .

Pleadings in This Action

The complaint in this court, filed September 20, 1971, recites the FTC order and defendant's failure to comply with its requirements before September 1, 1971, and asks for a penalty of $5,000 per day until compliance and a mandatory injunction for the accomplishment of compliance.

Defendant's answer asserts that it made good faith efforts to comply, but was defeated by circumstances beyond its control. Specifically, it asserts that Swingline's business in heavy duty industrial staplers became unprofitable because of changed economic conditions, that it suffered operating losses during 1970, and the first three months of 1971, and that it was therefore impossible to sell the Speedfast assets and impracticable to establish a viable independent business. The answer also asserts that the FTC's denial of an extension of time to comply was arbitrary and capricious, and that the suit was improperly brought because Swingline was given no opportunity to be heard by the FTC before the case was certified to the Attorney General for prosecution.

Assembly of Data

Swingline did not utilize the time between July 30, and October 17, 1969 to assemble the data necessary to permit divestiture in compliance with the FTC order, and it proceeded after October 17th in a routine manner. Benjamin Hampton, the Executive Vice President of Swingline, asked Sandor Schweiger, the corporate counsel, in October 1969 to prepare a selling document. This was not completed until March 1970. Jack Linsky, President of Swingline, had become seriously ill in September 1969, taking away leadership at an important time.

The Commission wrote to Swingline's counsel on January 13, 1970 requesting additional details concerning compliance, to be submitted not later than January 26, 1970, and asking for a copy of the selling brochure.

Preparation of the selling document involved determining the type of presentation, getting a number of persons to work on various aspects, updating a 1965 report compiled by Booz, Allen and Hamilton, management consultants, and making an inventory of the materials on hand. Many portions of the ultimate brochure were substantially identical with the Booz, Allen and Hamilton report. The Booz, Allen and Hamilton report had been prepared to justify the purchase price of Speedfast, because Jack Linsky, the major stockholder of Swingline, also owned all the stock of Speedfast.

The court finds that there was substantial work required in preparing the selling document, but that the work was done with no sense of urgency on the part of the Swingline staff.

The government criticizes the selling brochure for not listing the right to licenses under the Spotnails patents as **[41]** part of the assets to be sold. Swingline counters by saying that the Spotnails patents were to be available only if the new company requested them, and that they were mentioned in an annexed copy of the FTC order. The court regards the omission as significant, in view of the fact that the Spotnails licenses and Spotnails customer list were separately listed in an earlier memorandum from counsel to the officers of Swingline and Spotnails summarizing the FTC order. The "Memorandum in Support of Agreed Upon Order," signed by both parties in the FTC proceeding, had mentioned the existence of patent protection as "The paramount obstacle to new entry in this industry * * *." Sales of Speedfast products having been abandoned, and Spotnails having developed new patents after the Speedfast acquisition, the court regards the omission of reference to Spotnails in the brochure as an effort to get by with the minimum measure of compliance with the FTC order, at risk of not being able to dispose of the assets "as soon as practicable." This omission cannot be attributed solely to Swingline's lackadaisical attitude toward the divestiture.

Negotiations With Prospective Buyers

There were news articles about the FTC proceedings in August and October 1969 in the Wall Street Journal and other publications. Inquiries about the acquisition of the Spotnails-Speedfast assets began to come to Swingline shortly after the announcement of the consent decree, and even before it became final.

Swingline responded to each inquiry but not with any degree of diligence.

DESA Industries Inc. wrote to Swingline on September 9, 1969, even before the FTC order became final, but the brochure outlining the items that it might acquire was not forwarded until March 5, 1970. Negotiations with DESA continued until August 6, 1970, when Swingline was informed that the corporation had no further interest in the matter.

Omark Industries, Inc. wrote on October 27, 1969 about its interest in acquiring the Speedfast assets. Again Swingline delayed until March 5, 1970 before sending a brochure and was slow in its response to inquiries after that date. Negotiations with Omark terminated on September 29, 1970. Omark learned enough from its negotiations to enter the fastener industry itself in 1972.

Discussions with Waldman Corporation were begun in about October 1969. Representatives visited Swingline's Long Island City plant in December 1969, but no offer was obtained.

There were contacts with several other companies.

Swingline did not put a price on its package until about September 1970, and then its figure of $1,250,000 proved to be considerably too high. Swingline states that it was afraid that any price it fixed might be so high as to repel the buyer or so low as to invite a stockholders' suit. It seems to have been more concerned about its relation with stockholders than about its obligation to the FTC. There had been a stockholder suit in 1966 attacking the purchase of Speedfast.

The FTC, in mid-1970, when it noted no progress in divestiture, stated that Swingline should have consulted an investment banking firm. Swingline had considered this unnecessary, but in the summer of 1970 consulted Laidlaw & Co., which wrote to 121 prospects, with no results.

Hilti International, S.A., a Swiss (Liechtenstein) company, began negotiations with plaintiff in September 1970, but did not conclude any arrangement. Swingline had asked Hilti for $1,500,000, including foreign patents. Hilti has also entered the fastener field in competition with plaintiff.

Creation of a New Company

Laidlaw & Co. advised against trying to set up a new company, because it would not have sufficient breadth of product to be viable. Nevertheless, this [42] is the route which Swingline had to follow in order to accomplish the divestiture which the FTC ordered. Negotiations with Lloyd Singer, a former director of Swingline, began in April 1971, and concluded on or about September 3, 1971, when Swingline was finally able to submit an eligible company to the FTC. Singer's connection with Swingline had terminated when American Brands acquired Swingline, as described below.

The price to Singer's new company was only $250,000, payable over a term of years and not in cash. The terms were complicated and presented a different package from what the FTC order contemplated. Swingline had to promise additional support beyond the requirements of the FTC order. Mr. Blakeman, President of Spotnails, Inc., indicates costs of $240,000 over a two-year period to meet Swingline's obligations to the new company.

Compliance Reports

Swingline's first quarterly compliance report dated December 15, 1969 stated in general terms that it was making efforts to divest itself of the Speedfast assets. It asserted that Swingline had completed its work on a selling brochure, which was being reviewed and edited by a professional public relations firm. It described various efforts to dispose of the Speedfast assets and listed some of the people with whom the company had been in contact, but it did not include either DESA or Omark, in spite of the fact that testimony at the trial indicated that both of them had communicated with Swingline during September or October. The Commission expressed dissatisfaction with the general nature of the report and asked for copies of all correspondence, a list of assets to be included in the divestiture, the price established for the divestiture, and a list of all customers to whom Spotnails was selling on October 17, 1969.

The second quarterly compliance report dated March 17, 1970 listed Omark and DESA among several companies with whom contact had been made, but it did not supply all the information requested by the FTC after the first report. The attached correspondence indicated that Omark had been informed on October 28, 1969 that it was premature to make contact. A subsequent letter from Omark dated December 8, 1969 asking for the terms and conditions of sale had apparently gone unanswered. The Commission replied under date of March 24, 1970,

> It is apparent that Swingline has not taken affirmative steps to locate and develop an eligible company but has relied solely upon requests made to it * * *. We find wholly unacceptable both the failure of Swingline to establish an asking price for the to-be divested assets as well as requiring interested parties to take the initiative and submit a bid.

Swingline's third quarterly report dated June 16, 1970 described discussions with DESA, Omark and others and notified the Commission of the acquisition by Spotnails, Inc. of Western Machine & Welding Corp. The Commission's response on July 14, 1970 noted that written communications evidencing negotiations had not been furnished as required by the FTC and that five of the questions put to

Swingline in the Commission's letter of January 13, 1970 had not yet been answered.

After receiving Swingline's fourth quarterly report dated August 11, 1970, the Commission called attention to the October 17, 1970 deadline for presenting an eligible company to the Commission and stated that "this request is absolute." This comment resulted in the correspondence described above, in which the Commission agreed not to claim any penalty if an eligible company was presented by December 15, 1970.

Swingline's fifth quarterly report dated October 8, 1970 described further efforts to dispose of the Speedfast business, and attached copies of correspondence with various prospects. The Commission's comment, in a letter of October 16, 1970, called attention to the fact that a list of Spotnails' customers which [**43**] had been requested by the Commission on January 13, March 24, and July 14, 1970 had not yet been provided, that financial statements for Spotnails had not been submitted as requested, that there was no evidence of any correction of the selling brochure to include a reference to Spotnails patents, and that the Commission's request of March 24, 1970 for monthly reports of compliance had not been satisfied. A list of five specific sets of documents and information was requested.

Financial Effects of Delay in Compliance

The Comptroller of Spotnails testified concerning the revenue and expenses allocable to the assets to be divested and stated that they reflected a loss of $1,470 during the period in which compliance with the FTC order was delayed. His figures, however, involved so many questionable assumptions and so many uncertainties that they are not a satisfactory basis for any finding. The pretax profit of Spotnails as a whole was $170,332 for the period from December 16, 1970 to August 31, 1971. This represented a substantial decline from pretax profits of $664,016 for the fiscal year ended August 31, 1969.

The parties stipulated that Swingline was financially able to pay the maximum penalty of $1,300,000.

During the period after the issuance of the FTC order, Spotnails' share in the market in industrial staplers and fasteners dropped slightly, a circumstance which Swingline cites as evidence that the public interest in preventing monopoly did not suffer during the delay in compliance with the FTC order.

Impossibility

Swingline asserts that it was impossible to comply with the FTC order within the time limit because of the business recession of 1969–

70. It points out that there was a substantial decline in the number of mergers which took place during that period. This evidence cuts both ways, for it shows that mergers were still possible if people would adjust their terms to the realities of the situation.

In fact, Swingline itself acquired a small tool and die shop early in 1970. During the same year, it also acquired Western Machine Co., a fabricator of machinery. Swingline in turn was acquired by American Brands, Inc. in May 1970. The Treasurer of American Brands, in recommending the purchase to the Chairman of the Board in January 1970, said,

> The company has an excellent growth record and is predicting a 20% increase in both sales and earnings for the current fiscal year.

Swingline's evidence on national economic statistics shows a drop of 0.5% for 1970 in gross national product in constant dollars, and a slump *in growth* of sales of heavy-duty industrial stapling. Such sales were $56.7 million in 1969, $56.9 million in 1970, and $66.9 million in 1971. The opinion expressed by Swingline's expert is not that it would have been impossible to sell Speedfast assets in 1970, but that it would have been "very difficult to find a qualified buyer." There was no evidence that the renewed growth in sales of industrial stapling in 1971 came as a surprise to people in the industry.

Swingline's pricing of the Speedfast package, asking over $1,000,000 in 1970, shows that the failure to comply with the FTC order was attributable more to Swingline's desire to get a good price than to the state of the nation's economy.

Denial of Extension

In August 1970, the FTC had informed Swingline that its time to submit an eligible company would expire on October 17, 1970, Swingline responded by letter already described, that the nature of the FTC proceeding had been such that the FTC order did not become final until December 16, 1969, and therefore December 15, 1970 was the effective date for compliance, and the FTC agreed to seek no penalty before that date.

[44] Swingline applied on December 14, 1970 for an extension until April 1, 1971 of the time within which to comply with the FTC order. This request was denied without any specific statement of reasons on January 8, 1971. The FTC expressly referred to its right to seek civil penalties.

Certification to the Attorney General

On June 14, 1971, the Chairman of the Federal Trade Commission wrote to Attorney General John N. Mitchell certifying that Swingline, Inc. and American Brands, Inc. had violated the divestiture provisions of the Commission's order and transmitting copies of a proposed complaint and a memorandum in support of the complaint.

The Applicable Law

The statute providing for a civil penalty in this case is Section 11 of the Clayton Act, 15 U.S.C. § 21(*l*), which provides:

> Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission of such failure or neglect shall be deemed a separate offense.

There are relatively few reported cases concerning the determination of the amount of a civil penalty. Both decided cases and reported settlements appear generally to fix a round figure rather than to compute the amount on the basis of a specific daily penalty.

The provision for institution of an action for a civil penalty is in Section 16 of the Federal Trade Commission Act, now 15 U.S.C. § 56, which reads:

> Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 54 of this title or under subsection (*l*) of section 45 of this title, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection.

The Defense of Impossibility

[1] There is no need to determine whether impossibility of performance is a defense to failure to obey a FTC order. The proof here falls far short of showing impossibility. The most it shows is that performance was difficult and that it would have required more intensive effort than Swingline was willing to devote to the task.

[2] Swingline's argument boils down to the double contention (a) that its delay in compliance was not wilful and (b) that it acted in good faith. The court finds that the delay was not wilful, but the lack of diligence in attempting to comply prevents an affirmative finding of good faith.

[3] A civil penalty is somewhat like a punishment for civil contempt, in that its imposition does not depend on wilfulness.

[4] Disobedience of a court order need not be wilful in order to support a finding of civil contempt. *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 69 S. Ct. 497, 93 L. Ed. 599 (1949) (violation of Fair

Labor Standards Act); *National Labor Relations Board* v. *Local 282*, 428 F. 2d 994, 1000–1001 (2d Cir. 1970). While mere negligence may not be enough to support a finding of contempt, a lack of diligent effort to comply with the order is significant. As was stated in a trademark case, *Babee-Tenda* **[45]** *Corp.* v. *Scharco Mfg. Co.*, 156 F. Supp. 582, 587 (S.D.N.Y. 1957):

> They were required to take energetic steps to see that the orders of the court were carried out.

[5] Inability to comply with a court order may be a defense to a charge of contempt, *United States ex rel. Emanuel* v. *Jaeger*, 117 F. 2d 483, 488 (2d Cir. 1941), but not if the defendant created his own inability. *In re D. I. Operating Co.*, 240 F. Supp. 672, 677 (D. Nev. 1965).

[6, 7] Similar rules apply to FTC orders. Arguments that divestiture would be difficult or even impossible are not a defense to an action for civil penalty, although they may have a bearing on the extent of the penalty. *United States* v. *Beatrice Foods Co.*, 344 F. Supp. 104, 116 (D. Minn. 1972). Lack of intent to violate the order is not a defense to liability, but only a factor to be considered in mitigation of the penalty. *United States* v. *H. M. Prince Textiles, Inc.*, 262 F. Supp. 383, 389 (S.D.N.Y. 1966); *United States* v. *Vitasafe Corp.*, 212 F. Supp. 397 (S.D.N.Y. 1962).

This case is not like *United States* v. *St. Regis Paper Co.*, 285 F. 2d 607, 614 (2d Cir. 1960), *aff'd*, 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed. 2d 240 (1961), where the court recognized that a claim of "an honest mistake in a good-faith attempt to comply" might be raised in mitigation of the penalty. Nor is it like *Kerr Steamship Co.* v. *United States*, 284 F. 2d 61 (2d Cir. 1960), *cert. granted*, case vacated and remanded with instruction to dismiss appeal as moot, 369 U.S. 422, 82 S.Ct. 974, 7 L.Ed. 2d 847 (1962), where there was a question of the intent and meaning of a Federal Maritime Board order.

[8] Moreover, as the court held in *United States* v. *Beatrice Foods Co.*, *supra*, 344 F. Supp. 104, penalties may be imposed for a failure to comply with a divestiture order as well as for affirmative acts in violation of an FTC order.

Extension of Time

[9, 10] The right to an extension of time to comply with an order rests in the discretion of the Federal Trade Commission. 16 C.F.R. § 4.3(b). The denial of an extension of time cannot be criticized as arbitrary in this case, in view of Swingline's slow start, its failure to respond effectively to the Commission's comments on its quarterly compliance reports, the warning of the compliance date that was given

it in August, and the acceptance by the Commission in October 1970 of Swingline's excuse that it thought it was entitled to count the sixty-day appeal period in determining when the order became final. There was no need for the FTC to spell out the reasons for denying an extension of time.

Certification

[11] Neither the statute nor the regulations require that the FTC give notice to a party before certifying a case to the Attorney General for an enforcement proceeding. The fact of violation being clear, the only reasons a respondent could give to persuade the Attorney General not to proceed would be the same reasons that are appropriate to present to a court in mitigation of the amount of the penalty.

The FTC told Swingline on August 11, 1970 that it should present an eligible company by October 17, 1970 and that "this request is absolute." When it acquiesced in a later deadline, the Commission stated only that it would not claim a penalty if an eligible company was presented by December 15, 1970. No further notice of an intention to seek a penalty was necessary.

[12] Even if these notices were not in the case, the assertion that in some cases respondents have been permitted to submit memoranda prior to certification does not make such a submission a condition precedent to an action. The purpose of the "Finality Act" was to expedite enforcement, not to cumber it with the sort of obstacles which Swingline would interpose. *Federal Trade Commission* v. *Jantzen*, 386 U.S. 228, 231, 87 S. Ct. 998, 1000, 18 L. Ed. 2d 11 (1967); *Federal Trade Commission* v. [46] *Henry Broch & Co.*, 368 U.S. 360, 365, 82 S. Ct. 431, 7 L. Ed. 2d 353 (1962).

[13] Certification was necessary only to provide authority for the Attorney General to bring the action. *United States* v. *St. Regis Paper Co.*, 355 F. 2d 688 (2d Cir. 1966). There is nothing in 15 U.S.C. § 56 to indicate that Congress intended to require an adversary proceeding between the violation of an order and the institution of an action.

Defendant refers to an amendment of 16 C.F.R. § 3.61(a) on March 17, 1972 which expressly referred to certification of facts to the Attorney General "without advising a respondent whether the actions set forth in a report of compliance evidence compliance with the Commission's order." This language may properly be treated as declaratory of proper procedure rather than as eliminating a step previously required. In any event, Swingline could not have been under any misapprehension that it had complied with the order in this case. It had been clearly informed that its reports did not show compliance.

The Amount of Penalty

[14] The amount of penalty depends on the facts of each case. There are relatively few reported decisions on violations of FTC orders.

In the *Beatrice Foods* case, supra, it appears from information in the parties' memoranda that the penalty was fixed at $9,800 or only $200 a day. On the other hand, in *United States* v. *ABC Consolidated Corp.*, 1968 Trade Cas. ¶ 72,621 (E.D.N.Y. 1968), where the government asked for $319,000 on the basis of $1,000 per day, the penalty was fixed by agreement at $200,000 for a delay of about eleven months in complying with a divestiture order. (The amount appears in the trial memorandum here, although not in the reported opinion.)

In the *Vitasafe* case, the government asked for a penalty of $50,000 and was granted $18,000 (see 352 F. 2d at 62 (2d Cir. 1965)). In the *Prince Textiles* case, the penalty was fixed at only $250 for each violation, whereas the government had asked for the maximum ($5,000). 262 F. Supp. at 387, 389.

In other types of cases, civil penalties have been relatively modest. The Civil Aeronautics Board imposed a fine of only $65,000 upon the Penn Central Company for devious, flagrant and persistent violation of the statutes against a common carrier by rail having an interest in an air carrier. See Daughen & Binzen, The Wreck of the Penn Central (Signet ed. 1973), pp. 166–67. The maximum potential penalty in the *Penn Central-Executive Jet* case might have amounted to $7,000,000; but the venture had caused severe losses to Penn Central, and the violation did not involve disobedience of an order previously entered.

In the *Alitalia* case, where this court had found that Alitalia was selling tickets at an illegal discount, *Civil Aeronautics Board* v. *Alitalia-Lines Aeree Italiane*, 328 F. Supp. 759 (1971), the Board rejected a $30,000 settlement offer and ultimately settled the case for $50,000, although potential penalties were over $2,000,000. CAB Order 72–8–3, Aug. 1, 1972. Again, this involved violation of a statute whose application was contested and not of a specific Board order.

[15] Among the factors recently listed by Judge Motley in *United States* v. *J. B. Williams Co., Inc.*, 354 F. Supp. 521, 548 (S.D.N.Y. 1973), to be considered in determining the amount of civil penalties in an FTC action are

> their financial ability to pay the penalties demanded, the degree of harm which defendants may have caused . . . and their good or bad faith . . . .

Other factors may include the nature of the excuses for delay and the extent to which defendant has profited by failing or delaying to comply.

[16] In this case, financial ability is not a primary factor. Swingline has the ability to pay the full penalties demanded. However, the amount asked is substantial in relation to its total assets and its annual profits.

[47] The harm caused by Swingline's delay is difficult to assess. The harm may have been less serious than the harm caused in the *Williams* case, where the respondents continued publishing misleading advertisements after an order to cease publishing them; but Swingline's delay had a significant effect on the public interest. The suppression of competition, initiated in 1965, continued until September 1971, at least nine months beyond the time when the FTC said that competition should have been restored. The restoration of competition was made more difficult and precarious because it required revival of the Speedfast goodwill, which had grown more stale with each day's delay.

The degree of good faith was rather low in this case. There was no excuse for the delay from July 30, 1969, when the form of order was agreed on, or at least from October 17, 1969, when the order was certified by the FTC, until March 1970, when a selling brochure was finally developed; there were long delays in following up expressions of interest which had been received as early as September and October 1969; Swingline endeavored to avoid giving a license for Spotnails patents by excluding any reference to them in the brochure and leaving it to the purchaser to dig the information out of the annexed FTC report; there was a long failure to put a price on the package; and there were continued failures to furnish information requested by the FTC.

Swingline's default in this case is not comparable to that in *United States* v. *Northern Pacific Ry.*, 242 U.S. 190, 37 S. Ct. 22, 61 L. Ed. 240 (1916), where the Supreme Court referred to an "unintentional omission or mistake."

There was no real excuse for the delay. Swingline refers to difficult economic conditions during 1970. These conditions did not, however, prevent it from being involved in two acquisitions and one merger during 1970. The conditions simply called for "energetic steps" (see *Babee-Tenda* v. *Scharco Mfg. Co.*, *supra*, 156 F. Supp. at 587), which Swingline did not take.

The benefit Swingline received from its delayed compliance was minimal, even if half of the $170,000 profits of Spotnails could be attributed to the retention of the assets which should have been divested. On the other hand, the costs of its ultimate compliance have turned out to be very large. The price promised it by the new company was a mere fraction of the evaluation which Swingline originally put on the assets. The amount which Swingline has spent on special services to comply with the order is almost equal to the total consideration of

$250,000 which it was promised. Swingline thus has suffered substantial loss through being forced to divest in haste after a further extension of time was denied and through having to assume onerous obligations to the new company beyond the requirements of the FTC order.

In this case, the penalty should not approach the maximum, but should be large enough to hurt, and to deter anyone in the future from showing as little concern as Swingline did for the need to meet an FTC time-table.

A penalty of $150,000 is determined to represent fair consideration of all the factors listed.

Injunction

Swingline has now divested itself of the assets described in the FTC order and complied with its obligations to the new company. There is no showing of particularized need for injunctive relief against any future obligations under the FTC order.

This decision is intended to comply with the requirements of F.R. Civ. P. 52 concerning findings of fact and conclusions of law.

It is ordered that the amount of the civil penalty payable to the United States by Swingline, Inc. be fixed at $150,000, that the prayer for injunctive relief be denied, and that the Clerk of Court enter judgment for plaintiff as set forth above.

F.T.C. v. RICHARD JACKSON, ET AL.*

Civ. A. No. C74–5S. F.T.C. File No. 99–169.

(United States District Court, Western District of Washington, February 15, 1974)

On petition for enforcement of subpoena *duces tecum* issued by the F.T.C., court held that the subpoena should be enforced in part. The sections of the subpoena requesting certain economic information were outside the resolution on the basis that the information would have to have been reasonably relevant to some other valid subject of inquiry and the F.T.C. had not informed respondents or the court of any alternative subjects of inquiry. A recitation of the statutory authority under section 5 of the F.T.C. Act alone, is insufficient under the regulations and the cases to give notice of a subject of investigation other than those set out in the resolution.

Before SHAW, *District Judge*.

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*Not otherwise reported. Motion to reconsider denied, May 21, 1974. For case before the Commission, see *Mayday Company, Inc., et al.*, 88 F.T.C. 775.

This matter comes before the Court on the petition of the Federal Trade Commission (hereinafter FTC) for an order requiring the respondents Richard Jackson and Ward Keller, officers of Mayday Co., Inc. (hereinafter Mayday), to appear and produce documentary evidence in an investigation being conducted by the FTC. By resolution dated June 13, 1973, the FTC indicated the scope of its investigation to be as follows:

> To determine whether or not Mayday Company, Inc., and Ricks-Ehrig, Inc., and others may be engaged in unfair or deceptive acts or practices in violation of the Federal Trade Commission Act, 15 U.S.C. 45, including but not limited to misrepresentations of career opportunities in investigation and security and the necessity for and quality of the training provided by Mayday Co., Inc., in Washington and other states.

On June 19, 1973, the FTC issued to respondents subpoenas duces tecum. Respondents indicated by letter dated July 6, 1973 that they would comply in part but refused to submit certain of the documents called for in the specifications to the subpoenas. The documents refused concern (1) the total amount of compensation of each Mayday employee who exercises supervisory functions over other employees; (2) the breakdown into major categories of the gross revenues of Mayday over the four-year period 1970–1973; (3) the totals and the breakdown into major categories of the expenditures of Mayday over the same four-year period; (4) the before-tax profits of Mayday over the same four-year period; (5) dividends and payments with respect to ownership interests paid to owners of Mayday over the same four-year period; (6) other payments to Mayday owners over the same four-year period; (7) payments to respondents other than their compensation as officers and directors over the same four-year period; (8) the cost of providing Mayday's course of instruction to one student; (9) names, addresses, and current employment of all persons who graduated from Mayday's course of instruction in 1972 and 1973; (10) names and addresses of all persons who agreed to subscribe to Mayday's course of instruction, paid money, and did not begin the course of instruction in 1971, 1972, and 1973; (11) names, addresses, and length of employment of all persons who sell Mayday courses to prospective students and the total compensation of each; (12) copies or photocopies of all financial statements prepared for Mayday which show the amounts and sources of revenues or expenditures; (13) the names and addresses of all employers who have hired Mayday graduates and the number of persons hired; (14) correspondence and other writings which deal in whole or in part with contacts between Mayday and employers of security and investigative personnel other than that dealing with availability of jobs, existence of placement services, design of course materials, complaints of lack of training, and evaluations of Mayday training; (15) copies of all materials relied upon by Mayday in the preparation of its course materials which are not in its possession, custody, and control; (16) all materials prepared for and correspondence with the National Home Study Council other than those submitted to the National Home Study Council to obtain and maintain accreditation by that organization; (17) all writings concerning contacts of Mayday personnel with local, state, or federal agencies (other than the FTC) concerning the quality or content of Mayday's advertising or course material other than complaints by such agencies; and all correspondence with or materials prepared for the Veterans Administration or state accrediting agency other than documents submitted to the Veterans Administration or any agency of the State of Washington which accredits courses on behalf of the Veterans Administration to obtain and maintain Veterans Administration approval. Respondents resist surrendering some items altogether and resist surrendering others without a suitable protective order.

The Court having considered the petition, its attachments, and the memoranda in support and in opposition filed herein, and having heard oral argument in open court, finds that certain of the items refused are reasonably relevant to the investigation proposed in the FTC resolution and should be produced and that certain other of the items are not reasonably relevant and need not be produced. The Court also finds no necessity for a protective order for the items found to be reasonably relevant.

Items (9), (10), (13), (16) and (17) are reasonably relevant to the purposes of the FTC investigation as set forth in the resolution dated June 13, 1973. Also, item (11) is reasonably relevant except that the total compensation of each such person need not be supplied and item (14) is reasonably relevant except that only those parts of the correspondence and other writings which deal with the specified contacts need be supplied.

The Court has the power to qualify an order for production to protect confidential business information. *FTC* v. *Bowman*, 149 F. Supp. 624 (D. Ill. 1957), *affirmed* 248 F. 2d 456 (7th Cir. 1957). Respondents argue that such qualification on FTC contacts with past graduates and employers of past graduates is necessary in this case because Mayday depends upon past graduates and their employers to recommend future students and to help in placement of students as they graduate. Although information on past graduates and their employers is important to Mayday and should be protected by the FTC to the extent possible under its regulations, the Court finds that this information is of the type which the FTC must investigate under its statutory responsibility and therefore concludes that a protective order is not proper in this case.

The Court finds that the remaining items are not reasonably relevant to the purposes of the FTC investigation as set forth in the resolution dated June 13, 1973. In the present case, the resolution recited the broad statutory authority of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and then added language indicating that the principal focus of the investigation would be on misrepresentations by Mayday. The specifications in the subpoena duces tecum called for considerable information about the economic operations of Mayday.

The FTC argues that the economic information is reasonably relevant to an investigation of misrepresentation because that information could yield evidence of unconscionable pricing. The only case cited in support of the proposition that unconscionable pricing is a valid subject for investigation in a misrepresentation case is *Tashof* v. *FTC*, 437 F. 2d 707 (D.C. Cir. 1970).

In that case the Court of Appeals reviewed an order of the FTC filed against appellant. The FTC findings in support of its order covered four areas of deceptive advertising and misrepresentation, one of which was misrepresentation of easy credit terms. That specific finding was supported by two further findings: (1) that appellant's collection policy was extremely rigorous, counter to the suggestion of the term "easy credit" and (2) that unconscionably high prices inflated the total cost to purchaser and made the term "easy credit" misleading. The Court of Appeals decided the finding of the rigorous collection policy was valid and was sufficient to support the finding that there had been a misrepresentation of easy credit terms. The court chose not to decide whether unconscionable prices would be a valid subject of investigation in a misrepresentation case. In addition, the present case is distinguishable from *Tashof* on its facts since the alleged misrepresentation has no relation to representations of credit terms. Thus, although the finding of relevance by the FTC in *Tashof* has certain weight, it has not been decided by the courts and should be limited to its specific facts. This Court finds that there has been no showing that the economic information sought in this case is reasonably relevant to an investigation of alleged misrepresentations by Mayday, particularly at this pre-adjudicatory stage of the proceedings.

The FTC also places emphasis on the language of the resolution stating that the investigation need not be limited to the possible misrepresentations described therein. However, even if this argument were accepted, the information would have to be reasonably relevant to some other valid subject of inquiry and the FTC has not informed respondents or the Court of any alternative subjects of inquiry. In addition, there is a requirement in the FTC regulations, 16 C.F.R. § 2.6, that a person under investigation be informed of the purpose of that investigation. If the subject of the present investigation is other than misrepresentations by Mayday, the FTC must so inform the respondents. The first part of the resolution, reciting the broad statutory authority of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, would not be sufficient notice of alternative subjects of inquiry. The resolutions in the cases cited by the FTC contained the broad statutory authority of § 5 in conjunction with the statutory language of § 2 of the Clayton Act, 15 U.S.C. § 13, which, together with the specifications of the subpoenas duces tecum, supplied the specificity of notice required by due process and warranted the upholding of the subpoenas. *FTC* v. *Green*, 252 F. Supp. 153 (S.D.N.Y. 1966); *FTC* v. *Gibson*, 460 F. 2d 605 (5th Cir. 1972). A recitation of the statutory authority of § 5 alone, particularly with the addition of language indicating that the primary subject of investigation would be misrepresentations, would be insufficient under the regulations and the cases to give notice of a subject of investigation other than misrepresentations. *FTC* v. *American Tobacco Co.*, 44 S. Ct. 336 (1924).

In Summary, the respondents are to supply the material offered in their letter dated July 6, 1973, and, in addition, the material called for above.

Appropriate order should be submitted to the Court for entry.

WILLIAM H. RODGERS, JR. v. F.T.C.*

No. 71-2859. F.T.C. File No. 99-112.

(United States Court of Appeals, Ninth Circuit, February 25, 1974)

1. LACKING CHARGES OF VOTER INTERFERENCE OR ELECTION CALCULATION INFIRMITIES, PROSCRIPTIONS OF F.T.C. ACT WERE NOT APPLICABLE TO CAMPAIGN ACTIVITIES IN STATE OF WASHINGTON

   Proscriptions of Federal Trade Commission Act were not applicable to campaign activities of opponents to "anti-litter" measure in State of Washington at least insofar as such activities mainly sought to influence the electorate at large where no charge was made of interference with voters at the polls or any infirmity in the election calculation.

(Syllabus, with substituted caption, taken from 492 F. 2d 228)

On action for declaratory judgment, court held that F.T.C. Act proscriptions were not applicable to campaign activities in the State

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*Reported in 492 F. 2d 228 (1974), *cert. denied;* 419 U.S. 834.

of Washington where no charges were made of voter interference at the polls or infirmities in election calculation.

Affirmed.

William H. Rodgers, Jr., in pro per.

Harold D. Rhynedance, Jr., Asst. Gen. Counsel (argued), *Nicholas S. Reynolds* (on the brief), *Robert E. Duncan*, Federal Trade Commission, Washington, D.C., *Stan Pitkin*, U.S. Atty., *Albert E. Stephan*, Asst. U.S. Atty., Seattle, Wash., for defendant-appellee.

Before KOELSCH and TRASK, *Circuit Judges*, and JAMESON†, *District Judge.*

PER CURIAM:

William H. Rodgers, Jr., an assistant professor of law at the University of Washington School of Law, appeals from a final judgment of the United States District Court that dismissed his complaint for a declaratory judgment and equitable relief in a proceeding which had originated before the Federal Trade Commission (Commission). The judgment was pursuant to a motion to dismiss filed by the Commission.

This litigation is an outgrowth of a proposal which was taken to the voters **[229]** of the State of Washington as Initiative 256, an "anti-litter" measure. If adopted, it would have forbidden the sale in Washington of beer and soft drinks in containers not having a refund value of at least five cents. It was rejected by the voters on November 3, 1970, by margin of 51 percent to 49 percent. By letter dated December 11, 1970, appellant wrote to the Secretary of appellee Federal Trade Commission, and requested that the Commission investigate what appellant described as "unfair and deceptive practices in commerce" arising out of that campaign.

The letter with documentation attached set forth the "facts upon which allegations are based."[1] Appellant's letter then concluded that on the basis of those alleged facts the Commission could find that the opponents of the initiative measure had combined "in both vertical and horizontal agreements, to make price representations to the public that constituted unfair and deceptive trade practices."

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†Honorable William J. Jameson, Senior United States District Judge, from the District of Montana, sitting by designation.

[1] "Simply stated, the illegality here alleged is that the grocery chain stores and the manufacturers of beer and soft drink combined, in both vertical and horizontal agreements, to make price representations to the public that constituted unfair and deceptive trade practices. At times these representations were made through the coordinating medium of Citizens Committee Against 256, at times they were made directly—for example, through the use of the stickers promising price increases. No doubt exists that if these dire threats to raise prices were implemented in a joint move by the affected industries after passage of the initiative a prima facie case of price fixing would be established. No less a violation has occurred when the industries join together with a threat of price increases to coerce the consumer to reject a ballot proposition. What happened was that the manufacturers and chains, in the course of the campaign, announced a joint price move to take effect after the election and upon the condition of the passage of 256. Saying that there is an agreement to fix prices established the violation. If there was no agreement, then the representation was false and unlawful on that separate ground. My own view is that the agreement was proven by the concerted, massive and planned move to threaten the consumer with a . . . 48 cent increase for each six-pack of a number of different products." C.T. at 35.

On January 26, 1971, Mr. Charles A. Tobin, the Secretary of the Commission, responded to appellant's letter and stated that the Commission found no actionable violation "even assuming a wrongful motive, for purposes of consideration of your complaint, and the willful use of distortion or deception."

With administrative relief denied, the appellant, repeating and embellishing the allegations in his earlier letter,[2] filed an action against the Commission in the District Court on April 8, 1971.

The complaint requested a judgment ordering the Commission to undertake an investigation under what it alleged was a correct interpretation of the law and asked for a declaration that the practices which the plaintiff described were violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and of the Sherman Act, 15 U.S.C. § 1 et seq. After oral argument upon the memoranda filed, the District Court denied appellant's motion for summary judgment and granted the Commission's motion to dismiss upon the grounds (1) that it was a matter committed to the discretion of the Federal Trade Commission; and (2) that the action was barred by the Supreme Court's decision in *Eastern R. R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961).

Assuming without deciding that the decision of the Commission in this case is reviewable under the Administrative Procedure Act, 5 U.S.C. §§ 701–706, we go directly to the merits of appellant's claim. The Federal Trade Commission, in rejecting his contentions, pointed out that although this was not activity de[**230**]signed to influence a legislative body, the people, acting directly through either the initiative or referendum, are exercising the same power of sovereignty as that exercised by the legislature in passing laws. The Washington courts have so held:

> In this case we have, instead of statute, an initiative measure limiting the taxing power. That, however, can make no difference, for the latter is as much a legislative act as is the former. By Article 2, § 1, Amendment 7 to the state Constitution, it is provided that the legislative authority of the state shall be vested in the Legislature, with an express reservation in the people of the power to

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[2] Appellant in his brief stated that in making his allegations in his complaint he had "repeated and refined" the allegations that were made to the Federal Trade Commission. Among the "refinements" was an allegation not made to the Federal Trade Commission that the conspiracy "was accomplished in part in violation of Washington State law which forbids corporations with a majority of out-of-state shareholders from making contributions in local initiative campaigns."

> propose bills and laws and to enact or reject the same at the polls. The first power so reserved is the initiative. The passage of an initiative measure as a law is the exercise of the same power of sovereignty as that exercised by the Legislature in the passage of a statute. *Love* v. *King County*, 181 Wash. 462, 44 P. 2d 175, 178 (1935).

The Commission noted:

> The proscriptions of Section 5 of the FTC Act, as we view them, like the proscriptions of the Sherman Act, are tailored for the business world, not for the political arena. We fail to perceive in the allegations any situation involving unfair methods of competition or business combination characterized by express or implied agreement or understanding that the participants will jointly give up their trade freedom, or undertake to take away the trade freedom of others. The cited representations, even if jointly made, alluding to higher prices, increased costs, economic hardships, and the like, which would assertedly be occasioned by passage of the subject legislative measure, appear to us to have been, at most, joint efforts to influence legislation.
>
> Even assuming a wrongful motive, for purposes of consideration of your complaint, and the willful use of distortion or deception, it is our view that actionable violation of Section 5 of the FTC Act is not indicated due to the overriding public interest in preservation of uninhibited communication in connection with political activity, particularly in connection with legislative processes. Nor would illegality attach because joint action may have been here undertaken on the premise of economic advantage, not merely political interest. Letter of Charles A. Tobin, Secretary, Federal Trade Commission, to William H. Rodgers, Jr., Jan. 26, 1971, in Brief of Appellant, Appendix at 10, 11–12.

The Commission then decided that action on the complaint of appellant under the Federal Trade Commission Act was not warranted. It relied upon *Eastern R. R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 139, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961).

Appellant strenuously argues that the Commission and the District Court which reviewed the Commission's order incorrectly construed the reach of the *Noerr* doctrine. He places the issue which he raises in perspective by stating in his opening brief:

> [I]t is urged on this appeal that the allegations to the FTC make out a case of overwhelming political influence in bringing about anti-competitive results from governmental action so complete and so thorough as to constitute an illegal instance of monopolization under the antitrust laws. Insofar as appellant is aware, this issue is being presented to an appellate court for the first time. The case presents an appealing occasion for application of the laws against monopoly to political campaigns. Brief of Appellant at 6.

Whatever appeal the facts of this case hold out to appellant, we have neither the inclination nor the authority to discard the rationale and the decision of the Supreme Court in *Noerr*. That case, upon which the Federal Trade Commission and the District Court principally relied, was a private antitrust action by the motor truck operators against the **[231]** railroads. The substance of the Sherman Act violation charged was that the rail carriers had mounted a far reaching and "vicious, corrupt and fraudulent" publicity campaign against the truckers which was designed to foster the adoption and retention of laws and law enforcement practices intended to damage and destroy the truckers as competitors. The Court held that the Sherman Act did not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws. A contrary holding, said the Court, would impute to the Sherman Act a purpose to regulate not business activity but political activity, a purpose which would have no basis in its legislative history. Such a construction would also interfere with the right to petition.

Said the Court:

> Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. We reject such a construction of the Act and hold that, at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had. 365 U.S. at 139–140, 81 S. Ct. at 530–531.

Noerr was followed a few years later by *United Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965). There the unlawful conspiracy alleged was one between mine owners and unions to cause the Secretary of Labor to establish unreasonably high wages to force the complainant out of business. Thus the improper influence was not to cause passage of legislation but to cause executive action. The Court upheld the position it had announced in *Noerr:*

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. 381 U.S. at 670, 85 S. Ct. at 1593.

More recently *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972), reaffirmed the rationale of *Noerr* and of *Pennington*. That case, however, involved allegations that the conspiracy was to deter the competitors in their use of administrative and judicial proceedings so as to deny them the right to free and unlimited access to those tribunals. The result would be to discourage and ultimately prevent the competitors from invoking the processes of the administrative and judicial tribunals. This, the Court said, could bring the situation within the "sham" exception of *Noerr* which would apply where the activity complained about is a mere screen for what in fact is an attempt to interfere with the business relationships of a competitor. *Eastern R. R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961).

Neither *Trucking Unlimited* nor *Pennington* lends support to appellant's arguments here. Both the supporters of Initiative 256 and its opponents had equal right to submit their arguments to the electorate at large. No charge is made of interference with voters at the polls or any infirmity in the election tabulation. The arguments of appellant fall directly within the rule of *Noerr* and the cases following it. Cases relied upon by appellant such as *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F. 2d 341 (9th Cir. 1969), and *Harman* v. *Valley* **[232]** *National Bank*, 339 F. 2d 564 (9th Cir. 1964), are not apposite.[3]

One other argument that appellant made orally was that Washington State law was violated because that law "forbids corporations with a majority of out-of-state shareholders from making contributions in local initiative campaigns." No such charge was made in the complaint to the Federal Trade Commission except as it was referred to in "an unpublished draft of a paper describing the initiative campaign which I have prepared for possible publication." An examination of this document fails to disclose any direct charge of violation of Washington State law[4] and no facts were submitted to the Commission which would support any charge of illegality.

An examination of the complaint filed indicates that there was nothing before the trial court which would require it to engage in a substantial inquiry. Taking the letter presented to it and the exhibits attached, the issue was whether *Noerr* controlled or, at the most, whether the allegations presented a matter within the *Noerr* exception. We believe that the Commission acted within the scope of its authority and that its action was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. §§ 706(2) (A), (C); *see Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415–416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). The trial court correctly decided the issue and its decision is affirmed.

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[3] *Sun Valley* and *Harman* involved the possible loss of antitrust immunity, relative to a concerted attempt to influence executive action, since the official whose favorable decision was sought was himself alleged to be acting unlawfully *i.e.*, as a member of the conspiracy. Similarly, the result in this case is not controlled by *Sacramento Coca-Cola Bottling Co.* v. *Chauffeurs Local 150*, 440 F. 2d 1096 (9th Cir.), *cert. denied*, 404 U.S. 826, 92 S. Ct. 57, 30 L. Ed. 2d 54 (1971). In that case, which also involved administrative decisionmaking, the *Noerr* exemption was held inapplicable because the defendants sought to influence "public officials engaged in purely commercial dealings" and employed tactics including "threats and other coercive measures." 440 F. 2d at 1099. Neither condition is satisfied here.

Appellant's reliance upon *Israel* v. *Baxter Labs, Inc.*, 151 U.S. App. D.C. 101, 466 F. 2d 272 (1972), and *Semke* v. *Enid Automobile Dealers Ass'n*, 456 F. 2d 1361 (10th Cir. 1972), is also misplaced. Each of these cases involved alleged attempts to misuse administrative processes in order to further primary anticompetitive objectives. Such activity, if proved, would fall within the "sham" exception of *Noerr* as interpreted by the Court in *Trucking Unlimited*. 404 U.S. at 515–516, 92 S. Ct. 609. The case before us here, however, is distinguishable in two respects. First, the allegedly unethical conduct of the "conspirators" herein occurred solely within the "political arena," not within an administrative or judicial context. *See Trucking Unlimited supra*, at 513, 516, 92 S. Ct. 609. Secondly, the materials brought to the attention of the Commission did not indicate that the opponents of Initiative 256 had acted primarily to attain anticompetitive goals or that their actions had resulted in an abuse of the initiative proceedings.

[4] C.T. at 14–15.

CONTROL DATA CORPORATION, ET AL. v. F.T.C. ET AL.*

Civ. A. No. 4–74–Civ. 25 F.T.C. Docket No. 8940.

(United States District Court, District of Minnesota, February 28, 1974)

On motion for temporary relief and preliminary injunction, court held that it has jurisdiction only with respect to the dispute arising out of documents requested by plaintiffs under the Freedom of Information Act. The court lacks jurisdiction to intercede into Commission proceedings already in progress on the grounds that plaintiffs have failed to exhaust their administrative remedies. Therefore, the court denies plaintiffs' motion for temporary relief and for preliminary injunction and also denies defendants' motion to dismiss and for summary judgment. Further, the court ordered *in camera* inspection of the disputed documents falling under the Freedom of Information Act.

Before LARSON, *District Judge.*

ORDER

Plaintiffs have moved for declaratory relief pertaining to production of certain documents demanded from defendants pursuant to the Freedom of Information Act, for declaratory relief concerning the Federal Trade Commission's Procedures and Rules of Practice, and for a permanent injunction enjoining defendants from violating their rights to a fair hearing before the Commission and staying all further proceedings pending against them until such documents are produced and the Administrative Law Judge takes them into account in reconsidering plaintiffs' motion to dismiss the Commission's pending complaint against them, or in the alternative, for a preliminary injunction until the Court determines the issues involved herein.

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*Not otherwise reported. See also pp. 1002, 1107, 1449, 1500 herein.

Defendants oppose these motions and have moved to dismiss the action for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure and for summary judgment under Rule 56.

Oral argument was heard on February 4, 1974.

The Court has considered the briefs, affidavits, and arguments of counsel.

On all of the files and proceedings herein,

IT IS ORDERED:

1. That plaintiffs' motion for declaratory relief pertaining to the Commission's Procedures and Rules of Practice be, and it hereby is, denied.

2. That plaintiffs' motion for a preliminary or a permanent injunction staying the further proceedings of the Commission and compelling reconsideration of their motion to dismiss be, and it hereby is, denied.

3. That defendants' motion to dismiss the action for lack of subject matter jurisdiction be, and it hereby is, denied.

4. That defendants' motion for summary judgment be, and it hereby is, denied.

5. That defendants submit to the Court for *in camera* inspection within ten (10) days of the entry of this Order the two documents requested by plaintiffs that defendants contend are exempt from disclosure under the Freedom of Information Act. During this same time period, plaintiffs and defendants shall be entitled to file with the Court any supporting memoranda regarding exemption of these documents and whether there exist other documents demanded by plaintiffs under the Freedom of Information Act.

MEMORANDUM

This is an action challenging certain procedures and pending administrative proceedings of the Federal Trade Commission (hereinafter FTC or the Commission).

The plaintiffs are Control Data Corporation (hereinafter CDC) and Automation Institute of America, Inc. (hereinafter AIA). CDC is a Delaware corporation with its principal place of business in Bloomington, Minnesota, AIA, a wholly owned subsidiary of CDC, is a California corporation with its principal place of business also in Bloomington, Minnesota. CDC engages in electronic data processing vocational educational programs through its Control Data Institutes division, and AIA franchises private vocational schools giving instruction in this subject. The plaintiffs currently are respondents in proceedings before the FTC for alleged violations of § 5 of the Federal Trade

Commission Act, 15 U.S.C. § 45, in the conduct of their respective programs or franchising.

The defendants are the FTC, its chairman, its four individual commissioners,[1] and the administrative law judge who has been appointed by the Commission to make an initial determination in the above mentioned proceedings.

In March 1971 the Commission served CDC and AIA with subpoenas for the production of various documents covering a period in excess of two years. Following production of the material, hearings were conducted in the summer of 1971. On May 1, 1972, the FTC informed plaintiffs of its intention to institute formal proceedings against them that ultimately could lead to issuance of a cease and desist order regarding specified conduct allegedly in violation of § 5. CDC and AIA were then given an option to enter into a proposed consent order to obviate the impending administrative proceedings.

The following day the FTC circulated a press release explaining its action and charging, *inter alia*, that the vocational education programs in which CDC and AIA were involved were "virtually worthless" for purposes of future employment.

CDC and AIA filed a proposed consent decree with the Commission on September 5, 1972. Thirteen months passed before they next heard from the Commission. On October 3, 1973, the Commission informed them that their proposal was unacceptable. On that same date a formal complaint was filed by the FTC against CDC and AIA, commencing administrative proceedings for the alleged violations of § 5.

On October 22, 1973, CDC and AIA made a motion to the administrative law judge to dismiss the complaint. They maintained that the 13 month lapse between their submission of the proposed consent decree and the ultimate filing of the complaint against them constituted prejudicial delay in violation of §§ 6(b) and (e) of the Administrative Procedure Act, 5 U.S.C. §§ 555(b) and (e).[2] They simultaneously moved the administrative law judge under the Freedom of Information Act, 5 U.S.C. § 552(a)(3) (1970) (hereinafter FOIA), to produce and identify documents in the possession of the Commission falling within four specified categories.

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[1] Commissioner David S. Dennison, Jr., one of the defendants, resigned his position with the Commission prior to the filing of the instant complaint. His resignation has left a vacancy on the Commission. He is being deleted as a defendant in this action pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure.

[2] Section 555(b) provides for rights of appearances before administrative agencies by interested persons or counsel representing persons compelled to appear before such agencies. It also provides that "[w]ith due regard for the convenience and necessity of their parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."

Section 555(e) provides, in pertinent part, for "[p]rompt notice" to be given of denials of written applications, petitions, or other requests of "an interested party made in connection with any agency proceeding."

In particular, they sought documents regarding the Commission's practice or policy of preparedness for litigation at the time the Commission's staff first recommends issuance of a notice of proposed complaint, documents regarding time consumed by the Commission in evaluating and passing upon proposed consent decrees, documents relating to the 12 month period between submission of their proposal and the FTC's rejection of it, and documents regarding the effects of this time lapse. All of these materials purportedly would have a bearing on the prejudice issue.

CDC and AIA followed up this request with a motion on November 5, 1973, for a subpoena duces tecum, seeking the same documents as were demanded under the FOIA.

Under the Commission's Procedures and Rules of Practice, all motions for subpoenas must be made to the administrative law judge, 16 C.F.R. § 3.36; all requests for materials under the Freedom of Information Act must be directed to the Commission itself. 16 C.F.R. § 4.8–.11.

All of the motions were denied by the administrative law judge on November 13, 1973. He ruled that non-adjudicative consent decree procedures prefatory to the filing of a complaint by the Commission were not governed by §§ 6 (b) and (e) of the Administrative Procedure Act.

Evidently believing that he was not authorized to pass upon the FOIA request in light of the FTC's procedural regulations, he ignored this motion. He did hold that it was premature to raise the prejudice issue and that its resolution should await further developments during the upcoming administrative hearing. The documents sought by the subpoena, therefore, were not considered to be relevant at this stage of the proceedings.

The denial of the motion to dismiss was made without prejudice to its renewal subsequently in the proceedings. The administrative law judge also declared that the request for documents should be made to the Commission, pursuant to its regulations implementing the FOIA.

On November 16, 1973, CDC and AIA made an independent demand upon the Secretary of the Commission for the documents they had unsuccessfully sought from the administrative law judge and simultaneously petitioned the Commission for production of these materials. On that same day they also applied to the administrative law judge for a stay of his rulings and the taking of an interlocutory appeal to the Commission. This motion was denied on December 3, 1973.

Since the administrative law judge's denials of the various motions do not constitute final agency action, they are not subject to judicial review. 5 U.S.C. § 704. They also are not now reviewable by the Commission. 16 C.F.R. § 3.23. A hearing on the merits of the complaint is scheduled before the administrative law judge this August. Once he makes his "initial decision" in the matter, that ruling may be appealed to the Commission. 16 C.F.R. §§ 3.51, 3.52. The Commission's determination will then constitute "final agency action," which may be reviewed by the appropriate appellate court. 15 U.S.C. § 45(c). Under 15 U.S.C. § 45(d) exclusive jurisdiction lies with the appellate court to affirm, enforce, modify, or set aside the Commission's actions. Review by the Supreme Court may then be obtained by a petition for a writ of certiorari. 15 U.S.C. § 45(g)–(i).

This action was brought January 16, 1974. Plaintiffs seek declaratory relief as well as a permanent injunction staying all further FTC proceedings against them until the documents they desire have been produced by the Commission and the administrative law judge takes them into account in reconsideration of his previous denial of their motion to dismiss. Alternatively, they seek a preliminary injunction while the Court considers the issues they have raised. Jurisdiction is alleged under the FOIA,[3] certain provisions of the Administrative Procedure Act, the declaratory judgment statutes, other jurisdictional statutes, and the general equity jurisdiction of the Court.

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[3] The Freedom of Information Act provides, in pertinent part, as follows:

"(3) . . . [E]ach agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

* * * * * * *

(2) related solely to the internal personnel rules and practices of an agency;

* * * * * * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

* * * * * * *

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

* * * * * * *

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress. . . ."

Defendants have moved for dismissal under Rule 12(b)(1) of the Federal Rules of Civil Procedure on the grounds of lack of subject matter jurisdiction and also for summary judgment under Rule 56.

On January 31, 1974, four days prior to the Court's scheduled hearing on the motions, the Commission responded to the earlier requests by CDC and AIA under the FOIA.

The Commission has provided CDC and AIA with a copy of Chapter 3.21 of its Operating Manual. It claims that two other documents exist pertinent to their demands: a memorandum concerning the FTC's readiness for litigation and a document regarding the passage of time between submission of the proposed consent decree and the issuance of the complaint in the instant matter. The Commission claims that these documents are exempt from disclosure under (b)(2) and (b)(5) and (b)(5) and (b)(7), respectively. It has declined to exercise its discretion in granting access to them.

Plaintiffs first seek declaratory relief regarding what they term the FTC's "bi-furcated" system of requiring motions to dismiss and for discovery to be addressed to and ruled upon by the administrative law judge and FOIA demands to be presented to and passed upon separately by the Commission. They seek to have the Court render a declaratory judgment under 28 U.S.C. §§ 2201, 2202 that all motions for dismissal and for requests under the FOIA be submitted to the administrative law judge.

The essence of their claim is that under the "bi-furcated" procedures competent, relevant evidence was withheld from the administrative law judge. They say these regulations denied them the intended benefits of the FOIA and deprived them of a full and fair hearing in violation of the Federal Trade Commission Act, 15 U.S.C. § 41, *et seq.*, the Administrative Procedure Act, 5 U.S.C. § 555, *et seq.*, and the Fifth Amendment of the Constitution.

Because CDC and AIA have not exhausted their administrative remedies on the fair hearing issue, the Court cannot grant the relief they seek. *Sterling Drug Inc.* v. *Federal Trade Commission*, 450 F. 2d 698 (D.C. Cir. 1971). The issue is "not such a strictly legal question that it can be properly decided on the incomplete facts and arguments now before [the court]." *Ibid.*, 711. Because the Commission itself or an appellate court reviewing the final order of the Commission may correct any errors, the Court should stay its hand in interfering with the administrative process at this early stage of the proceedings.

Plaintiffs also request the Court to enjoin the pending FTC proceedings against them until the Commission discloses the documents they seek under the FOIA, they have an opportunity to present these documents to the administrative law judge, and he takes them into account in reconsideration of his previous denial of their motion to dismiss the complaint. Because the Commission has now responded to their FOIA request—divulging one document, denying two others under specified statutory exemptions—this motion must be recast in the form of a request to stay FTC proceedings until final determination of the status of the documents demanded by the plaintiffs.

This raises a threshold question of the Court's jurisdiction to grant such relief. Under the FOIA this Court is empowered "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant[s]."

But the pendency of the FTC proceedings poses an obstacle: the general rule proscribing the enjoining of administrative proceedings. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Adams* v. *Federal Trade Commission*, 296 F. 2d 861, 864 (8th Cir. 1950); *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission*, 280 F. 2d 45, 48 (8th Cir. 1922). These cases essentially stand for the proposition that plaintiffs must first "run the gamut of administrative proceedings" before seeking judicial relief. *Adams* v. *Federal Trade Commission*, *supra*, 865. The administrative proceedings are not to be interfered with, as a general rule, until judicial review of the final order of the agency. Jurisdiction for review here lies exclusively with the appropriate Court of Appeals, 15 U.S.C. § 45(d), and by writ of certiorari to the Supreme Court, 15 U.S.C. § 45(g)–(i).

Recent cases under the FOIA, however, have substantially eroded the *Myers* rule against enjoining pending administrative proceedings. Shortly after the instant action was taken under advisement the Supreme Court addressed the issue in *Renegotiation Board* v. *Bannercraft Clothing Company, Inc.*, 42 L.W. 4203 (No. 72–822, Feb. 19, 1974). In that case three litigants before the Renegotiation Board brought suit in the District Court to stay pending agency proceedings until resolution of their claims for production of certain documents under the FOIA.

The question of whether to compel production of the disputed documents was *sub judice*. At issue was the equitable jurisdiction of the Court to stay the pending administrative proceedings. The lower court had granted injunctive relief, and this decision was affirmed by the Circuit Court for the District of Columbia in a 2-to-1 decision. *Bannercraft Clothing Company, Inc.* v. *Renegotiation Board*, 466 F. 2d 345 (1972).

In a 5-to-4 decision the Supreme Court first agreed with the lower courts that the FOIA was applicable to litigants currently engaged in proceedings before the Renegotiation Board. 42 L.W. at 4208.

Although the Supreme Court's opinion dealt narrowly with Renegotiation Board proceedings, the broader reasoning of the Circuit Court's decision supports application of the FOIA to litigants engaged in administrative proceedings with other Federal agencies, including the FTC. 466 F. 2d at 351–352. A subsequent decision by that Court, decided prior to the Supreme Court's opinion in *Bannercraft*, reaffirmed the broad applicability of the FOIA to proceedings before other administrative agencies. *Sears, Roebuck and Company* v. *NLRB*, 473 F. 2d 91, 93 (1972), *cert. pending*, 42 L.W. 3038 (No. 72–1503, July 10, 1973). *See also Sterling Drug Inc.* v. *Federal Trade Commission, supra*, 703 (ruling *sub silento* that the FOIA applies for purposes of discovery by FTC litigants although upholding the lower court's determination that the documents sought there were exempt from disclosure).

Pursuant to these decisions, the Court must reject defendants' assertion that the FOIA is inapplicable to requests by the litigants engaged in pending FTC proceedings. In any event, the Commission apparently has retreated from this position since it has responded to the instant demand, granting disclosure in part, denying it in part.

Not only does the FOIA apply, but it does not limit the inherent equitable powers of the Court. Under the Supreme Court's decision in *Bannercraft*, the Court does have equitable jurisdiction to entertain this action by CDC and AIA. 42 L.W. at 4206. Consequently, defendants' motion to dismiss for lack of subject matter jurisdiction must be denied.

But this only goes to the Court's jurisdiction in the broad sense of competency to act on the matter before it. *See Bannercraft Clothing Company, Inc.* v. *Renegotiation Board, supra*, 354. The closely related doctrine of exhaustion of administrative procedures also must be considered. This principle pertains to the narrower issue of the timing and propriety of acting and, unlike subject matter jurisdiction, is discretionary with the Court. *Ibid.*

It was on this issue that the Supreme Court disagreed with the Circuit Court's decision and reversed and remanded the case. The Circuit Court had dissected the exhaustion doctrine into its "component parts" and concluded that none of the policies underlying the doctrine would be offended by staying pending proceedings until resolution of the FOIA demands. 466 F. 2d at 354–361. The Supreme Court, however, felt that the contractors were compelled to pursue all of their administrative remedies before the Board, rather than invoking equitable relief to stay the pending proceedings. 42 L.W. at 4209.

Unlike the typical adjudicatory procedure of FTC litigation, proceedings before the Renegotiation Board involve a series of statutorily prescribed de novo determinations. At each stage of the multilevel process, a litigant risks incurring additional liability. *See* Note, *Developments Under the Freedom of Information Act—1972*, 1973 Duke L.J. 178, 179–180, n. 11. Because of the distinctions between litigation before the FTC and the Renegotiation Board, the Supreme Court's holding in *Bannercraft* may be limited to the "unique" nature of the Renegotiation Board's proceedings. *Ibid.*, 183–184.

Some of the language in Justice Blackmun's majority opinion supports this view. At one point he stated the ruling as follows: "[W]e hold only that in a *renegotiation* case the contractor is obligated to pursue its administrative remedy. . . ." 42 L.W. at 4209 (emphasis in original). He subsequently declared that "[t]he nature of the renegotiation process mandates this result." *Ibid.*

If *Bannercraft* is construed as applying to all administrative agencies, plaintiffs clearly would not be entitled to restrain the pending FTC proceedings. As previously mentioned, they have not exhausted their administrative remedies under the Federal Trade Commission Act and FTC regulations, just as the litigants in *Bannercraft* had not run the gamut of proceedings prescribed by the Renegotiation Act.

But even if *Bannercraft* is read narrowly, as may befit the language of the case, the same result would obtain. The Supreme Court expressly refrained from passing upon "whether or under what circumstances, it would be proper for the District Court to exercise jurisdiction to enjoin agency action pending the resolution of an asserted FOIA claim." *Ibid.* The Circuit Court, however, did pass upon this issue. The guidelines it set forth are not satisfied in the instant case.

The insuperable obstacle to granting a stay here is the absence of "irreparable injury" to the plaintiffs. They say that the upcoming hearing on the merits can be averted only by access to the disputed documents for presentation to the administrative law judge in order that he may reconsider his denial of their motion to dismiss the complaint. By being forced to submit to the adjudicatory hearing, they say that they will be subjected to the following burdens: inability to locate some key witnesses needed to rebut the charges against them; fading memories of those witnesses they manage to secure; costs of maintaining their defense in the administrative proceedings; and the attendant adverse publicity emanating from the FTC's "virtually worthless" charge in the May 2, 1972, press release.

While not insubstantial, these comprise "the usual expense and annoyance which accompany vindication of a right through normal legal channels." *Bannercraft Clothing Company, Inc.* v. *Renegotiation*

Board, *supra*, 355. "Mere litigation expense, even substantial and unrecoupable cost," does not constitute irreparable injury for purposes of averting the exhaustion doctrine. *Renegotiation Board* v. *Bannercraft Clothing Company, Inc.*, *supra*, 4210. Unavailability or ineffectiveness or favorable witnesses also does not constitute "the sort of irreparable injury of which equity normally takes cognizance." *Bannercraft Clothing Company, Inc.* v. *Renegotiation Board*, *supra*, 355.

The stigma of the "virtually worthless charge," with its attendant adverse effects on plaintiff's businesses, is comparable to the obloquy one is likely to experience whenever a civil complaint or indictment is filed against him. Having to now undergo administrative hearings to clear their reputations is "a risk of litigation that is inherent in society, and not the type of injury to justify judicial intervention." *Sears, Roebuck and Company* v. *NLRB*, *supra*, at 93. Entitlement to the documents they seek, even if these would be significantly helpful to them, is "of a different order from the kind of irreparable injury required to interrupt an administrative proceeding." *Ibid.*

Since CDC and AIA may renew their motions to dismiss the complaint during the upcoming administrative hearings, "extraordinary circumstances" do not exist for staying those proceedings. *Ibid.* Absent a "cogent showing of irreparable harm," they are not entitled to restrain pending FTC proceedings against them. *Ibid.*

But this does not end the matter. While denying declaratory relief and the restraining of FTC proceedings, the Court retains jurisdiction over the FOIA claims. Because the Commission has now responded to the request for documents, determination of that dispute is now ripe. The case has reached "a posture at which judicial intervention would be effective and appropriate." *Bannercraft Clothing Company, Inc.* v. *Renegotiation Board*, *supra*, 354. Summary judgment must therefore be denied.

The question then becomes what kind of intervention is in order. Precluded from staying pending proceedings, the Court is not barred from making an independent determination of the status of the documents demanded by plaintiffs, without having to enjoin the current FTC proceedings. Moreover, since it appears that no further FTC action is scheduled in this matter until commencement of the hearing this August, restraining the proceedings is unnecessary.

Resolution of the dispute under the FOIA can be accomplished expeditiously by compelling submission of the disputed documents for *in camera* inspection. *Ibid.*, 361; Note, 1973 Duke L.J. 178, *supra*, 184. This will not interfere with current FTC proceedings. Moreover, exercise of this injunctive power is specifically bestowed by the FOIA and it is not in any way inconsistent with the Supreme Court's decision in *Bannercraft.* 42 L.W. at 4210.

Accordingly, within ten (10) days of the entry of this Order defendants shall submit to the Court for *in camera* examination the two documents they claim are exempt from disclosure under the FOIA. Within this same time period, defendants may file with the Court any memoranda they desire in support of their contention. Plaintiffs may within the same time period, of course without access to the submitted documents, file with the Court any memoranda contesting exemption of the documents. During this same time period all parties may also file memoranda regarding the FTC's claim that no further pertinent documents exist.

The Court will then undertake *in camera* examination of the documents. Should it determine that plaintiffs are entitled to them, the Court will order that they be produced for them. But the Court will not then enjoin the administrative law judge to reconsider his denial of the motion to dismiss the complaint. Ordering such relief would contradict what the Court has said about the inappropriateness of interfering with the pending FTC proceedings.

In his denial of the motion to dismiss, the administrative law judge preserved plaintiffs' rights to renew their request during the adjudicatory proceedings. He also indicated that this may be appropriate upon submission of additional documentation received from the Commission. Therefore, he presumably would be receptive to reconsidering the motion should plaintiffs secure access to the documents they desire and he finds them to be competent and relevant to the prejudice issue.

Alternatively, he may adhere to his observation that this issue must await resolution until more facts are presented during the hearing on the merits. That determination and subsequent action by the administrative law judge or the Commission proper would be outside the equitable scope of this Court.

NATIONAL DYNAMICS CORPORATION, ET AL. v. F.T.C.*

No. 355, Docket 73-1754. F.T.C. Docket No. 8803.

(United States Court of Appeals, Second Circuit, March 6, 1974)

1. BARRING DECEPTIVE USE OF UNUSUAL EARNINGS OF A FEW, MANUFACTURER WOULD NOT BE LIMITED TO ADVERTISING AVERAGE SALES OR EARNINGS OF DIS-

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*Reported in 492 F. 2d 1333 (1974). *Cert. denied;* November 11, 1974, 419 U.S. 993, 95 S. Ct. 303. For case before the Commission, see 82 F.T.C. 488; *modified,* 85 F.T.C. 404.

TRIBUTORS, BUT WOULD BE PERMITTED TO USE RANGES FOR VARIOUS TYPES OF DISTRIBUTORS

[1334] Battery additive manufacturer would not be limited to advertising only average sales or earnings of its distributors rather than being permitted to state ranges for various types of distributors, providing it did not make deceptive use of unusual earnings realized by a few.

2. REQUIREMENT THAT RECORDS BE KEPT REFLECTING SALES, PROFITS OR DISTRIBUTOR EARNINGS "UNDER CIRCUMSTANCES SIMILAR TO" PURCHASERS WAS TOO VAGUE

While Federal Trade Commission could permissibly require battery additive manufacturer to keep records of sales of distributors in various basic categories, such as part-time and full-time workers, requirement that manufacturer keep records reflecting sales, profits or earnings of distributors "under circumstances similar to" purchasers or prospective purchasers was too vague.

3. NO DENIAL OF DUE PROCESS OCCURRED WHERE RECORDKEEPING REQUIREMENT WAS NOT SOUGHT IN COMPLAINT, BUT WAS PROPOSED IN COMPLAINT COUNSEL'S BRIEF

In proceeding to require battery additive manufacturer to cease and desist from deceptive advertising, manufacturer was not denied due process because recordkeeping provision of cease and desist order was not sought in complaint, where such provision was proposed in complaint counsel's brief to commission and answered by manufacturer.

4. PORTIONS OF CEASE AND DESIST ORDER REGULATING LABORATORY TEST CLAIMS IN ADDITION TO DURATIONAL CLAIMS WAS PROPER WHERE ADVERTISEMENTS WERE CLEARLY UNSUBSTANTIATED AND LABORATORY TEST CLAIMS WERE WITHOUT QUALIFICATION

Where administrative law judge and commission found that battery additive manufacturer's performance claims relating to durational capacities of additive were clearly unsubstantiated, and commission further found that manufacturer had expressly or impliedly represented additive as laboratory tested, without qualification, and that representations conveyed misleading impression that duration-of-effect claims were based on laboratory tests, portions of cease and desist order regulating laboratory test claims in addition to durational claims was proper.

5. REQUIREMENT OF DISTRIBUTION OF COPIES OF ORDER AND SIGNED ACKNOWLEDGEMENT OF RECEIPT THEREOF WAS WITHIN F.T.C.'S AUTHORITY

Commission could require that battery additive manufacturer supply each distributor with copy of order requiring it to cease and desist from deceptive advertising, and to procure signed statements acknowledging receipt thereof.

(Syllabus, with substituted captions, taken from 492 F. 2d 1333)

On petition for review of cease and desist order of F.T.C., court held that the manufacturer should not be limited to advertising only the average sales or earnings of its distributors; that requirement that manufacturer keep records reflecting sales, profits or earnings of distributors "under circumstances similar to" prospective purchasers was too vague; that requirement to cease making misleading statements as to laboratory tests was reasonable; and that F.T.C. could require manufacturer to distribute copies of the cease and desist order to all distribtuors and to procure signed statement of acknowledged receipt.

Petition denied in part; cause remanded in part.

Jerold W. Dorfman, New York City (*Friend & Dorfman*, New York City, of counsel), for petitioners.

John T. Fischbach, Federal Trade Commission, Washington, D.C., (*Calvin J. Collier*, Gen. Counsel, and *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, Federal Trade Commission, Washington, D.C., of counsel), for respondent.

Before MOORE, FRIENDLY and ANDERSON, *Circuit Judges*.

PER CURIAM:

National Dynamics Corporation (NDC) manufactures a battery additive known as VX-6. It markets the product largely through some 12,000 distributors. Some of these work on a full-time [**1335**] basis, but most work only part-time. The distributors are not NDC employees, but the company supplies them with sales and advertising materials with which to promote the product.

In November 1969, the Federal Trade Commission issued a complaint against NDC's advertising practices. Broadly speaking, the charges were of two sorts: Some related to allegedly misleading claims concerning potential earnings of VX-6 distributors; others concerned the performance claims NDC made for its product. Following the leisurely course typical of FTC proceedings, this one led to a six paragraph cease and desist order issued February 16, 1973, and ended in an order denying reconsideration dated May 1, 1973.

Only four of the six ordering paragraphs are challenged. Two of these, paragraphs 1 and 2, relate to the overly enthusiastic depiction of the rewards awaiting prospective distributors; one, paragraph 4, relates to representations concerning the performance of VX-6; the remaining one, paragraph 6, directs NDC to deliver a copy of the order to all present salesmen or other persons engaged in the sale of its products and to secure a signed statement acknowledging receipt.

[1] Paragraph 1 requires NDC to cease and desist from

> Representing, directly or by implication, that persons purchasing respondents' products can or will derive any stated amount of sales, profits or earnings; or representing, directly or by implication, the past or present sales, profits or earnings of purchasers of respondents' products unless in fact the past sales, or the profits and earnings represented, are those of a substantial number of purchasers and accurately reflect the average sales, profits or earnings of such purchasers under circumstances similar to those of the purchaser or prospective purchaser

to whom the representation is made; or misrepresenting, in any manner, the past, present or future sales, profits or earnings from the resale of respondents' products.

In the course of its attack on this paragraph, NDC says it cannot feasibly comply with the phrase "under circumstances similar to those of the purchaser or prospective purchaser to whom the representation is made" since it does not know what the circumstances of any particular purchaser may be. Apparently the Commission was endeavoring to require NDC to disclose whether the distributors whose earnings they cited worked part-time or full-time, but the language is not well adapted to carrying out this sound purpose. We likewise do not see why NDC should be limited to advertising only the average sales or earnings of its distributors rather than be permitted to state ranges for various types of distributors, provided it does not make deceptive use of unusual earnings realized only by a few. We shall not undertake to redraft the paragraph; with some good will on both sides, these problems should be readily susceptible of resolution.[1]

[2, 3] Changes in paragraph 1 will require conforming changes in paragraph 2 which requires NDC to maintain records substantiating the accuracy of its representations. Beyond that, while the Commission can permissibly require NDC to keep records of the sales of distributors in various basic categories, such as part-time and full-time workers, the requirement that the records reflect the sales, profits or earnings of distributors "under circumstances similar to" purchasers or prospective purchasers is too vague. NDC also objects to the recordkeeping requirement because it claims that it cannot feasibly obtain the profit and earn[**1336**]ings figures of its thousands of distributors. Commission counsel answers that NDC must have records showing the sales to each distributor and information concerning the permitted markup, and that this would suffice if the representations were similarly limited. We think this paragraph should be clarified as indicated. On the other hand, NDC's argument that it was denied due process because the recordkeeping provision was not sought in the complaint, although it was proposed in complaint counsel's appeal brief to the Commission and answered by NDC, is without merit, *FTC* v. *National Lead Co.*, 352 U.S. 419, 427–428, 77 S. Ct. 502, 1 L. Ed. 2d. 438 (1957), as NDC's broader attacks even more plainly are.

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[1] NDC has called our attention to the action of the FTC in approving an affidavit of compliance on a similar issue in Matter of Merlite Industries, Inc., File No. 6523049, dated March 1, 1967. Without in any way limiting the FTC to that formulation, we think it may afford a useful basis from which to start a redraft.

[4] Paragraph 4 of the order directs NDC to cease and desist from

> Representing, directly or by implication, in any advertisement that an independent laboratory has tested any product or that any laboratory test substantiates or supports performance claims in said advertisement, unless each performance claim in said advertisement has been substantiated by a competent scientific test conducted by said laboratory or laboratories and unless such laboratory or laboratories have supplied respondents with a written report which describes, in detail, the entire test performed, including, but not limited [to], the product tested, instruments used, test procedures, data and results of such test.

NDC says this is inconsistent with the findings by the Administrative Law Judge and the Commission that the test reports in the company's possession adequately substantiated its claims concerning the effectiveness of VX-6. However, both the Administrative Law Judge and the Commission found that NDC's performance claims relating to the durational capacities of VX-6 were clearly unsubstantiated. The Commission further found that petitioners had expressly or impliedly represented VX-6 as laboratory-tested, without qualification, and that those representations had conveyed the misleading impression that the duration-of-effect claims were based on laboratory tests. Although petitioners contend that paragraph 4 should, at most, prohibit only unsubstantiated durational claims, the paragraph as written appears reasonably related to the misrepresentations found by the Commission. Accordingly, we find no flaw in paragraph 4, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 389-390, 85 S. Ct. 1035, 13 L. Ed. 2d 904 (1965).[2]

[5] We likewise see no merit in NDC's objections to paragraph 6, described above. NDC's point is that since it supplies the distributors with all the advertising materials, there is no need to send a copy of the order and obtain a receipt. But distributors may have a supply of old materials and may not confine themselves to the written word. Since the copies of the order can be delivered along with the revised advertising material, the only burden on NDC is of using certified mail so as to obtain a receipt. To impose this requirement is well within the broad power confided to the FTC in framing remedial orders.

The petition to review is denied except with respect to Paragraphs 1 and 2 of the order which are remanded to the Commission for reformulation in accordance with this opinion. No costs.

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[2] Petitioners contend that the initial complaint and proposed order did not adequately identify the issues to be litigated. However, the complaint sufficiently alleged that the performance claims had not been substantiated through adequate testing and that the product had not been "fully tested," and paragraph 4 of the final order is a narrower version of the two portions of the proposed order dealing with representations of testing.

UNITED STATES OF AMERICA v. BEATRICE FOODS CO.*

No. 73-1120. F.T.C. Docket No. 6653.

(United States Court of Appeals, Eighth Circuit, March 8, 1974)

1. COMPROMISE ORDER OF F.T.C. PROSCRIBED NOT ONLY ACQUISITION OF INTEREST "IN" A DAIRY, BUT ALSO ACQUISITION OF INTEREST "OF" A DAIRY

   Compromise order of FTC requiring divestiture by distributor of dairy products of five dairies, whether owned in full or in part by distributor, and requiring distributor to cease and desist from acquiring, directly or indirectly, any interest in any firm engaged principally in business of manufacturing, processing or distributing described dairy products did not proscribe only acquisition of interest "in" a dairy, but also proscribed acquisition of interest "of" a dairy.

2. IN DETERMINING PURPOSES OF DECREE, NEGOTIATIONS BETWEEN F.T.C. AND APPELLANT BEFORE CONSENT DECREE AND APPELLANT'S POST DECREE CONDUCT WERE NOT MATERIAL

   Negotiations between FTC and distributor of dairy products before consent decree and distributor's post decree conduct were not material in determining purposes of decree.

3. STATUTE DOES NOT REQUIRE NOTICE FOR IMPOSITION OF PENALTIES FOR VIOLATION OF F.T.C. CEASE AND DESIST ORDER

   No notice is required by statute for imposition of penalities for violation of cease and desist order of FTC.

4. APPELLANT'S ACQUISITION OF SALES VOLUME OF DAIRY WAS WRONGFUL, AFTER BEING PLACED ON NOTICE BY F.T.C. DECREE BARRING APPELLANT FROM ACQUIRING ANY "INTEREST IN" A DAIRY FIRM

   FTC decree barring distributor of dairy products from acquiring any "interest in" a dairy firm placed distributor on notice that its acquisition of sales volume of dairy, causing loss of that dairy as competitor, was wrongful.

5. IMPOSITION OF PENALTY FOR PERIOD BEFORE F.T.C. GAVE NOTICE DID NOT VIOLATE DUE PROCESS, WHERE DELAY AND F.T.C. UNCERTAINTY WERE ATTRIBUTABLE TO CORPORATION'S OWN PROCRASTINATION IN GIVING SUFFICIENT INFORMATION UPON WHICH TO ACT

   Where delay and alleged uncertainty of FTC in stating that transactions of corporation were proscribed by prior FTC order were attributable in large measure to corporation's own procrastination in giving FTC sufficient information upon which to act, imposition of penalty for period before FTC gave notice that corporation's conduct violated order did not violate due process.

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*Reported in 493 F. 2d 1259 (1974), *cert. denied,* 420 U.S. 961 (1975). For case before the Commission, see 67 F.T.C. 473,68 F.T.C. 1003, *modified* 71 F.T.C. 797. See also pp. 320, 437 herein.

6. MISCONSTRUCTION OF LAWFUL OBLIGATIONS IS NO DEFENSE IF IN LAW THAT INTERPRETATION IS ERRONEOUS

Simply because a party misconstrues its lawful obligations under consent decree in antitrust case does not afford it a legal defense if in law that interpretation turns out to be erroneous.

7. DAILY PENALTY WAS PROPERLY IMPOSED WHERE EACH DAY'S HOLDING OF ILLEGALLY ACQUIRED INTERESTS WAS A SEPARATE OFFENSE

Each day's holding of illegally acquired interests in violation of Federal Trade Commission's cease and desist order was a separate offense for which daily penalty was properly imposed.

8. DISTRICT COURT HAS STATUTORY AUTHORITY TO ORDER DIVESTITURE OF ACQUIRED INTERESTS WHEN THEY WERE ACQUIRED IN VIOLATION OF F.T.C. ORDER

District court has statutory authority to order corporation to divest itself of interests it acquired in violation of Federal Trade Commission's cease and desist order.

9. F.T.C.'S OBJECTION TO SALE OF ONE PLANT AND STOCK OF ANOTHER TO ONE PURCHASER MERELY MEANT THAT APPELLANT NEEDED TO COME FORWARD WITH AN IMPROVED PACKAGE

In view of provision of FTC cease and desist order to effect that, if corporation established that by its good-faith efforts it had been unable to dispose of five properties to single purchaser, it might dispose of properties to two or more purchasers, approved in advance by FTC, objection by FTC to sale of one plant and stock of another to a single purchaser did not excuse corporation from further performance, but merely meant that it had to come up with a better package.

10. F.T.C.'S APPROVAL OF SALE OF FOUR PROPERTIES DID NOT TERMINATE OBLIGATION TO DISPOSE OF FIFTH PROPERTY UNDER DIVESTITURE ORDER DIVIDED INTO TWO PARTS; NOR WAS THE CORPORATION ENTITLED TO ADDITIONAL 18 MONTHS FROM RECEIPT OF NOTICE OF ITS OBLIGATION TO DIVEST ITSELF OF THE FIFTH PROPERTY

Where FTC divestiture order was divided into two parts: a one-year period in which corporation was to attempt to sell five properties to single purchaser and an additional six months in which it could complete divestitures by sales to separate purchasers, if need be, approval by FTC of sale of four of properties to single purchaser did not render the order inoperative and, as to fifth property, corporation was not entitled to an additional 18 months from date it received notice that it was still obligated to divest itself of that property.

11. GOOD FAITH WAS NOT A COMPLETE DEFENSE TO IMPOSITION OF PENALTIES, MERELY RELEVANT AS TO SEVERITY OF PENALTY TO BE ASSESSED

Good faith was only relevant as to severity of penalty to be assessed against corporation which failed to comply with Federal Trade Commission divestiture order and was not a complete defense to imposition of penalties against it for violation of the order.

(Syllabus, with substituted captions, taken from 493 F.2d 1259)

In civil enforcement action against distributor of dairy products for alleged violations of F.T.C. consent order, court held that F.T.C.'s decree barring appellant from acquiring any "interest in" a dairy firm placed appellant on notice that its acquisition of the sales volume of another dairy was wrongful; that, because F.T.C.'s delay in stating that transactions were proscribed were caused by appellant's procrastination in providing F.T.C. with sufficient information upon which to act, imposition of penalty for period before F.T.C. gave notice did not violate due process; and court had power to order divestiture.

Affirmed.

Edward L. Foote, Chicago, Ill., for appellant.

George Edelstein, Atty., U.S. Dept. of Justice, Antitrust Div., Washington, D.C., for appellee.

Before LAY and BRIGHT, *Circuit Judges*, and EISELE, *District Judge.***

[1261] LAY, *Circuit Judge.*

This is an appeal from a summary judgment granted by the District Court for the District of Minnesota, the Honorable Philip Neville presiding, in a suit brought by the United States against Beatrice Foods Company under § 11(*l*) of the Clayton Act, 15 U.S.C. § 21(*l*); and § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*). The government sought civil penalties and injunctive relief for two violations of a Federal Trade Commission consent order. The trial court granted summary judgment in favor of the United States, assessed monetary penalties and ordered divestiture of Beatrice's holdings acquired in violation of the FTC order.[1]

On appeal Beatrice contends that:

(a) Under Count I, there has been no showing that Beatrice's transactions with Maple Island Dairies violated the consent decree;

(b) The district court erred in granting summary judgment in that questions of fact exist as to the intended meaning of the consent decree;

(c) The district court erred in imposing daily penalties for the Maple Island transactions, first, because Beatrice was not given adequate notice of the alleged order violation, and second, because there was no continuing violation but only a single illegal acquisition;

(d) The district court lacked the power to grant injunctive relief requiring Beatrice to divest itself of its interest in Maple Island; and

(e) Under Count II, the court erred in requiring Beatrice to divest its minority stock interest in Valley Gold Dairies.

**G. THOMAS EISELE, United States District Judge, Eastern District of Arkansas, sitting by designation.

[1] The opinions below are reported at 344 F. Supp. 104 (summary judgment), and 351 F. Supp. 969 (penalties and decree).

Background

In 1956, the Federal Trade Commission instituted proceedings against Beatrice and three of its competitors alleging acquisitions in violation of § 7 of the Clayton Act, 15 U.S.C. § 18, and § 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). The proceedings against Beatrice's competi[**1262**]tors were all settled by consent decrees.[2] In March, 1964, an FTC hearing examiner held that five of Beatrice's recent acquisitions violated § 7 of the Clayton Act. The examiner ordered divestiture of the five firms and enjoined Beatrice for ten years from acquiring "the whole or any part of the stock, share capital or assets" of any dairy firm. On April 26, 1965, the FTC affirmed the examiner's decision.

Beatrice petitioned for review of the order in the Ninth Circuit. While the petition was pending, the FTC and Beatrice agreed to settle the case with entry of a modified order. In May 1967, the Ninth Circuit modified the FTC order to reflect the settlement and affirmed the order as modified. On June 7, 1967, the FTC issued the modified order.

The modified order required divestiture of five unlawfully acquired dairies, whether owned in whole or in part by Beatrice, to a single purchaser.[3] The order also contained the following cease and desist provision:

> Beatrice shall cease and desist, for a period of ten (10) years from the effective date of this order from acquiring, directly or indirectly, any interest in any firm, corporate or noncorporate, engaged principally or as one of its major commodity lines at the time of such acquisition in any State of the United States or in the District of Columbia in the business of manufacturing, processing or distributing at wholesale or on retail milk routes any of the products described in Paragraph I of this order, without the prior approval of the Commission.

COUNT I: THE MAPLE ISLAND TRANSACTIONS

Count I of the government's complaint alleged that Beatrice violated the above cease and desist order by acquiring an "interest in" Maple Island Dairies. The district court so found.

Maple Island Dairies distributed dairy products in Minnesota and Wisconsin. In 1968, Maple Island decided to dispose of its unprofitable "northern division" distribution system. This division had been distributing dairy products bearing the Maple Island label (1) at four stores owned by Maple Island,[4] (2) along 11 routes operated by Maple Island employees, and (3) along 11 routes owned and operated by independent distributors.

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[2] Each firm was ordered to:

[C]ease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital or assets (other than products sold in the course of business) of any concern, engaged * * * in the business of manufacturing, processing or selling at wholesale or on retail milk routes [specified dairy products].

[3] The modified order permitted one dairy in West Virginia to be sold separately. The original order had required divestiture of five dairy plants scattered all over the country. The consent decree, however, substituted five plants all located in the southwest.

Representatives from Maple Island met frequently with representatives of Russell Creamery of Wisconsin, Inc., a wholly-owned subsidiary of Beatrice. As a result of these discussions, the 11 routes owned by Maple Island were converted into independent distributorships. The new distributors purchased from Maple Island the assets used to operate the routes, including inventory and accounts receivable. The purchase of seven of the 11 routes was financed primarily by Beatrice. The new distributors agreed to distribute Maple Island products exclusively. They also executed conditional sales contracts, factor's liens, and notes in favor of Maple Island. Then, Beatrice, Maple Island, and each distributor signed an agreement whereby Maple Island assigned to Beatrice the conditional sales contract, factor's lien, note and franchise agreement, and the distributor accepted the assignment. On September 1, 1968, Russell Creamery [**1263**] (Beatrice) began supplying the dairy products for all but a few of the new distributors.

The 11 independent Maple Island distributors, who owned their own physical facilities, only owed Maple Island for their 30-day trade accounts. Four paid these amounts themselves, six were financed by Beatrice and one was dropped from the arrangement. Maple Island also granted to Beatrice the right to use Maple Island's labels in the northern division for five years.

As a result of the above transactions, the government charged that Beatrice had violated the consent cease and desist order by acquiring an "interest in" Maple Island.

On appeal, Beatrice argues that the phrase used in the FTC order, "interest in," "does not apply to assets or interests *of* a dairy, but rather prohibits the acquisition of an interest *in* a dairy." In rejecting this argument, and in holding that there was no dispute of facts, Judge Neville found that the term "interest" has a consistent and commonly understood meaning in relationship to property, business and other things of value, citing the Restatement of Property § 5:

> The word "interest" is used in this Restatement both generically to include varying aggregates of rights, privileges, powers, and immunities, and distributively to mean any one of them.

The district court then found that:

> "[I]nterest" includes, by definition, the rights transferred here to Beatrice by Maple Island. The license to use the label, the notes, distributorship agreements,

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[4] The disposition of the four Maple Island stores is not involved in this case.

> sales contracts and factor's liens are all "rights in the nature of property" and valuable rights forming a part of the business and in many instances comprising assets of Maple Island. Whereas before, Maple Island held all rights, privileges, powers, and immunities relating to the assets transferred, after the transfer, Beatrice held some of those rights and the independent distributors held the rest. And while the sales contracts, factor's liens and notes did not give Beatrice title. Beatrice clearly held a security *interest*, i.e., a right of ownership contingent upon the default of the titleholder. Such interests are no less interests within the terms of the order because contingent upon default of the debtor. Perhaps most significant, prior to the transfer, Maple Island had the "rights to the benefits" inseparable from the property transferred, *i.e.*, the sales of its milk to the customers along Maple Island's former routes. After the transfer, Beatrice had those rights at least for the minimum period of the distributorship agreements and the advantage of an established and continuing relationship with the distributors. Beatrice thereby gained access to all or most of the customers—the sales volume—who previously bought milk from Maple Island. The net result was an increase in gross sales of Russell Creamery in Superior alone of nearly $1 million, about 30%.

United States v. *Beatrice Foods Co.*, 344 F. Supp. 104, 111–112 (D. Minn. 1972).

[1] Beatrice's argument is that the trial court was totally preoccupied with defining "interest" and failed to recognize that the real term of art within the decree is the preposition "in" as distinguished from the possible use of the word "of." Thus it is argued that the compromise decree allows the purchase of interests *of* a dairy and proscribes only the acquisition of interests *in* a dairy. We think the argument disingenuous. Neither preposition in the context of the overall decree demonstrates, a definitive, special meaning. Both "in" and "of" are, in common usage, words of function bearing similar connotations of active and possessive participation. *See* Webster's Third New International Dictionary 1139, 1565 (1967). We must give the decree its "normal meaning" rather than one party's view of its purpose.

[1264] It is urged the trial court erred in failing to admit evidence of the pre-order negotiations between the parties to ascertain "the purpose" of the decree. Similarly, it is argued that post-decree conduct is also material.[5] We reject this contention on the same grounds that

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[5] On January 25, 1968, the FTC informed National Dairy, one of Beatrice's competitors who had earlier signed a consent decree, that the acquisition of the market share of distributors or processors would violate National's order. Specifically, the FTC wrote that:

> National Dairy is hereby notified that the Commission regards the prohibition on acquisitions in said order, Part III, as including the entering into of any arrangement with another party by which National Dairy obtains the market share, in whole or in part, of such other party. Such arrangements would include any transaction by which a processor ceases selling milk under his own label and instead distributes National Dairy milk under one of National Dairy's labels. *On the other hand, ordinary requirements or supply contracts under which a processor-distributor discontinues his processing business but continues to operate as a distributor selling, under his own label, milk supplied him by National Dairy would not be regarded as coming within the order.* (emphasis added).

The FTC advised Beatrice that it would interpret the Beatrice decree in the same manner, even though the language of the two orders was slightly different. Parenthetically, the trial court did. In *United States* v. *Armour & Co.*, 402 U.S. 673, 682, 91 S. Ct. 1752, 1757, 29 L. Ed. 2d 256 (1971), the Supreme Court observed:

> [T]he scope of a consent decree must be discerned within its four corners, and *not by reference to what might satisfy the purposes of one of the parties to it.* (emphasis added.)

See also, *Gila Valley Irrigation Dist.* v. *United States*, 118 F. 2d 507 (9th Cir. 1941); *United States* v. *J. B. Williams Co., Inc.*, 354 F. Supp. 521 (S.D.N.Y.), appeal docketed, No. 73–1624 (2d Cir. 1973); 80 Harv. L. Rev. 1303, 1315 (1967).

[2] Although we think the order clear, parenthetically we note that it only prohibits acquisitions made without prior Commission approval. Beatrice knew that it was under a broad cease and desist order which was designed to prevent a large multimarket company from acquiring regional dairy firms. Beatrice could easily have allayed the risk of later litigation by seeking the Commission's prior approval before entering into negotiations with Maple Island. Significantly, Beatrice did seek FTC approval for several other acquisitions during this same period of time.

Imposition of Daily Penalties

With regard to the Maple Island transaction, the district court fined Beatrice $200 per day from September 1, 1968 (the date Beatrice began supplying milk to the independent distributors) through October 23, 1970 (the date the government filed its complaint), for a total of $156,400.

Beatrice attacks the imposition of the above penalty on two grounds. First, it argues that it was not given adequate notice of the violation until October 23, **[1265]** 1970, the date the complaint was filed.[6] Second, Beatrice contends that daily penalties were unwarranted be-

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we note that the Commission's interpretation of the National Dairy order was subsequently invalidated and no new clarification ensued.

Beatrice contends that the above-underlined sentence expressed the Commission's intent not to prohibit the acquisition of distributorships. It argues that this post-decree conduct by the FTC is relevant to a determination of the order's meaning. However, its authority for this point, *United States* v. *Atlantic Refining Co.,* 360 U.S. 19, 79 S. Ct. 944, 3 L. Ed. 2d 1054 (1959), does not appear to extend as far as Beatrice would like. There, the Court found from the language of the decree *alone* that the government's position was at best a strained construction. It then bolstered this view by reference to the government's post-decree conduct, which had been consistent with the Court's reading of the decree. Thus, it appears that the decree in *Atlantic Refining* was *unambiguous* and that the post-decree conduct was somewhat superfluous.

Furthermore, as the government notes, the FTC's letter of January 25, 1968, sets forth a far different factual hypothesis than Beatrice's arrangement whereby the rights under the distributorships carried with them the license to use Maple Island's label, its goodwill and sales volume in the northern division.

[6] Since the trial court held that this was the *last* day for which a penalty could be imposed, acceptance of Beatrice's notice theory would mean that only one day's penalty could be assessed.

cause the consent order prohibits only the *act of acquisition* and not continued holding of illegally acquired assets. These two contentions will be discussed separately.

A. *Notice*

Beatrice argues that *no* penalty could be imposed before the FTC gave notice that Beatrice's conduct was in violation of the cease and desist order. Assessment of penalties for conduct occurring before such notice would, according to Beatrice, violate due process.

We look first at the statutory scheme for the imposition of penalties to determine if a notice requirement was intended by Congress.

When the FTC determines that one of its orders has been violated, the statutory procedure calls for certification of pertinent facts to the Attorney General. 15 U.S.C. § 56. If the Attorney General decides to bring suit, the penalty provisions of § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), and § 11(*l*) of the Clayton Act, 15 U.S.C. § 21(*l*), come into play.[7] These statutes contain no notice requirement. In *United States* v. *J. B. Williams Co., Inc.*, 354 F. Supp. 521 (S.D.N.Y.), appeal docketed, No. 73-1624 (2d Cir. 1973), the district court unequivocally rejected the argument that notice is statutorily required:

> The court disagrees with defendants' assertion that "it is settled that the Government may not impose penalties under 15 U.S.C. § 45(*l*) with respect to alleged violations of orders where these violations preceded Commission notice that the conduct was deemed in violation of the order." Defendants' Memorandum 58-59. *Such notice is neither required by the statutory scheme nor by the Commission's rules and procedures.* The only procedural step required by the F.T.C. Act before institution of a Section 5(*l*) suit is the certification of facts relating to the alleged violation to the Attorney General. *See* Section 16, 15 U.S.C. § 56. *A blanket rule requiring prior notice by the Commission of alleged violations of its orders has absolutely no statutory basis whatever.*

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[7] Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), provides:

Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

Section 11(*l*) of the Clayton Act, 15 U.S.C. § 21(*l*), provides:

Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense.

Id., 354 F. Supp. at 532 (emphasis added).

The legislative history of the penalty provisions supports this conclusion. The Federal Trade Commission Act was amended in 1938 by the Wheeler-Lea Act, which provided that FTC orders would become final in 60 days or upon completion of review proceedings in the courts of appeals. Act of March 21, 1938, 52 Stat. 111. The Clayton Finali[**1266**]ty Act of 1959 similarly amended the Clayton Act. Act of July 23, 1959, 73 Stat. 243. These significant changes lend considerable support to the government's position that no notice is required by the statute. Prior to 1938, the Commission had to prove *three* violations before penalties could be assessed. First, it had to prove a violation upon which to base its own cease and desist order. Second, it had to prove a violation of the order (*i.e.*, conduct occurring *after* the issuance of the order) before a court of appeals could enforce the order. Finally, it had to prove a third violation for a violator to be held in contempt of the court of appeals enforcement order. The Wheeler-Lea Amendment changed this cumbersome procedure. However, the same three steps remained in effect insofar as Clayton Act violations were concerned until 1959. The legislative history of the Clayton Finality Act, discussed in *FTC* v. *Jantzen, Inc.*, 386 U.S. 228, 87 S. Ct. 998, 18 L. Ed. 2d 11 (1967), makes it clear that that amendment was designed to streamline enforcement proceedings under the Clayton Act in the same manner as the Wheeler-Lea Amendment had done for the FTC Act:

> The effectiveness of the Clayton Act . . . has long been handicapped by the absence of adequate enforcement provisions. . . . S. 726 would put teeth into Clayton Act orders and would fill the enforcement void which has existed for many years.

S. Rep. No. 83, 86th Cong., 1st Sess. 2 (1959), U.S. Code Cong. & Admin. News 1959, p. 1815.

> The bill . . . is in effect a perfecting amendment to the Clayton Act. It has no other purpose than to effect the will of Congress with respect to the role of the Federal Trade Commission in Clayton Act enforcement in the same manner and to the same degree that the will of Congress was effectuated by the Wheeler-Lea amendments to the Federal Trade Commission Act.

105 Cong. Res. 12732.

In *FTC* v. *Henry Broch & Co.*, 368 U.S. 360, 82 S. Ct. 431, 7 L. Ed. 2d 353 (1962), the Supreme Court discussed this legislative history and then noted:

> In contrast, the procedures that are contained in the Federal Trade Commission Act for enforcement of cease-and-desist orders issued thereunder are much simpler and more direct. A cease-and-desist order issued pursuant to section 5 of the Federal Trade Commission Act, as amended, becomes final upon the expiration of the time allowed for filing a petition for review, if no such petition is filed within that time.

Id. at 366 n. 6, 82 S. Ct. at 435 *quoting* H.R. Rep. No. 580, 86th Cong., 1st Sess. 4, U.S. Code Cong. & Admin. News 1959, p. 1804.

However, the Supreme Court did warn that overly broad language in an FTC order would not necessarily "withstand scrutiny under the 1959 amendments." The Court said:

> The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.

Broch, *supra*, at 367–368, 82 S. Ct. at 436.

See also, *Sperry Rand Corp.* v. *FTC*, 110 U.S. App. D.C. 1, 288 F. 2d 403, 404 (1961); and *United States* v. *Standard Distributors*, *Inc.*, 267 F. Supp. 7, 9 (N.D. Ill. 1967), for a similar interpretation. *Cf.* *United States* v. *H. M. Prince Textiles*, *Inc.*, 262 F. Supp. 383, 388 (S.D.N.Y. 1966).

[3] We are thus satisfied that no notice is required under the statutes. However, this does not resolve the constitutional challenge to the imposition of penalties before notice of violation is given. As indicated Beatrice asserts that notice was not given until the complaint was filed. On the other hand, the government's position is that the cease and **[1267]** desist order itself gives sufficient notice of what conduct is proscribed.

Beatrice relies primarily on *Continental Baking Co.* v. *Dixon*, 283 F. Supp. 285 (D. Del. 1968). There, the government notified Continental that its compliance report, with regard to a cease and desist order previously entered against it, was unacceptable in that the information it contained was indequate and incomplete. Thereafter, Continental filed a supplemental report. The FTC then notified Continental that the reports did not show compliance and added that it was unable to determine whether Continental was in violation of the order without more information.

Continental then brought suit, seeking to quash the FTC's order for a third report and requesting a preliminary stay suspending penalties until the dispute over the reports was settled. Under Continental's interpretation of the statute, 15 U.S.C. § 45(*l*), it would be subject to penalties for each day that the controversy remained unresolved (if it were ultimately found in violation)—hence, the request for the stay.

The court found that the penalty issue was not ripe for review:

> If the Court were to accept Continental's view of the relevant statutory provision it would be constrained to grant the stay requested, but as the Court reads the provisions of 15 U.S.C. § 45(*l*) in conjunction with the rules and

> regulations[8] of the Federal Trade Commission, the Commission has the obligation to determine and to inform parties whether and to what extent their conduct may be in violation of a cease and desist order. It is only after the Commission has made such a finding that the penalties contemplated by 15 U.S.C. § 45(*l*) could be assessed, and only from that day forward. Any other interpretation of the statute and regulations would raise serious questions of due process.
>
> In the instant case, the Commission concedes that it has made no decision as to whether plaintiff's conduct violates the cease and desist order. As this Court views the litigation at this preliminary stage, no penalties have accrued against which this Court could issue a stay, and thus, there is no justiciable controversy which would render the case ripe and proper for review.

Continental Baking Co v. *Dixon*, 283 F. Supp. 285, 287–288 (D. Del. 1968).

Beatrice likewise relies on the dictum of the district court found in *United States* v. *ITT Continental Baking Co.*, No. C–1220 (D. Colo. Aug. 2, 1971), *aff'd*, 485 F. 2d 16 (10th Cir. 1973). That case was also a suit by the government to recover civil penalties and injunctive relief for violations of a consent cease and desist order. Although the district court found that the transactions violated, the order, it refused to impose daily penalties based on the "single acquisition" theory (discussed *infra*). With respect to notice, ITT Continental apparently contended that the FTC had to notify it of its intent to certify the case to the Attorney General. The district court rejected this argument; however, it added the following statement:

> Had the Court concluded that the violations were continuing in nature, a determination of the question of whether or not reasonable notice should have been given would be required. In light of the Court's finding in paragraph 7 hereof, this question need not be resolved, but, as obiter dictum, it would seem unreasonable to permit the commission to *knowingly* let daily penalties accrue without giving notice of the commission's position at the earliest reasonable time.

Slip Opinion at 5 (emphasis added).

[**1268**] In affirming the district court, the Tenth Circuit made no mention of the notice issue, presumably because it was unnecessary in light of the court's holding that daily penalties were unwarranted.[9]

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[8] As the government points out in its brief, the court never indicated what rules and regulations of the Commission it was referring to. There are no Commission regulations which require the giving of notice of a violation.

[9] The only other case to consider the notice issue in the constitutional sense appears to be *United States* v. *J. B. Williams Co. Inc.*, 354 F.Supp. 521 (S.D.N.Y.), appeal docketed, No. 73–1624 (2d Cir. 1973). Although the court *rejected* the constitutional argument, it appears that the case is distinguishable on its facts:

> If defendants intend by this assertion to claim a violation of their right to due process in this case, the claim is rejected. *The record shows that the FTC informed defendants that the advertisements contained in their first compliance report were in violation of the order.* The Commission took the unusual step of permitting defendants to file a second compliance report. The Commission informed defendants in June, 1969, on the basis of this report, that they were still not in compliance with the order. When, after this notice and after 17 months since the order became final, defendants proceeded to disseminate the advertisements challenged here without prior approval by the Commission, defendants acted at their own peril.

J. B. Williams, *supra*, 354 F.Supp. at 532–533 (emphasis added).

Beatrice attempts to bolster its due process argument with the following facts:

(1) On December 9, 1968, the Commission notified Beatrice by letter that it had come to the Commission's attention that Beatrice "may have acquired, directly or indirectly, an interest in Maple Island. . . ." This letter also requested Beatrice to submit all information relevant to the Maple Island transaction and "a detailed statement why, in Beatrice's opinion, the acquisitions or transactions are not subject to the Commission's order."

(2) In January, 1969, Beatrice filed its annual compliance report, in which it referred only to "agreements with independent distributors of Maple Island." This information being inadequate, the Commission, by letter dated April 29, 1969, again requested Beatrice to provide detailed information regarding the Maple Island "arrangements." It does not appear in the record that Beatrice ever replied directly to this letter.

(3) On September 12, 1969, the Commission resolved to investigate Beatrice's compliance with the order. By letter of September 12, 1969, the Commission informed Beatrice of the resolution. The letter also rejected Beatrice's 1969 compliance report "for the reason that the Commission is unable to determine from such report the manner and extent of Beatrice's compliance with [the cease and desist] order." The letter further stated that the Commission was of the opinion that the report "raises a real question as to whether the arrangements did not in fact involve fundamental questions of order coverage." Pursuant to the September 12, 1969, resolution, the Commission also ordered Beatrice and Maple Island to file special reports. These reports were filed with the Commission in November, 1969.

(4) On June 17, 1970, the Commission certified to the Attorney General the facts it felt constituted violations of the order. It does not appear from the record that Beatrice was notified of this certification. On the Commission's recommendation, the Attorney General filed suit on October 23, 1970.

In summary, none of the Commission's communications with Beatrice prior to October 23, 1970, unequivocally stated that the Commission felt Beatrice was in violation of the order.[10] At most, the Commission indicated that *possible* violations existed which warranted further investigation. Beatrice urges that this is exactly what *Continental Baking Co.* v. *Dixon*, *supra*, held to be insufficient notice.

The government does not attempt to distinguish *Dixon*, but simply asserts that the decision ignores the statutory **[1269]** scheme.[11]

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[10] As will be discussed, the government specifically informed Beatrice of the Valley Gold (Count II) violation.

[11] The government points to *United States* v. *Ancorp National Services, Inc.*, 367 F. Supp. 1221 (S.D.N.Y. 1971), where, in a ruling on a preliminary motion, the court characterized *Dixon* as "a misconception of the entire statutory framework."

Relying on the previously discussed legislative history, the government argues that the order itself is sufficient notice of the duty it imposes.

[4, 5] We think the basic question necessarily turns on whether the order itself is sufficiently clear to place Beatrice on notice of the prohibited conduct. The question of proper notice, as in cases of statutory construction, depends on whether the order itself is so vague "that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ."
Cf. Connally v. *General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926). This same reasoning must apply to construction of the order here involved. Our examination satisfies us that the FTC decree barring Beatrice from acquiring any "interest in" a dairy firm was in fact sufficiently precise in terminology to place Beatrice on notice of its wrongful action in its transactions with Maple Island Dairies. Additionally, one cannot completely ignore the atmosphere and official history surrounding the cease and desist order. We think it obvious, as the trial court concluded, that "the acquisition of the sales volume by Beatrice and the loss of Maple Island as a competitor is the kind of event the order was intended to prevent." Moreover, the delay and alleged uncertainty of the FTC in stating that the transactions were proscribed is attributable in large measure to Beatrice's own procrastination in giving the FTC sufficient information upon which to act. If Beatrice had simply taken the trouble to seek permission of the FTC or even to make inquiries whether FTC approval was necessary, much delay could have been avoided.

[6] Litigation continually arises as to the meaning and breadth to be given consent decrees in antitrust cases. *Cf. United States* v. *Armour & Co.*, 402 U.S. 673, 91 S. Ct. 1752, 29 L. Ed. 2d 256 (1971); *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 79 S. Ct. 944, 3 L. Ed. 2d 1054 (1959). Simply because a party misconstrues its lawful obligations under such decrees, it is not afforded a legal defense if in law that interpretation turns out to be erroneous. Misunderstanding of the law is no more an excuse under the Clayton Act than anywhere else. In effect, the argument proffered here is similar to the defendant's contention, urged more emphatically in the district court under Count II, that it acted in good faith. We think, as did the district court, that if this has any relevancy at all it is a factor to be considered by the trial court only in measuring or mitigating the penalty.

B. *The Offense: Single or Continuing?*

The continuing penalty provisions of 15 U.S.C. §§ 21(*l*) and 45(*l*) are virtually identical. Section 21(*l*) provides in part:

> **Each separate violation of any such order shall be a separate offense, *except that in the case of a violation through continuing failure or neglect to obey a***

> *final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense.* (emphasis added.)

Beatrice argues that here there was no *continuing* violation. Since the consent decree prohibits only "acquisitions" [12] rather than "acquisitions and further holdings," Beatrice argues that it has committed only one violation because an acquisition is an isolated occurrence which is not continuing in nature.[13] The government, on the **[1270]** other hand, argues that an acquisition is a continuing offense until it is undone.

This case is factually similar to *United States* v. *ITT Continental Baking Co.*, No. C–1220 (D. Colo. Aug. 2, 1971), *aff'd*, 485 F. 2d 16 (10th Cir. 1973), wherein the Tenth Circuit adopted the position advocated by Beatrice, *i.e.*, that the FTC order [14] merely proscribed the *acquisition* of assets: "The acquisition itself, and not the *method* of operation thereafter, is the critical factor, and this is the event or incident to which the complaint and the order were directed." 485 F. 2d at 19 (emphasis in original).

Such a limited construction of the order ignores the crucial effects of an acquisition and would render nonacquisition orders virtually meaningless.[15] As the government persuasively urges here:

> For competitive purposes there is nothing intrinsically wrong with the "act of acquisition" in and of itself. *Rather it is the effect of an acquisition, the relationship it creates which may lead to its proscription.* . . . The order's express and agreed terms barred further "acquisitions" and that term plainly had the same meaning as in Section 7 of the Clayton Act. The anti-competitive effects of acquisitions condemned by Section 7 come from the fact that, by holding the assets, the acquiring firm changes the competitive structure of the industry involved. It is the permanent effect of prohibited acquisitions which Congress sought to remedy in the statute . . . . [Any other interpretation] *would convert*

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[12] The relevant portion of the decree is set out in full at p. 1262 of this opinion.

[13] Beatrice concedes that an order could be drawn which would prohibit acquisitions *and further holdings;* however, it argues that the order in question was not so drawn. Beatrice does not cite to any nonacquisition orders drawn with what it considers the requisite specificity. The clause in the Beatrice order seems to be the standard nonacquisition language.

[14] The relevant language in the ITT order is identical to that in the Beatrice decree.

[15] The Tenth Circuit stated that the imposition of [single] penalties "does not insulate the *consequences* of the acquisition from further proceedings which remain available to the Government." 485 F. 2d at 21 (emphasis added). Although it did not give any indication as to what these further proceedings are, there appear to be only two conceivable alternatives. First, the government could bring a contempt action for violation of the order, in which case the penalties would be within the discretion of the court. However, since the contempt suit and the civil penalty suit are regarded as concurrent remedies (*see United States* v. *Standard Distributors, Inc.*, 267 F. Supp. 7, 10–11 [N.D. Ill. 1967]) equally available to the government, there is no reason to limit the government to the contempt action when it is seeking more than $5,000 in penalties. Second, the government could bring a separate action for divestiture (or, as it did here, seek divestiture as another remedy for the order violation). However, divestiture alone is clearly not an adequate alternative. In the present case, Beatrice has enjoyed the benefits of the illegal acquisition since September 1, 1968, and continues to do so to this date since the district court's order was stayed pending appeal.

> *all orders barring future acquisitions into minor expenses of any acquisition or merger, for the prohibition could be avoided by payment of a $5,000 penalty.* (emphasis added).

In *Gottesman* v. *General Motors Corp.*, 414 F. 2d 956 (2d Cir. 1969), *cert. denied*, 403 U.S. 911, 91 S. Ct. 2208, 29 L. Ed. 2d 689 (1971), the court reasoned:

> Here the very acquisition and position of potential control which was found violative of the Clayton Act as of 1949 continued through 1961. *We need not dispute the statement of the district court that, in the ordinary antitrust case, there is no "presumption of continuance of unlawful conduct." Here, however, what was unlawful was du Pont's status as stockholder in General Motors, and that status continued until divestiture.*

Id. at 965 (emphasis added).

Similarly, in *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957), the defendants argued that where the challenged stock acquisition occurred in 1917, the government could not bring suit in 1949 to undo the acquisition since § 7 was applicable only to the acquisition and not to the subsequent holding of the stock. The Supreme Court rejected this argument:

> We repeat, that the test of a violation of § 7 is whether, at the time of suit, **[1271]** there is a reasonable probability that the acquisition is likely to result in the condemned restraints. . . . *The fire that was kindled in 1917 continues to smolder.*

Id. at 607, 77 S. Ct. at 884 (emphasis added).[16]

In *United States* v. *Schine*, 260 F. 2d 552 (2d Cir. 1958), *cert. denied*, 358 U.S. 934, 79 S. Ct. 318, 3 L. Ed. 2d 306 (1959), the defendants were found to have violated an antitrust decree by acquiring interests in theaters without prior court approval. The defendants tried to argue that the statute of limitations on these acquisitions had run; however, the court held:

> [A]lthough the initial acts in contempt of the decree occurred prior to the statutory period, the "illegal" conditions which they created continued up to the date of the order to show cause and resulted in what might be called "continuing contempts."

Id. at 555–556.

[7] It is significant that Beatrice does not contest the imposition of daily penalties for the Count II (Valley Gold) failure to divest. As the government points out, the daily penalty provision was thought necessary in the case of divestiture orders because otherwise "an order dissolving an unlawful merger could be ignored after the mere payment of a $5,000 fine." H.R. Rep. No. 580, 86th Cong., 1st Sess. 7, U.S.

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[16] *Gottesman* and *du Pont* each involved § 7 of the Clayton Act. Since the cease and desist order in our case is based upon the 1956 findings of the FTC that Beatrice had violated § 7, interpretations of that statute should be equally pertinent to an interpretation of the consent order.

Code Cong. & Admin. News 1959, p. 1807. If each day's holding of assets subject to a divestiture order is a separate offense, we think the same should be true of each day's holding of illegally acquired interests.

Equitable Power of District Court To Order Divestiture

The district court's order of December 26, 1972, required Beatrice to divest itself:

> absolutely and outright in good faith of all rights, titles, interests, assets and facilities including the use thereof, directly or indirectly acquired by defendant or its agents and subsidiaries in the former so-called northern division or area of Maple Island Dairy as the result of, and arising out of, its arrangements, contracts, or agreements or those of defendant's agents and subsidiaries, with Maple Island Dairy or others.

United States v. *Beatrice Foods Co.*, 351 F. Supp. 969, 972 (D. Minn. 1972).

[8] Beatrice complains that the district court lacked authority to enter the above order. Beatrice relies primarily on *Herbold Laboratory, Inc.* v. *United States*, 413 F. 2d 342 (9th Cir. 1969). In *Herbold*, the Ninth Circuit reasoned that "Congress, in prescribing a civil action for monetary penalties [15 U.S.C. § 45(*l*)], indicated no intent that the equitable powers of District Courts to issue injunctions might also be invoked." *Id.* at 344. The court further observed that:

> When a statute so clearly provides certain, specific sanctions for violations of a Cease and Desist Order, we cannot believe that the courts should reach beyond the statutory provisions and exert a power which, apparently, the Congress has deliberately withheld.

Id.[17]

[1272] Here, the district court held that 15 U.S.C. § 45(*l*), "though making no mention thereof, does not attempt to limit the exercise of the court's general equitable powers . . . ." *United States* v. *Beatrice Foods Co.*, 351 F. Supp. 969, 971 (D. Minn. 1972). We find ample authority for this reasoning.

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[17] It is significant to note that the *Herbold* court reversed the district court *in toto* because it found that *Herbold* had not violaed the cease and desist order. Moreover, the government had not requested injunctive relief until the time of closing argument before the trial court. The Ninth Circuit discussed the injunctive power question only because it was not sure that "the District Court, had it reached the conclusion that the appellants had not violated the Order, would not have undertaken to enjoin future violations." *Herbold, supra* at 344. Thus, the reasoning of the Ninth Circuit with respect to the propriety of injunctive relief was clearly dicta. The rationale of *Herbold* has been rejected by other courts. *See United States* v. *ITT Continental Baking Co.*, C–1220 (D. Colo. Aug. 2, 1971), *aff'd*, 485 F. 2d 16 (10th Cir. 1973) : *United States* v. *Bostic*, 336 F. Supp. 1312 (D.S.C. 1971), *aff'd per curiam*, 473 F. 2d 1388 (4th Cir. 1972). *cert, denied*, 411 U.S. 966, 93 S. Ct. 2146, 36 L. Ed. 2d 686 (1973) ; *United States* v. *Vitasafe Corp.*, 234 F. Supp. 710 (S.D. N.Y. 1964), *aff'd per curiam*, 352 F. 2d (2d Cir. 1965).

In *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946), the Price Administrator brought suit to enjoin a landlord from violating the Emergency Price Control Act and to require him to make restitution to tenants of excess rents collected. The trial court granted the injunction, but denied the restitution order because it felt there was no jurisdiction under the statute for restitution.

The Supreme Court reversed, finding that the district court's inherent equitable powers could be used to sustain a restitution order:

> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. *Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that judisdiction is to be recognized and applied.* "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown* v. *Swann*, 10 Pet. 497, 503, 9 L. Ed., 508. See also *Hecht Co.* v. *Bowles*, *supra*, 321 U.S. 321, 330, 64 S. Ct. 587, 88 L. Ed. 754.

Porter, *supra* at 398, 66 S. Ct. at 1089 (emphasis added).
See also Wyandotte Transportation Co. v. *United States*, 389 U.S. 191, 200, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967); *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 291–292, 80 S. Ct. 332, 4 L. Ed. 2d 323 (1960); *Culpepper* v. *Reynolds Metals Co.*, 421 F. 2d 888 (5th Cir. 1970).[18]

Finally, we note that the underlying statutory basis for an FTC cease and desist order is § 7 of the Clayton Act. Apropos to our discussion is the Supreme Court's discussion of that section in *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 328–331, 81 S. Ct. 1243, 1251–1253, 6 L. Ed. 2d 318 (1961):

> It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7. That statute is specific and "narrowly directed," . . . . The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for **[1273]** Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when § 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved. Of the very few litigated § 7 cases which have

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[18] As stated in *Walling* v. *Brooklyn Braid Co., Inc.*, 152 F. 2d 938 (2d Cir. 1945):
The action taken below was based upon the general powers of courts of equity to grant injunctions and, as in cases between private litigants, the public interest is always to be considered and protected when such a court in the exercise of its sound discretion grants or withholds injunctive relief. *Central Kentucky Gas Co.* v. *Railroad Commission*, 290 U.S. 264, 271, 54 S. Ct. 154, 78 L. Ed. 307; *United States* v. *Morgan*, 307 U.S. 183, 194, 59 S. Ct. 795, 83 L. Ed. 1211. In a case like this it is self-evident that the public interest is directly concerned in the proper enforcement of a valid wage order. Good administration of the statute is in the public interest and that will be promoted by taking timely steps when necessary to prevent violations either when they are about to occur or prevent their continuance after they have begun. *The trial court is not bound by the strict requirements of traditional equity as developed in private litigation but in deciding whether or not to grant an injunction in this type of case should also consider whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted.*
Id. at 940–941 (emphasis added).

been reported, most decreed divestiture as a matter of course. *Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found.* (emphasis added.)[19]

COUNT II: THE VALLEY GOLD TRANSACTION

As part of the consent decree, Beatrice was ordered to divest itself of its ownership of certain plants. The relevant portion of the decree reads:

> Beatrice Foods Co., ("Beatrice"), within a period not exceeding eighteen (18) months from the effective date of this order, unless extended, shall divest it self absolutely and in good faith to a purchaser approved in advance by the Commission, of all plants which are owned in whole or in part by Beatrice or operated by Beatrice at Pasadena, California (two plants); Cedar City, Utah; El Paso, Texas; Roswell, New Mexico; Albuquerque, New Mexico; all locations in the State of Arizona; and Morgantown, West Virginia, . . . as may be necessary to restore the properties as competitive entities, all as hereinafter provided.
>
> Provided, however, that this order does not require that the plant, assets, properties and businesses located at Morgantown, West Virginia, be sold to the purchaser of the other plants, assets, properties and businesses described above.
>
> Provided further, however, that if, at the expiration of one year from the effective date of this order, Beatrice establishes that despite its good faith efforts it has been unable to dispose of the plants, assets, properties and businesses described above—other than those located at Morgantown, West Virginia—to a single purchaser, Beatrice may dispose of said plants, assets, properties and businesses to two or more purchasers, approved in advance by the Commission.
>
> As used in this order the term "assets, properties and businesses conducted by Beatrice at or in conjunction with said plants" shall include all dairy distribution stations and branches regardless of where located, which are owned in whole or in part by Beatrice or operated by Beatrice and supplied by any of said plants.

In the fall of 1967, Beatrice presented for FTC approval an offer to purchase the El Paso dairy and the 18½% stock interest in Valley Gold Dairies, Albuquerque. This offer was rejected by the FTC, presumably because it did not dispose of *all* of the properties in the order to a single purchaser.

In January, 1969, Beatrice presented for FTC approval a plan to sell the four wholly-owned Beatrice properties in El Paso, Texas; Glendale, Arizona; Cedar City, Utah; and Pasadena, California, to a single purchaser. No one but the Valley Gold majority stockholder was interested in purchasing Beatrice's Valley Gold stock. However, this stockholder was *not* interested in all four of the other properties. Thus, it was impossible to sell all five to a single purchaser. Accordingly, the FTC approved the sale of the other four properties to a single [**1274**] purchaser, knowing that the Valley Gold stock was not part of the package. Thereafter the following events ensued:

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[19] On November 16, 1973, § 5(*l*) of the Federal Trade Commission Act was amended, expressly empowering district courts "to grant mandatory injunctions and such other and further equitable relief as they deem appropriate . . . ." Pub. L. No. 93–153, § 408(c), U.S. Code Cong. & Admin. News 1973, p. 656. In a letter to this court, the government has urged alternatively the retroactive applicability of this amendment because of its "remedial" nature. In view of our holding, we need not pass on this question.

(1) On March 6, 1969 (after the expiration of the 18-month period of the order), the FTC asked Beatrice to inform the FTC of its efforts regarding compliance with the divestiture order vis-a-vis the Valley Gold stock.

(2) Beatrice initially attempted to have the Valley Gold stock deleted from the order. The FTC denied this petition. In August, 1969, Beatrice therefore requested an extension of time until August 31, 1970, in which to divest the Valley Gold stock.

(3) The FTC denied the extension request, but said no action would be taken against Beatrice if the sale were completed by November 15, 1969.

(4) On November 14, 1969, Beatrice requested an extension until February 15, 1970. The FTC denied this request on December 12, 1969, and informed Beatrice that it intended to institute enforcement proceedings.

(5) On December 30, 1969, Beatrice requested FTC approval to sell the stock to the estate of the majority stockholder. Approval was given and the sale was actually completed on January 2, 1970.

The district court entered summary judgment for the government on this count as well, assessing penalties from November 15, 1969.

Beatrice argues that the order required timely divestiture of "all *plants* which are owned in whole or in part by Beatrice or operated by Beatrice at . . . Albuquerque, New Mexico." (emphasis added.) Beatrice contends that it never owned, in whole or in part, a "plant" in Albuquerque and urges that the trial court erred in equating a minority stock interest with ownership of a plant.

In its answer to the complaint, Beatrice "admits that it was required to divest itself of its interest in . . . Valley Gold Dairies."[20] Thus, there existed no material question of fact with respect to the meaning of the order. The trial court was correct in rejecting this argument.

[9] Beatrice's second contention is that the FTC's approval of the sale of the four properties to a single purchaser constituted a waiver of that portion of the order requiring divestiture of the Valley Gold stock. There is no merit to this argument. Beatrice completely ignores the proviso to the order which reads as follows:

> **Provided further**, however, that if, at the expiration of one year from the effective date of this order, Beatrice establishes that despite its good faith efforts

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[20] The trial court also examined internal Beatrice memoranda which it found unequivocally recognized Beatrice's obligation to divest the Valley Gold stock.

> it has been unable to dispose of the plants, assets, properties and businesses described above—other than those located at Morgantown, West Virginia—to a single purchaser, Beatrice may dispose of said plants, assets, properties and businesses to two or more purchasers, approved in advance by the Commission.

This paragraph simply means that the FTC's approval of the sale of the four properties only relieved Beatrice of the obligation to sell all five to a single purchaser. Beatrice was still required to find a second purchaser for the Valley Gold stock.

It is totally irrelevant that in 1967 the FTC rejected a proposed sale of the El Paso plant and the Valley Gold stock to a single purchaser. The FTC was merely trying to effectuate the purpose of the order, which would have been thwarted by approval of such a sale. The rejection simply meant that Beatrice had to come up with a better package, not that it was excused from further performance.

[10] Beatrice next contends that it was entitled to an additional eighteen months in which to divest the Valley Gold stock from March 6, 1969, the date [**1275**] when, according to Beatrice, it first received notice that it was still obligated to divest the Valley Gold stock. We disagree. Beatrice had notice from the date of the order that it had eighteen months in which to divest all five properties. As discussed earlier, the FTC's approval of the sale of the four properties did not terminate Beatrice's obligation to sell the Valley Gold stock. The divestiture order is clearly divided into two parts: (1) a one-year period in which Beatrice was to attempt to sell all five properties to a single purchaser, and (2) an additional six months in which Beatrice could complete the divestitures by sales to separate purchasers, if need be. Thus, the old order did not become "inoperative" when the first sale was approved; rather, it simply progressed to the second stage.

[11] Finally, Beatrice raises a good faith defense to the Valley Gold count. It argues that it was placed in an impossible position because there was only one purchaser interested in the Valley Gold stock, and this purchaser was not interested in the other properties. And, after the approved sale of the other properties, Beatrice still had difficulty completing the Valley Gold sale because of the purchaser's refusal to pay what Beatrice considered a fair price. The trial court properly rejected the good faith argument as a complete defense.[21]

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[21] The court did, however, consider defendant's claimed good faith when it assessed penalties at the rate of $200 per day, rather than the $5,000 per day requested by the government. Judge Neville observed:

> The court has some sympathy as a business proposition with defendant's difficulty in finding a ready market for a minority stock interest in a closed corporation, particularly where the principal stockholder of the corporation became deceased. The court also recognizes defendant did divest itself of its other properties as required and eventually of the Valley Gold stock, though some 49 days too late and beyond the last extension of time.

United States v. *Beatrice Foods Co.*, 351 F. Supp. 969, 971 (D. Minn. 1972).

The discretionary nature of the penalties here involved is crucial. Thus, in *United States* v. *H.M. Prince Textiles, Inc.*, 262 F. Supp. 383 (S.D.N.Y. 1966), the court held that good faith is not a defense to an action for civil penalties under § 45(*l*). *Accord, United States* v. *Vitasafe Corp.*, 212 F. Supp. 397 (S.D.N.Y. 1962). In *H.M. Prince*, the court observed that the order's "main objective is to insure the protection of the public which must be protected whether the violations are intentional or not." *H.M. Prince*, *supra* 262 F. Supp. at 388. Thus, we conclude, as did the district court, that good faith is only relevant to the severity of the penalty to be assessed.

The trial court's judgment on both counts is affirmed.

F.T.C. v. BRITISH OXYGEN CO., LTD., ET AL.*

Civ. A. No. 74–31. F.T.C. Docket No. 8955.

(United States District Court, District of Delaware, March 11, 1974)

On petition for preliminary injunction, court held that F.T.C. had made a proper showing under Sec. 13(b) of the F.T.C. Act that an acquisition made by respondents may be found to violate Sec. 7 of the Clayton Act and Sec. 5 of the F.T.C. Act and entered a preliminary injunction which required British manufacturer and American producer of industrial gases to maintain the U.S. firm as a viable, separate and independent company and to refrain from encumbering or transferring stock of the U.S. firm.

Ralph F. Keil, U.S. Atty., Wilmington, Del., *Calvin J. Collier*, Gen. Counsel, *Gerald Harwood*, Actg. Asst. Gen. Counsel, *Karl H. Buschmann*, *William A. Cerillo*, Attys., Washington, D.C., F.T.C., for petitioners.

James H. Gilliam, Jr., and *R. Franklin Balotti*, of *Richards, Layton & Finger*, Wilmington, Del., *Richard L. McMahon*, of *Potter, Anderson & Corroon*, Wilmington, Del. (*Sherman & Sterling*, New York City, of counsel), for respondents.

Before LATCHUM, *Chief Judge*.

PRELIMINARY INJUNCTION

The Federal Trade Commission's (the "Commission") application for a preliminary injunction under Section 13(b) of the Federal Trade Commission Act, as amended by Section 408(f) of the Trans-Alaska

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶75,003, at 96.445 (1974–1 Trade Cases). Order amending preliminary injunction dated March 11, 1974. For case before the Commission, *see* **86 F.T.C. 1241.** ***See also*** **p. 910 herein.**

Pipeline Authorization Act, P.L. 93–153, 87 Stat. 588, Nov. 16, 1973 [15 U.S.C. § 53(b)] having come on for hearing on March 8, 1974, and the Court having independently considered the affidavits, exhibits and briefs of the parties and oral argument of opposing counsel, the Court Finds and Concludes:

1. That the Court has jurisdiction over the subject matter and over all of the above named appearing respondents, viz. British Oxygen Company, Ltd., ("BOC"), a United Kingdom company, BOC Financial Corporation ("BOC Financial"), a Delaware corporation, BOC Holdings, Ltd. ("BOC Holdings"), a United Kingdom company, British Oxygen Investments, Ltd. ("BO Investments"), a United Kingdom company, and Airco, Incorporated ("Airco"), a New York corporation.

2. That the Commission has sufficiently demonstrated its "reason to believe" that Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, may be violated by the acquisition of Airco's stock by BOC through its subsidiaries.

3. That the Commission has made a "proper showing" of a "likelihood of ultimate success" under Section 13(b) of the Federal Trade Commission Act that BOC's acquisition of Airco's stock may be found to be in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act at the conclusion of its administrative proceedings now pending before it.

4. That the weighing of the equities is in favor of the application and that the matter is in the public interest.

> I. *Now Therefore*, pending the entry of a final order as defined in 15 U.S.C. §§ 21 and 45 in respect to the administrative complaint now before the Commission, this Court hereby issues the following preliminary injunction, Directing and Ordering BOC, BOC Financial, BOC Holdings, BO Investments and Airco, the named respondents, each of their officers, directors, employees and agents, each of their subsidiaries, successors and assigns, and all other persons in active concert or participation with respondents who shall have received actual notice of this order by personal service or otherwise, to:
>
> > A. Maintain Airco as a viable separate and independent company and to make no changes in its operations likely to hinder a future divestiture of Airco, including a merger, consolidation or acquisition of any equity interest.
> >
> > B. Preserve and protect all assets of Airco and refrain from disposing of or encumbering such assets, except in the

ordinary course of business, and refrain from comingling them with any other assets of BOC or its subsidiaries, without prior approval of the Commission.

C. Refrain from taking any steps to implement any provision of the agreements between Airco and BOC, dated July 25, 1973 and December 10, 1973, respectively except for Paragraphs 2, 3 and 4 of the December 10th agreement.

D. Refrain from making available or communicating to each other any confidential or proprietary information, including customer lists, trade secrets, formulas, know-how or manufacturing processes of each party, except this injunction shall not prohibit Airco and BOC from operating under any license agreements between them which were outstanding prior to July 1, 1973 or prohibit them from engaging in normal sales and purchase activities with each other in a volume not in excess of that which existed prior to July 1, 1973.

E. Retain separate and unencumbered all shares of Airco which BOC may own, acquire or control.

F. Refrain from attempting to influence or interfere with Airco's independent judgment on any matter so as adversely to effect the competitive position of Airco vis-a-vis BOC or any of its subsidiaries.

G. Refrain from transferring any shares of stock or other securities of Airco from BOC Financial to BOC or any other entity or person unless such transferee shall subject itself to the jurisdiction of this Court.

II. *It Is Further Ordered* That this preliminary injunction is issued upon the following conditions: (1) the Commission shall expedite the administrative proceeding in this matter, (2) shall file a written report with the Court at least every three months from the date hereof [of] the progress of the proceedings and the cause, if any, of any delays with a copy served on respondents, and (3) the Commission shall give a definitive answer at least within fifteen days after it receives a request for approval under any of the terms of this order.

III. *It Is Further Ordered* That this injunction is granted pursuant to 15 U.S.C. § 53(b) without the necessity of the Commission furnishing bond.

IV. *It Is Further Ordered* That the temporary restraining order heretofore entered in this action is hereby dissolved.

V. *It Is Further Ordered* That jurisdiction is hereby retained for the purpose of enabling any party to this proceeding to apply to this Court at any time for such further orders and directions as may be necessary and appropriate for the construction or carrying out of this order, for the modification of any provision thereof, and for the enforcement of compliance of any term or condition thereof and the punishment of any violations thereof.

F.T.C. v. CONTINENTAL OIL CO.*

Civ. A. No. 1094–73. F.T.C. File No. 99–157.

(United States District Court for the District of Columbia, March 11, 1974)

On petition for enforcement of subpoena *duces tecum* issued pursuant to an investigation into natural gas reporting procedures, court held that the information demanded, bid calculation files, was not relevant to the investigation and ordered the petition for enforcement denied.

Arnold T. Aikens, Washington, D.C., for plaintiffs.

E. William Barnett, Washington, D.C., for defendant.

Before HART, *District Judge*.

ORDER

Be It Remembered that on the 13th day of December, 1973, the Federal Trade Commission's petition for enforcement in the above cause came on for hearing and the Court having considered the Federal Trade Commission's petition, the pleadings and briefs of the parties on file in the above cause and the arguments of counsel in open court, and the Court being of the opinion that Continental's bid calculation files are not relevant to the investigation or inquiry being carried on by petitioner, it is hereby

ORDERED that the Federal Trade Commission's petition is hereby denied; provided that the Federal Trade Commission may, at a later date and upon good cause shown, apply to the Court for an order requiring production of individual bid calculation files in any case where the Commission can show that Continental has been awarded a bid on an offshore lease and has delayed for an unreasonable time in conducting drilling operations on such lease. Subject to being reopened as set forth above this cause is dismissed.

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶74,964, at 96,283 (1974–1 Trade Cases).

SPIEGEL, INC. v. F.T.C.*

No 73-1233. F.T.C. Docket No. 8869.

(United States Court of Appeals, Seventh Circuit, March 18, 1974)

1. WHILE PROOF OF ACTUAL INJURY IS UNNECESSARY TO SUPPORT F.T.C. CEASE AND DESIST ORDER, PROTECTION OF PUBLIC IS ESSENTIAL TO JUSTIFY FILING OF COMPLAINT

Protection of public is essential to justify filing of complaint under Federal Trade Commission Act, but proof of actual injury is unnecessary to support a Commission cease and desist order.

2. INDIVIDUALS IN SOCIETY HAVE THE RIGHT TO BE TOLD THE TRUTH SO THAT CHOICES CAN BE UNDERSTANDINGLY MADE AMONG PRODUCTS OR OFFERS

[60] A catalog retailer's promise of unconditional "free trial" or "percent off" when both were conditional, was not in the public interest since individuals in society have a right to be told the truth, so that their choices among products, or among offers, can be understandingly made.

3. F.T.C. COMPLAINT JUSTIFIED WHERE ALLEGED DECEPTIVE AND UNFAIR ADVERTISING PRACTICES RESULTED IN SUBSTANTIALLY HIGH NET SALES FOR RESPONDENT

Where catalog retailer in its sales effort advertised for credit customers in circulars to "established" and "new" customers, and seasonal catalogs to "new" customers, and retailer's net sales by "hot merchandise" catalogs were estimated at $27,000,000 in 1969 and 1970 and $30,000,000 in 1971, the Federal Trade Commission's complaint alleging that advertising practices were deceptive and unfair was justified and Commission did not waste its time with trivia in considering alleged deceptive and unfair practices.

4. F.T.C. FINDING OF A "CAPACITY AND TENDENCY" TO MISLEAD THE PUBLIC WAS SUPPORTED BY EVIDENCE

Evidence including showing that conditions of catalog retailer in its advertisements to customers were not stated or located in such a way that customers, without undue difficulty, would understand that the "free trial" and "percent off" offers were not truly free but conditioned on customer's meeting retailer's credit criteria supported the Federal Trade Commission's finding of a "capacity and tendency" to mislead the public.

5. VARIANCE BETWEEN F.T.C. ALLEGATION OF FAILURE TO DISCLOSE AND FINDING OF DISCLOSURE BEING "FAR REMOVED" FROM ALLURE OF ADVERTISEMENT WAS NOT FATAL

There was no fatal variance between the Federal Trade Commission's complaintiff's allegation of failure to disclose conditions on face of advertisements and the Commission's finding that placement of the conditions was "far removed" from the allure of the advertisment.

6. F.T.C. CEASE-AND-DESIST ORDER WAS NOT "VAGUE AND AMBIGUOUS" NOR DID IT "VIOLATE THE STIPULATION" ENTERED INTO BY PARTIES AT HEARING EXAMINER'S REQUEST

A cease and desist order of the Federal Trade Commission did not "violate the stipulation" entered into by the parties at request of the

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*Reported in 494 F. 2d 59 (1974). *Cert. denied;* October 21, 1974, 419 U.S. 896, 95 S. Ct. 175. For case before the Commission, see 82 F.T.C. 20.

hearing examiner nor was the order "vague and ambiguous," where thrust of the order was a requirement that credit conditions, relating to both prospective and established customers, be stated "clearly and conspicuously * * * in immediate conjunction with" the offer in order that prospects not be misled by positioning conditions where average person in catalog retailer's market would be likely to overlook them.

7. Need To Serve Customers or Meet Competition Are Not Justification for Deceptive and Unfair Advertisements

The Federal Trade Commission's cease and desist order issued against catalog retailer would not effectively "ban" free trial offers; unfair and deceptive advertisements cannot be justified on basis that they are needed either as a service to the consumer or to meet competition in the market.

8. Evidence Requested by Retailer in Quashed Subpoenas *"Duces Tecum"* Was Irrelevant to Proceedings

In proceeding against catalog retailer for deceptive trade practices and unfair competition, the succeeding examiner's quashing of subpoenas duces tecum issued against competitors did not deprive the retailer of evidence bearing on nature and extent of order to be entered, where evidence sought was of no avail since even if its competitors were more deceptive, the evidence was irrelevant since alleged facts that retailer's competitors were worse did not require that the retailer be permitted to continue the deception found by the Federal Trade Commission.

(Syllabus, with substituted captions, taken from 494 F. 2d 59)

On petition for review of F.T.C. cease and desist order, court held that public protection is essential to justify filing a complaint, but truth of actual injury is unnecessary to support cease and desist order; unconditional offers which are in fact conditioned are not in the public interest; the complaint was justified; and there was no fatal variance between allegations in the complaint and the findings of the Commission.

Affirmed.

Pell, *Circuit Judge*, dissented and filed opinion.

Jacob A. Stein, Washington, D.C., *Patrick W. O'Brien*, Chicago, Ill., for petitioner.

Harold D. Rhynedance, Jr., Asst. Gen. Counsel, *William A. E. Doying*, Atty., Federal Trade Commission, Washington, D.C., for respondent.

Before Kiley, *Senior Circuit Judge*, and Pell and Sprecher, *Circuit Judges.*

Kiley, *Senior Circuit Judge.*

[61] The Federal Trade Commission ordered petitioner, Spiegel, Inc., to cease and desist from engaging in deceptive trade practices

and unfair competition [1] in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(c).[2] Spiegel petitions to have the order reviewed and set aside. We deny the petition and direct enforcement of the Commission's order.

Spiegel is a catalogue retailer of, among other things, clothing, household appliances and kitchenware, with principal office and place of business in Chicago, Illinois. During the relevant period prior to November, 1971, it shipped its merchandise, when sold, from Chicago into several of the United States. In its sales efforts it advertised for credit customers in circulars to "established" and "new" customers, and seasonal catalogues to "new" customers. The Commission's complaint, issued November 8, 1971, alleged that Spiegel's advertising practices were deceptive and unfair in violation of the Act, and that the complaint was "in the public interest."

The cease and desist order followed upon Spiegel's answer denying deception, a pre-hearing stipulation of facts, a limited evidentiary hearing before a Commission hearing officer, appeals to the Commission by both parties,[3] and the Commission's adoption, with modifications, of the hearing officer's decision.

The complaint alleged that the statements contained in circulars and seasonal catalogues which offered "free trial" or "percent off" of merchandise represented directly or by implication that the offers were available "without condition of restriction;" that "in truth and in fact" the offers of shipment to the "new" customers were conditioned upon the offerees qualifying for credit under Spiegel criteria; and that no shipments were made under the offers to the "established ... credit customers" unless the amount of the purchases, added to the pre-existing credit charges of the purchaser, was less than the total credit amount Spiegel had previously allowed the customer.

The complaint charged that Spiegel's use of these alleged "false, misleading and deceptive statements" had the "capacity and tendency" to mislead the public into purchasing Spiegel's merchandise in reliance upon the truth of the statements "all to the prejudice and injury of the public and of [Spiegel's] competitors," and constituted unfair and deceptive practices and unfair competition in violation of the Act.

Spiegel's answer denied that the complaint was in the public interest, stated that the advertising followed the custom and usage of the trade, stated the alleged unlawful practices had been abandoned, and denied deception and injury to customers or competition.

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[1] Sec. 5(a)(6): "The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." [15 U.S.C. § 45(a)(6).]

[2] Sec. 5(a)(1): "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." [15 U.S.C. § 45(a)(1).]

[3] The Commission is both prosecutor and judge under § 5(45) of the Act, *FTC* v. *Klesner*, 280 U.S. 19, 27, 50 S. Ct. 1, 74 L. Ed. 138 (1929).

The Commission's Final Order [4] directed Spiegel to desist from its "free [**62**] trial" or "percent off" advertising practices as to prospective and established customers, unless it "conspicuously disclose[d] in immediate conjunction" with the offers that they are subject to Spiegel's credit approval; disclosed at the top of questionnaires requesting information about credit that the questionnaire is an application for credit; and disclosed any condition or restriction rendering an offeree ineligible to qualify for the offer. Finally, the order directed Spiegel to desist from representing directly or by implication that a free trial offer or price reduction is without condition when such condition exists.

I.

There is no merit in Spiegel's contention that the order should be set aside as too trivial for Commission attention because there was no proof of injury to the public or to Spiegel's competitiors.

[1] Protection of the public is essential to justify filing a Section 5 complaint. *FTC* v. *Klesner*, 280 U.S. 19, 27, 50 S. Ct. 1, 74 L. Ed. 138 (1929). However, proof of actual injury is unnecessary to support a Commission cease and desist order.

Significant in the examiner's decision, adopted by the Commission, are the statements that "an advertisement must be truthful . . . . To comply with the Federal Trade Commission Act, an advertisement must be akin to a passport for the complete truthfulness of the statements contained therein;" and that where, as here, the offers are conditioned, "unsophisticated clues to the conditions should be as obvious on the face of the advertisement as the inducing offers themselves."

The moral tone of those statements is implicit in Justice Cardozo's language in *FTC* v. *Algoma Co.*, 291 U.S. 67, 78–79, 54 S. Ct. 315, 320, 78 L. Ed. 655 (1934):

> Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency. The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. *Federal Trade Comm'n* v. *Royal Milling Co.*, 288 U.S. 212, 216, [53 S. Ct. 335, 77 L. Ed. 706]; *Carlsbad* v. *W. T. Thackeray & Co.*, 7 Cir., 57 F. 18. In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance. Nor is the prejudice only to the consumer . . . . "A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice." *Federal Trade Comm'n* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494, [42 S. Ct. 384, 385, 66 L. Ed. 729]. The careless and the unscrupulous must rise to the

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[4] Commission Chairman Kirkpatrick dissented on the ground that the advertisements adequately notified the customers of the conditions and that where no substantial economic loss "appears" and no testimony of consumer misunderstanding was received, the order was not "warranted."

> standards of the scrupulous and diligent. The Commission was not organized to drag the standards down.
>
> (Footnote omitted.)

The primacy of truthfulness in advertising was made explicit in *FTC* v. *Colgate-Palmolive*, 380 U.S. 374, 85 S. Ct. 1035, 13 L. Ed. 2d 904 (1965), wherein the Supreme Court held that it was a deceptive practice to convey to television viewers the impression that they were watching an actual experiment when they were viewing only a simulation, notwithstanding the fact that the experiment had been conducted off-camera and the product had performed as represented. The Court stated, at 388–389, 85 S. Ct. at 1044:

> We find an especially strong similarity between the present case and those cases in which a seller induces the public to purchase an arguably good product by misrepresenting his line of business, by concealing the fact that the product is reprocessed, or by misappropriating another's trademark. In each the seller has used a misrepresentation to break down what he regards to be an annoying or irrational habit of the buying public—the preference for particular manufacturers or known brands regardless of a prod[**63**]uct's actual qualities, the prejudice against reprocessed goods, and the desire for verification of a product claim. In each case the seller reasons that when the habit is broken the buyer will be satisfied with the performance of the product he receives. Yet, a misrepresentation has been used to break the habit and, as was stated in *Algoma Lumber*, a misrepresentation for such an end is not permitted.

The Ninth Circuit, citing *Colgate-Palmolive*, has held that "[d]eception itself is the evil the statute is designed to prevent." *Floersheim* v. *FTC*, 9 Cir., 411 F. 2d 874 (1969).[5] That holding is faithful to the Supreme Court decisions.

[2] The promise of an unconditional "free trial" or "percent off," when both are conditional, is not in the public interest. A good society depends upon promises being kept. And individuals in society have a right to be told the truth, so that their choices among products, or, as in this case, among offers, can be understandingly made. If sellers in our society are free to compete for consumers' patronage with others by unfair advertising, not only is the consumers' right violated, but our commitment to fair competition becomes a pretense. The courts "must set their faces" against those practices which are harmful to the public interest.

The record here contains ample proof of the need tq protect the public interest. Spiegel's catalogues were distributed in interstate commerce and its advertisements inserted in numerous metropolitan newspapers. Between 1969 and July 1970, approximately three million circulars offering price discounts were distributed. Spiegal distributed two million "free trial" offers annually. Net sales by "hot merchandise" catalogues were estimated at $27,000,000 in 1969 and 1970, and $30,000,000 in 1971.

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[5] See also *Exposition Press, Inc.* v. *FTC*, 295 F. 2d 869, 873 (2nd Cir. 1961).

[3] We hold that the complaint was justified and that the Commission did not waste its time with trivia in considering the alleged deceptive and unfair practices.

II.

[4] Spiegel argues that the Commission's order is not supported by the evidence. We need not discuss the circular and catalogue statements at length in disposing of the argument. Suffice to say that the statements are clearly designed to attract credit customers to Spiegel's offers. For example, a multi-paged circular is sent with a typewritten invitation to the "Dear Customer" to try the nineteen "outstanding values . . . at our risk." "[Y]ou can order any or all of these values on 30-DAY FREE TRIAL . . . . All we require is that your order be for $10 or more . . . . We'll rush your merchandise to you." "[R]emember, you're not buying . . . merely trying." In the margin of the first page in large type is the following: "SEND NO MONEY. TRY ANY OF THESE VALUES 30 DAYS FREE." There is no statement in the circular itself on any condition or restriction, other than the $10 minimum. In another free trial offer there are small print statements of credit qualifications, such as "subject to [Spiegel's] acceptance."

The Commission did not find that Spiegel stated the offers were unconditional. It found that the conditions were not stated or located in such a way that customers, without undue difficulty, would understand that the "free trial" and "percent off" offers were not truly free but were conditioned on the customer meeting Spiegel's credit criteria. As Spiegel states it, the alleged deceptive factor was in the placement and print size of the conditions, not the lack of statement of conditions.

We have examined the circulars and catalogues in the record containing similar statements, and we hold that the evidence gives substantial support to the Commission's finding of a "capacity and tendency" to mislead the public. The [**64**] testimony of Spiegel's vice-president that its advertisements lack "even the capacity to injure" does not compel a finding different from the Commission's.

III.

[5] There is no merit in Spiegel's contention that there is a fatal variance between the complaint's allegation of failure to disclose conditions on the face of the advertisements and the Commission's finding that placement of the conditions was "far removed" from the allure of

the advertisement. We find no variance. And this court's *Wrisley Co. v. FTC*, 7 Cir., 113 F. 2d 437, 442 (1940), does not support Spiegel.

IV.

[6] Spiegal has not persuaded us that three of the four paragraphs in the order "violate the stipulation" entered into by the parties at the request of the hearing examiner, and consequently bear the "badge of unfairness." [6] Nor is the order, in our opinion, "vague and ambiguous."

The thrust of the four paragraphs in the Commission's order is a requirement that the credit conditions, relating to both prospective and established customers, be stated "clearly and conspicuously . . . in immediate conjunction with" the offer in order that the prospects not be misled by positioning conditions where the average person in Spiegel's market would be likely to overlook them. The order is reasonably related to the violations found.

V.

[7] We do not share Spiegel's concern that the Commission's order will effectively "ban" free trial offers. We refer to the apt statement of the Supreme Court in *Colgate-Palmolive*, *supra*, 380 U.S. at 390, 85 S. Ct. at 1045: "We think it inconceivable that the ingenious advertising world will be unable, if it so desires, to conform to the Commission's insistence that the public be not misinformed." In any event, unfair and deceptive advertisements cannot be justified on the basis that they are needed either as a service to the consumer or meet competition in the market.

VI.

[8] The original hearing examiner, at Spiegel's request, issued twelve subpoenas *duces tecum* against competitors of Spiegel. The succeeding examiner *sua sponte* quashed the suboenas. Spiegel argues that the ruling deprives it of evidence bearing on the nature and extent of the order to be entered; and that the evidence sought would have shown Spiegel's conduct to have been exemplary viz-à-viz its competitors, since it alone of its competitors in the market stated credit conditions. It further claims the evidence was relevant to show it could believe its offers reasonable in light of its competitors' advertisements.

We hold that the ruling was not erroneous. The evidence sought was of no avail to Spiegel. Even if its competitors were more deceptive, the evidence was irrelevant. We note again the Cardozo statement, 291 U.S. at p. 79, at 54 S. Ct. at p. 320 of *Algoma*, that "the Commission was not organized to drag the standards down." See also the Sixth Circuit's statement in *Collier & Son Corp.* v. *FTC*, 427 F. 2d 261, 276 (1970): "The purpose of Commission orders is not to put those employing deceptive acts or practices *in pari delicto* with each other." That Spiegel's competitors were worse does not require that Spiegel be permitted to continue the deception found by the Commission.

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[6] The parties at the hearing stipulated that the sole issue before the examiner was whether Spiegel's advertisements of "free trial" offers or "percent off" offers are unfair or deceptive because of the manner in which customers are notified of Spiegel's requirement of credit approval in order to obtain the benefit of such offers.

[**65**] For the reasons given, the Commission's order is affirmed, and we direct its enforcement.

PELL, *Circuit Judge* (dissenting).

If for no other reason, the order of the FTC should be set aside by this court because of the utter triviality of the matter involved. I therefore respectfully dissent.

The FTC conceded the correctness of the general rule that detriment to the public interest must be shown. Here, by issuing its order, the FTC has in effect found there was detriment to the public interest in the situation of deadbeats being deceived into thinking that they are going to receive a free trial of, or a discount on, merchandise which they could not realistically purchase on either a cash or a deferred basis. It is difficult to imagine a less egregious affront to the public interest.

As early as 1924, only nine years after the FTC had begun to operate, it was stated that

> [t]he Commission is handling too many cases, and that it should exercise a greater discretion in selecting those cases which involve questions of public importance. It does not seem necessary that public funds should be employed to prosecute cases . . . involving trivial or merely technical offenses, in which the public interest is not always easy to discern. G. Henderson, The Federal Trade Commission 337 (3d ed. 1927).

Similarly, the Hoover Commission noted in 1949 that

> in the selection of cases for its formal dockets, the Commission has long been guilty of prosecuting trivial and technical offenses and of failing to confine these docket to cases of public importance. Commission on the Organization of the Executive Branch of the Government, 81st Cong., 2d Sess., Task Force Report on Regulatory Commissions, app. N, 128 (Comm. Print 1949).

Most recently, The President's Advisory Council on Executive Organization, in its report entitled "A New Regulatory Framework" (January 1971), stated:

> Much of the criticism of the FTC is aimed at its disproportionate attention to comparatively trivial matters—resulting largely from the breadth of its mandate and compounded by inherent deficiencies of the collegial form of organization. Preoccupation with minutiae over the years has created a "jack of all trades—master of none" profile for the FTC. *Id.* at 87.

In *S. Buchsbaum & Co.* v. *Federal Trade Commission*, 160 F. 2d 121 (7th Cir. 1947), this court, in holding that the findings and conclusion of the Commission that the petitioner had been guilty of deceptive acts was not supported by substantial evidence, made the following pertinent comment, at 123–124:

> [E]ven though there be no proof of actual deception required, *there must be a showing that the acts and practices sought to be proscribed are detrimental to the public interest in order to satisfy the statutory requirement that the proceeding be in the public interest.* 15 U.S.C.A. § 45(b). Here the Commission made no finding that the deception, if any, had ever resulted in or had any tendency to result in detriment to the purchasing public. We find nothing in the findings to support the conclusion that the acts and practices are "all to the prejudice and injury of the public." (Emphasis added.)

Putting the most blatant possible interpretation on the advertising material of Spiegel, and assuming, *arguendo*, that the most astute and sophisticated reader would be unable to find any clue in the material that would impose any qualification or condition on the enjoyment of **[66]** a free trial or a discount, whether that reader be an adult or a child, financially responsible or irresponsible, honest or dishonest, I cannot conceive that the public would be misled into thinking that these merchandising gimmicks were intended for any persons except a member of the prospective and potential purchasing public under circumstances in which Spiegel expected eventually either to receive the purchase price or the return of the merchandise. The inference that Spiegel intended to deal with financially irresponsible persons is scarcely supportable from the bare fact of a free trial offer or a discount possibility.

This is not a case where we are dealing with hidden charges which would vitiate the supposed discount, nor one where the applicant was supposedly getting a free trial but was actually required to keep the goods once they reached his possession. In fact, the parties stipulated that credit approval was the only restriction or condition qualifying these offers.

However, it is not necessary to decide the case on the above hypotheses. The basic evidence does not seem to be in dispute here, and that evidence in my opinion is totally lacking in substantiality to support a finding of deceptive advertising detrimental to the public. It is true that the statements that "All orders are subject to Spiegel Credit Approval" appeared on the catalogue rather than in equal size type with the reference to discounts and free trials. However, I know of no prohibition of the use of an eyecatcher as long as the rest of the advertising material puts the eyecatcher in proper perspective.

Under any interpretation of the advertising material, it is clear that one cannot partake either of the free trial period or the discount without filling out and signing the order form. It is necessary for the prospective free trial user or discount applicant, if a new customer, to give detailed information about marital status, income, financial obligations, nature of employment, and similar factual data for credit evaluation. In varying language, the order form makes it clear that all orders are subject to acceptance by Spiegel. As to established credit customers, I cannot conceive that they were not already aware of the fact that a favorable credit rating is required and that if they are delinquent they will not be the beneficiary of further unpaid-for utilization of Spiegel merchandise.

In his conclusion, the trial examiner stated that the practices had the capacity to mislead members of the purchasing public into the purchase of substantial quantities of Spiegel products. I wholly fail to comprehend this, as the only ones who received the products were those who passed muster on credit. It is not an uncommon trait for people to overextend themselves in credit purchasing, but there is nothing about this advertising to cause this natural human tendency to exceed its present liberal boundaries. Protection against our human frailties may be arguably a worthwhile object of civilization, but in this country, absent deception or misleading representations, we are still free to determine such matters for ourselves.

The trial examiner emphasized that advertising must be truthful, but again I fail to find that, reasonably construed, the advertising in question is otherwise. Also, the trial examiner specifically stated in reaching his conclusion that the advertising was deceptive and unfair that he did not do so on a basis of demonstrated injury to purchasers.

The Chairman of the Federal Trade Commission viewed this case, and its inconsequentiality, as I do, and I adopt and agree with his statement in dissent as being the proper dispositive basis of the case:

> I cannot agree that consumers would fail to appreciate that Spiegel's free-trial offers necessarily were subject to acceptance by Spiegel. The nature and amount of information obtained by Spiegel on its application forms, in my opinion, puts the consumer on notice that Spiegel has established criteria which prospective customers must meet prior to receiving the merchandise on a free-trial basis. It seems to me unlikely that a consumer would conclude that the information provided on the application form was irrelevant to Spiegel in deciding whether or not to provide the consumer with the offered merchandise.
>
> Of course, it is arguable that some few prospective customers who sent in filled-in application forms may not have fully understood the conditional nature of the offer. Also, I appreciate that economic injury is not always a condition precedent to an order under Section 5. However, in the circumstances of this case where no economic loss of any consequence appears and where no testimony was received with respect to consumers' understanding of the import of the application forms or whether Spiegel's disclosures were in fact sufficient, the entry of an order is not warranted.

Finally, and in any event, the order entered by the Commission is far too broad and is unjustified by this particular velitation.[1]

For the reasons set out in this dissent, I would set aside the order of the Commission.

DIENER'S, INC., ET AL., v. F.T.C.*

No. 73-1184. F.T.C. Docket No. 8804.

(United States Court of Appeals, District of Columbia Circuit, March 22, 1974)

1. TESTIMONY OF F.T.C. INVESTIGATOR WAS NOT RELIED UPON BY COMMISSION IN SUCH A MANNER AS TO IMPROPERLY FUSE ROLES OF JUDGE AND PROSECUTION

Federal Trade Commission did not improperly fuse roles of judge and prosecution in the manner and degree to which it relied on testimony of an FTC investigator in determining existence of asserted advertising violations, where investigator's testimony did not drift into a representation by him of ultimate validity of charges and where Commission was careful to assess such evidence in proper light.

2. BASING CEASE AND DESIST ORDER ON PAST PRACTICES NOT CONTINUED INTO PRESENT DID NOT LEAVE F.T.C. POWERLESS TO ISSUE SUCH ORDER

Federal Trade Commission was not powerless to issue a cease and desist order on the basis of past advertising practices that had not been shown to have continued to the present.

3. COURT OF APPEALS EXERCISED ITS POWER OF APPELLATE MODIFICATION IN ORDER TO CLARIFY F.T.C. CEASE AND DESIST ORDER CAST IN INAPPROPRIATE TERMS

Where Federal Trade Commission cease and desist order with respect to advertising practices was cast in inappropriate terms so that petitioners may have been justifiably uncertain as to what they could and could not do, thus subjecting petitioners to a competitive handicap, Court of Appeals would exercise its power of appellate modification and recast order in more specific terms to correspond with interpretations of current order that Commission had offered the court.

(Syllabus, with substituted captions, taken from 494 F. 2d 1132)

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[1] I do not dissent from that portion of the majority opinion dealing with Spiegel's inability to demonstrate that other mail order houses engage in the same type of inducement advertising but with less candor than Spiegel does. If a law violation exists, securing compliance with the law often follows selective prosecution of one among many violators. There is no indication here of other than a normal process of selectivity.

This phase of the case was again brought to my attention after the completion of the dissent by the receipt by my wife of a mailed offer from a nationally known merchandiser. On the envelope was the word in one inch letters, "FREE!" Inside, also in large letters, was reference to a free 14 day home trial of kitchen equipment. At the bottom of the backside of the "Free Trial Certificate," and nowhere else in the several sheets extolling the merchandise and referring to the privilege of free trial, small type stated, "All orders subject to credit acceptance or request for prepayment by our National Sales Office."

I read the challenged order in this case as relating only to the consuming public and not as being based upon injury to competitors, although that was also charged in the complaint. If this latter aspect had been involved, it would appear that the Subpoenas Duces Tecum should not have been quashed.

*Reported in 494 F. 2d 1132 (1974). For case before the Commission, see 81 F.T.C. 945, *modified* 84 F.T.C. 1306.

On petition for review of F.T.C. cease and desist order, court held that F.T.C. did not improperly fuse the roles of judge and prosecution; had power to issue cease and desist order on basis of past advertising practices; and the court would recast the order in more specific terms where it was cast in inappropriate terms.

Commission's order, as modified, affirmed and enforcement granted.

Jacob A. Stein, Washington, D.C., for petitioners.

Robert E. Duncan, Atty., F.T.C. with whom *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, Washington, D.C., was on the brief, for respondent.

Before MCGOWAN and MACKINNON, *Circuit Judges*, and CHRISTENSEN,* *United States Senior District Judge* for the District of Utah.

PER CURIAM:

[**1133**] This is a petition to review a Federal Trade Commission cease and desist order directed against certain advertising practices found by the Commission to violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Sections 4 (a) and (c) of the Textile Fiber Products Identification Act, 15 U.S.C. § 70b (a) and (c). We have examined petitioners' contentions carefully and find that they establish no basis for setting aside the Commission's order. We are persuaded, however, that one part of the remedial order is cast in inappropriately absolute terms, and we have accordingly modified that portion to correspond to the purpose and effect that the Commission has represented to us, both in its brief and at oral argument, it intended. We affirm the Commission's order, as modified by this court, and grant enforcement.

[1] Petitioners first assert that the Commission improperly fused the roles of judge and prosecutor in the manner and degree to which it relied on the testimony of an FTC investigator in determining the existence of the asserted violations. We disagree. Although a point does exist at which a blending of prosecutorial and adjudicative functions will deprive a party of a fair administrative hearing, *see e.g.*, *Amos Treat & Co.* v. *SEC*, 113 U.S. App. D.C. 100, 306 F. 2d 260 (1962), it does not appear to us that that point has been reached in this case. The investigator's testimony did not drift into a representation by him of the ultimate validity of the charges. Moreover, the Commission expressed an awareness of the potential problems of accepting its investigator's testimony, and was careful to assess this evidence in the proper light. Having examined the record and the opinions of the Administrative Law Judge and the Commission, we find no indication that petitioners were denied a fair administrative adjudication. *Cf. Kennecott Copper Corp.* v. *FTC*, 467 F. 2d 67, 79 (10th Cir.), *cert.*

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*Sitting by designation pursuant to Title 28, U.S. Code, Section 249(d).

denied, 416 U.S. 909, 94 S. Ct. 1617, 40 L. Ed. 2d 114 (1974); *FTC* v. *Cinderella Career and Finishing Schools*, 131 U.S. App. D.C. 331, 404 F. 2d 1308, 1315 (1968).

[2] Petitioners also claim that the Commission failed to articulate a basis for holding that entry of its order is in the public interest. To the extent that this claim rests on an assertion that the Commission order is not based on substantial evidence of record, it is without merit. Equally unpersuasive is petitioners' claim that the proven violations occurred too far in the past to justify an order aimed at present and future practices. Clearly the Commission is not powerless to issue a cease and desist order on the basis of past practices that have not been shown to have continued to the present. See *Giant Food, Inc.* v. *FTC*, 116 U.S. App. D.C. 227, 322 F. 2d 977, 986 (1963), *cert. dismissed*, 376 U.S. 967, 84 S. Ct. 1121, 12 L. Ed. 2d 82 (1964), and cases cited therein. And even assuming the existence of a point at which past practices must be considered too dated to support an FTC cease and desist order, we do not find the time span between the occurrence of the proven violations and the issuance of this order to present any significant problem.

[3] One assertion of error by petitioners does have merit. Petitioners assert that the Commission order subjects them to a competitive handicap. Pointing out that the Commission order against their competitor, Giant Food, Inc., allows Giant to make savings claims in relation to either the difference between Giant's previous and present prices or in relation to differences between Giant's prices and those of its competitors,[1] petitioners insist [**1134**] that the Commission has prevented them from making the full range of savings claims that Giant's order permits. In response, the Commission asserts that a reading of the order in its entirety reveals that it does not preclude claims of savings over competitors' prices, so long as such representations satisfy the basic requirements of paragraph four and five governing "trade area savings" claims. The Commission further maintains that petitioners did not voice any similar objection in the proceedings before it, and that the matter is not deserving of judicial attention since, in any event, petitioners can seek clarification by raising the matter with the Commission when they file their compliance reports.

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[1] The relevant portion of the order against Giant Food, Inc. prevents Giant from:

> Representing in any manner that by purchasing any of its merchandise, customers are afforded savings amounting to the difference between respondent's stated price and any other price used for comparison with that price, unless a substantial number of the principal retail outlets in the trade area regularly offer the merchandise for sale at the compared price or some higher price or unless respondent has offered such merchandise for sale at the compared price in good faith for a reasonably substantial period of time in the regular recent course of business.

In re Giant Food, Inc., Order Making Final Modifications of Order to Cease and Desist, 66 F.T.C. 476, 478–79 (1964).

We do not feel that approval of the order in its present form is a prudential resolution of this issue. Examination of the entire order does suggest that perhaps petitioners may be unduly sensitive to the language of certain parts. Nonetheless, portions of the order do speak in sweeping terms and may leave petitioners justifiably uncertain as to what they can, and what they cannot, do. We think that an ordering provision should be as free of ambiguity as possible. Thus we feel it appropriate to exercise our power of appellate modification, 15 U.S.C. § 45(d), to recast the order in more specific terms corresponding with the interpretations of the present order that the Commission has offered to this court. While recognizing that our modification may in some respects compound the already existing redundancy of some of its provisions, a redundant cease and desist order is, surely, preferable to an ambiguous one.

Petitioners have offered four modifications of the order which, they assert, are required to correct its deficiencies. We have examined petitioners' proposed modifications in light of the nature of their objections, as well as the evidence of record concerning the nature and scope of their violations, and have concluded that our modification of paragraph two of the order will adequately resolve the existing ambiguities. Accordingly, we modify paragraph two to read:

> Using the words "Save" or "Savings" or any other word or words of similar import or meaning in conjunction with a stated dollar or percentage amount of savings *between respondents' stated price and any other price used for comparison with that price*, unless the stated dollar or percentage amount of savings actually represents the difference *between the offering price and the actual price at which a substantial number of principal retail outlets in the trade area regularly sell or offer the merchandise for sale or* between the offering price and the actual bona fide price at which such merchandise had been sold or offered for sale on a regular basis to the public by the respondents for a reasonably substantial period of time in the recent, regular course of their business. [Modifications in emphasis.]

We reject petitioners' other proposed modifications. Petitioners' suggested alteration of paragraph 5(a) is unnecesary, particularly in light of our modification of the second paragraph. Paragraph 5(a) is, by its terms, limited to savings claims between "respondents' stated price and respondents' former price," and, as such, is both readily understandable and warranted by the evidence of record. Petitioners' suggested modifications to the first and third paragraphs are both unnecessary and unsound.

[**1135**] In all other respects, the order of the Commission is affirmed and its enforcement, as modified by this court, is granted.

It is so ordered.

F.T.C. v. TEXACO, INC.*

Civ. A. No. 1089–73

F.T.C. v. STANDARD OIL CO. (Indiana)*

Civ. A. No. 1090–73

F.T.C. v. EXXON CORPORATION*

Civ. A. No. 1092–73

F.T.C. v. SHELL OIL COMPANY*

Civ. A. No. 1093–73

F.T.C. v. STANDARD OIL CO. OF CALIFORNIA*

Civ. A. No. 1095–73

F.T.C. v. MOBIL OIL CORPORATION*

Civ. A. No. 1096–73

F.T.C. File Nos. 99–152–53, 155–56, 158–59

(United States District Court for the District of Columbia,
March 22, 1974)

On petition for enforcement of subpoenas *duces tecum* issued in the course of an investigation into natural gas reporting procedures, court held that the subpoenas were improper in that they sought data for purposes of enabling the Commission to attempt to determine natural gas reserves or the validity or accuracy of natural gas reserve estimates, and the court being of the opinion that the subpoenas are improper in other respects and should not be enforced as issued, the F.T.C. petition for enforcement is granted in part and denied in part.

Before HART, *Chief Judge.*

ORDER

The Federal Trade Commission ("Trade Commission") having petitioned on June 13, 1973, for enforcement of subpoenas *duces tecum* issued by an Assistant Director of the Trade Commission's Bureau of Competition to each of the above captioned respondents on November 24, 1971, in the course of a Trade Commission investigation into natural gas reserve reporting procedures (FTC Investigation File No. 711 0042); and the respondents having opposed enforcement of said subpoenas, contending that the principles of primary jurisdiction and collateral estoppel preclude the Trade Commission from seeking the demanded documents or data for purposes of determining the validity or accuracy of natural gas reserve estimates, and contending further, *inter alia*, that certain demands of the subpoenas are irrelevant to any proper subject or area of investigation and are unduly broad and burdensome; and the parties having fully briefed and presented oral argument on the issues; and the Court upon consideration of all the premises, being of the opinion that the Trade Commission is authorized to pursue the investigation to determine whether there exists any evidence of conspiracy in the reporting of proved natural gas reserve estimates to the American Gas Association by respondents, but that the subpoenas *duces tecum* are improper insofar as they seek data for the purposes of enabling the Trade Commission to attempt to determine natural gas reserves or the validity or accuracy of natural gas reserve estimates, matters already considered and ruled upon by the Federal Power Commission, and the Court being of the further opinion that the subpoenas are improper in other respects as well and should not be enforced as issued:

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* Not otherwise reported.

It is now therefore ordered:

1. Enforcement of specifications A, B, C, D, E, and F of the subpoenas *duces tecum* is hereby granted. Enforcement of specifications G, H, I, J, K, and L is hereby denied except as provided below.

2. Respondents shall produce documents as called for by specifications G, H, and I of the subpoenas *duces tecum* for the years 1969, 1970 and 1971, subject to the following modifications and limitations:

(a) Production shall be limited to documents containing or underlying proved natural gas reserve estimates. Raw field data, bid calculation data, and bid calculation files are not required to be produced. As regards underlying back-up data for each estimate called for by specification G, only the immediate data used to make the estimate need be submitted. For estimates arrived at volumetrically, specification I(1) will be satisfied by supplying all the underlying numbers which were used in the formula including the recovery factor and the size of the reservoir(s). As for the estimates arrived at by pressure decline curves, specification I(1) will be satisfied by submitting the curve used.

(b) Production of documents shall be made with respect only to a random sample of 100 of those offshore Southern Louisiana fields which were included in reports for 1971 by the Southern Louisiana Subcommittee of the American Gas Association Committee of Natural Gas Reserves. This random sample shall be selected by a procedure agreed upon between Trade Commission and respondents.

(c) Each respondent shall make production with respect to the fields, selected in the manner described in paragraph 2(b), in which it had an ownership interest as of the date reports were submitted by the Southern Louisiana Subcommittee of the American Gas Association Committee of Natural Gas Reserves.

(d) All production ordered pursuant to this paragraph 2 shall be made for the sole purpose of permitting the Trade Commission to investigate whether there is a conspiracy in the reporting of natural gas proved reserve estimates, and not for the purpose of permitting the Trade Commission to investigate or determine the amount of proved natural gas reserves.

3. Respondents shall produce documents as called for by specifications J and K of the subpoenas *duces tecum*, subject to the following modifications and limitations:

(a) Production shall be limited to documents relating to proved natural gas reserve estimates in those offshore Southern Louisiana fields which were included in reports for 1971 by the Southern Louisiana Subcommittee of the American Gas Association Committee of Natural Gas Reserves.

(b) Production shall be limited to documents prepared or dated during the years 1966 through 1971, inclusive, which were exchanged between or among, or constitute, contain or refer to any agreement, arrangement or communication between or among, respondent or others, including the American Gas Association.

4. Respondents shall produce documents as called for by specification L, except production shall be limited to the employees who have acted with respect to proved natural gas reserve estimates for offshore Southern Louisiana during the years 1966 through 1971, inclusive.

5. In complying with this Order, the definition of terms contained in the original subpoenas *duces tecum* shall apply.

6. Respondents shall comply with this Order within 180 days after the date upon which they are advised of the sample fields selected in accordance with paragraph 2(b) hereof.

7. Each respondent shall have the option of producing documents called for by this Order at the corporate office or field location where the responsive documents are normally maintained or at the Federal Trade Commission's offices in Washington, D.C. With respect to documents as to which any respondent elects to make production at a corporate office or field location, the Trade Commission shall inspect and reproduce any of said documents at such office or field location, or at such other location as agreed upon by the respective parties, and shall bear any costs of reproduction or copying which the Trade Commission may require or desire.

8. Any document produced under this Order which contains confidential information may be designated as being confidential by the respective respondents, in which event all documents so designated shall be subject to the following protective treatment:

(a) Documents designated as confidential by a respondent shall be deposited with and be maintained by a custodian who shall be the Secretary to the Commission. Unless and until otherwise ordered by the Court upon due notice to all affected parties documents so designated may be inspected only at the depository location and only by employees of the Trade Commission officially assigned to the Trade Commission's investigation entitled "File No. 711 0042." Said documents shall be used only in connection with said investigation, and said employees shall not suffer or permit disclosure or copying of any such document, or any portion thereof, or any information contained therein to any other person.

(b) Unless and until otherwise ordered by the Court upon due notice to all affected parties, documents designated confidential under this Order shall remain in custody of the Custodian and neither the documents nor any copies thereof shall be removed from such custody.

(c) At the conclusion of the Trade Commission's investigation pursuant to which such confidential documents have been produced, all documents so designated as confidential, together with all copies thereof, shall be returned to the respective respondent unless the Trade Commission seeks and obtains an order of the Court providing otherwise.

(d) The protective provisions of this Order shall be deemed to apply to the Trade Commission, to the individual Commissioners of the Trade Commission and to all persons in the employ of the Trade Commission; sanctions for violation of any provision of this Order may be imposed on the Trade Commission, or any person who violates any provision of this Order.

9. The Court reserves its ruling as to any and all matters, contentions or issues not specifically disposed of by this Order. Jurisdiction over these proceedings is retained for the purposes of providing other and further relief as necessary.

So ordered this 22nd day of March, 1974.

F.T.C. v. SUPERIOR OIL COMPANY, INC.*

Civ. A. No. 1091-73. F.T.C. File No. 99-154.

(United States District Court for the District of Columbia, March 22, 1974)

On petition for enforcement of a subpoena *duces tecum* issued in connection with the investigation into natural gas reporting procedures, court held that the subpoena should be enforced in part and denied in part. Specifications G through J of the subpoena were denied enforcement and quashed. Further, a procedural protective system was ordered instituted to insure confidentiality of material deemed confidential by respondent.

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*Not otherwise reported.

Before HART, *Chief Judge.*

ORDER

Upon consideration of the Federal Trade Commission's petition for enforcement of a subpoena *duces tecum*, the matter having been fully briefed and argued before the Court, and the Court having advised in the premises, it is this 22nd day of March, 1974,

ORDERED, That the respondent, The Superior Oil Co., Inc., shall comply, within 180 days from the date on which this Order becomes final, with Specifications A through F and K through L of the subpoena, provided that Specifications A, B, D, E and F may be complied with by submitting a verified written statement by an officer of the Company containing the requested information in lieu of the documents specified, and it is

FURTHER ORDERED, That as to the respondent, The Superior Oil Co., Inc., Specifications G through J of the subpoena be, and the same hereby are, denied enforcement and quashed; and it is

FURTHER ORDERED, That any document produced under this Order which contains confidential information may be designated as being confidential by the respondent, in which event all documents so designated shall be subject to the following protective treatment:

(a) Documents designated as confidential by a respondent shall be deposited with and be maintained by a custodian who shall be the Secretary to the Commission. Unless and until otherwise ordered by the Court upon due notice to all affected parties documents so designated may be inspected only at the depository location and only by employees of the Trade Commission officially assigned to the Trade Commission's investigation entitled "File No. 711 0042." Said documents shall be used only in connection with said investigation, and said employees shall not suffer or permit disclosure or copying of any such document, or any portion thereof, or any information contained therein to any other person.

(b) Unless and until otherwise ordered by the Court upon due notice to all affected parties, documents designated confidential under this Order shall remain in custody of the Custodian and neither the documents nor any copies thereof shall be removed from such custody.

(c) At the conclusion of the Trade Commission's investigation pursuant to which such confidential documents have been produced, all documents so designated as confidential, together with all copies thereof, shall be returned to the respondent unless the Trade Commission seeks and obtains an order of the Court providing otherwise.

(d) The protective provisions of this Order shall be deemed to apply to the Trade Commission, to the individual Commissioners of the Trade Commission and to all persons in the employ of the Trade Commission; sanctions for violation of any provision of this Order may be imposed on the Trade Commission, or any person who violates any provision of this Order.

The Court reserves its ruling as to any and all matters, contentions or issues not specifically disposed of by this Order. Jurisdiction over these proceedings is retained for the purposes of providing other and further relief as necessary.

So ordered this 22nd day of March, 1974.

F.T.C. v. BRITISH OXYGEN CO., LTD., ET AL.*

Civ. A. No. 74–31. F.T.C. Docket No. 8955.

(United States District Court, District of Delaware, March 28, 1974)

On motion for limited reargument by one of the respondents of preliminary injunction order by court March 8, 1974 as modified March 11, 1974, (see p. 887 herein), court held that the injunction contained a restriction on further stock acquisitions that performed the same function as the contractual restrictions mentioned by respondent in earlier argument and any restrictions placed on respondent by preliminary injunction were remedied by requirement that F.T.C. act within 15 days on any request by respondent Airco for approval for disposal of assets.

Motion for limited reargument denied.

Ralph F. Keil, U.S. Atty., Wilmington, Del., *Calvin J. Collier*, Gen. Counsel, *Gerald Harwood*, Actg. Asst. Gen. Counsel, *Karl H. Buschmann*, *William A. Cerillo*, Attys., Washington, D.C., for F.T.C., for petitioners.

James H. Gilliam, Jr. and *R. Franklin Balotti*, of *Richards, Layton & Finger*, Wilmington, Del., *Richard L. McMahon* of *Potter, Anderson & Corroon*, Wilmington, Del. (*Sherman & Sterling*, New York City, of counsel), for respondents.

Before LATCHUM, *Chief Judge*.

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 75,004, at 96.447 (1974–1 Trade Cases). For case before the Commission, see **86 F.T.C. 1241**. See also p. 887 herein.

MEMORANDUM OPINION AND ORDER

Airco, Inc., one of the respondents in this proceeding, has moved for limited reargument of this Court's order of March 8, 1974, and modified March 11, 1974, issuing a preliminary injunction. Specifically, Airco desires to modify Paragraphs B and C of the injunction.

Paragraph B directs the respondents to:

> B. Preserve and protect all assets of Airco and refrain from disposing of or encumbering such assets, except in the ordinary course of business, and refrain from commingling them with any other assets of BOC or its subsidiaries, without prior approval of the Commission.

Airco argues that since less than 26% or Airco's assets are employed in lines of commerce involved in the Commission's complaint, Par. B of the preliminary injunction, perhaps inadvertently, has unduly restricted Airco's freedom to deal with the 64% of its assets which are totally unrelated to the case. This argument was fully advanced at the time the injunction issued, and the Court was aware of the temporary restriction placed upon Airco by this provision. To alleviate the restriction, the Court granted the relief requested on the condition that the Commission act promptly (within 15 days) upon any request of any approval to dispose of or encumber Airco's assets. The Court concluded that the temporary restriction was reasonable, under 15 U.S.C. § 53(b), to assure effective remedial relief of the Commission's allegations were ultimately sustained.

Secondly, Airco contends that Paragraph C of the injunction nullifies the prohibition contained in the final paragraph of the July 25, 1973 agreement between BOC and Airco which provides that BOC shall not acquire additional Airco shares for a period of 5 years without Airco's approval. Airco thus suggests that this paragraph of the agreement should be specifically excepted in Paragraph C. This is unnecessary for Airco's protection of its contractual undertaking because Paragraph A directs BOC "to make no changes in its [Airco's] operations likely to hinder a future divestiture of Airco, including . . . *acquisition of any equity interest*." This restriction on acquiring additional Airco shares by BOC so long as the injunction is outstanding performs the same function as Airco's contractual right under the July 25th agreement.

Order

For the foregoing reasons, the motion of Airco, Inc. for limited reargument is hereby denied.

F.T.C. v. FREDERICK CHUSID*

Civ. A. No. 74 C 53. F.T.C. File No. 99–1968.

(United States District Court, Northern District of Illinois, March 28, 1974)

On petition for enforcement of subpoena *duces tecum*, court granted respondent's petition to dismiss the subpoena on technical grounds which do not preclude the issuance of another subpoena at a later date.

Before WILL, *District Judge.*

MEMORANDUM OPINION

This action has been brought by the Federal Trade Commission (FTC), with the authorization of the Attorney General of the United States, for judicial enforcement of a subpoena *duces tecum* issued in the course of an investigation of Frederick Chusid & Company. The FTC has applied to this court, pursuant to Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, for an order requiring respondent to appear and produce documentary evidence.

Respondent has moved to dismiss the petition contending he is not in default of any subpoena, and that these proceedings are therefore premature. In the alternative, he opposes the enforcement of the subpoena, arguing that it is void in a number of respects. For the reasons set forth below, respondent's motion to dismiss the petition will be granted.

The facts of this case are not in dispute and may be summarized briefly. On January 22, 1973, the FTC adopted a resolution directing an investigation into whether Frederick Chusid & Co. was engaged in unfair or deceptive practices in violation of Section 5 of the Federal Trade Commission Act. Pursuant to this resolution, the Commission on February 14, 1973 issued a subpoena *duces tecum* to Frederick Chusid, as Chairman of the Board of Frederick Chusid & Co. The return dates specified on the subpoena were April 2, and April 3, 1973.

In accordance with § 2.7(b) of the regulations of the FTC, Chusid filed a timely motion to quash the subpoena, setting forth a number of grounds in support thereof. Such a motion requires a ruling by the Commission itself. 16 C.F.R. § 2.7(b). Neither respondent nor his attorneys received any notice of the disposition of this motion prior to the return dates of the subpoena. On April 2, respondent appeared at the designated place and time set forth in the subpoena, but refused to produce the requested documents until a ruling had been made on the motion to quash. The presiding FTC official at the investigatory hearing had no knowledge of the status of the pending motion, and attempted to proceed with the hearing. When it became clear that respondent, on advice of counsel, was not going to produce any information until the motion had been ruled upon, the presiding official excused Chusid from the witness stand. He also stated that Chusid was not excused from the subpoena but gave no indication whatsoever as to when, if ever, Chusid should reappear.

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* Not otherwise reported.

Nothing further happened until Chusid's attorneys received a letter from the Secretary of the Commission dated May 25, 1973, stating that the motion to quash was being denied and giving the reasons therefor. The letter concluded by stating:

> The information specified by the subpoena shall be forwarded to the Chicago Regional Office within five days of the receipt of this letter, and arrangements shall be made to present all testimony required by the subpoena within 15 days of the receipt of this letter.

This May 25 letter was sent by first class mail, and was signed by the Secretary of the Commission, "by direction of the Commission." Apparently, the Secretary then realized that all such communications were required to be sent by either certified or registered mail, so on June 1, 1973, he sent a copy of the earlier letter, registered, return receipt requested, to the same attorneys. Chusid himself never received any notification from the Commission. Respondent has not as yet produced the documents requested in the subpoena, and the FTC filed this petition for enforcement on January 8, 1974.

Respondent's first motion is to dismiss the petition, contending that there is no extant subpoena to enforce. He argues that, since on April 2 the original subpoena was not continued to any other day by the issuing officer, it no longer had any effect after April 3. Moreover, since no new subpoena issued after the Commission's ruling on the motion to quash, he contends there is nothing for which he can be held in default. We agree.

We do not see how the original subpoena can have any continuing vitality. The Commission's own rules clearly require that all subpoenas must specify a designated time and place either to testify or to produce documentary evidence. 16 C.F.R. § 2.7(a). The only provision made for continuing a subpoena is also contained in that section, which states:

> [F]or good cause shown, [the issuing officer] may extend the time prescribed for compliance with subpoenas issued during the investigation of any matter.

The Commission's failure to rule on the preliminary motion to quash is obviously "good cause" for extension of the time prescribed for compliance. Yet no provision whatsoever was made for any specific extension. The respondent was merely told, not by the issuing officer but by the presiding officer, that he was excused from the witness stand but not from the subpoena. At the very least, the presiding officer should have stated that the witness was excused until such time as the Commission made its ruling, or set some date for respondent to reappear. But the transcript of the proceedings reveals that the presiding officer was unwilling even to recognize the existence of the motion to quash. He attempted to rule respondent's objections to proceeding on this ground as "out of order."

Furthermore, respondent himself never received a proper ruling from the Commission on his motion to quash. The Commission's rules require that all notices be sent by certified or registered mail to the person named. Here, only respondent's attorneys received copies of the Commission's order. The Commission's argument that respondent received "actual notice" as proved by his appearance on the return date, April 2, makes no sense whatsoever with regard to the ruling made nearly two months later on May 25, 1973.

Nor can the May 25 letter from the Commission be construed as a new subpoena. Its failure to designate a specific time and place for production of the subpoenaed documents is in violation of the Commission's own rules. See 16 C.F.R. § 2.7(a). And, the failure to serve Chusid himself with this document is even more fatal in this context than it was in connection with the Commissioner's ruling on the motion to quash.

Consequently, we find that the petition for enforcement must be dismissed as there is no existing subpoena of which respondent could be found in default. In light of this finding we do not reach respondent's arguments attacking the validity of the original subpoena. An appropriate order will enter.

CREDIT CARD SERVICE CORPORATION, ET AL. v. F.T.C.*

No. 73-1357. F.T.C. Docket No. 8861.

(United States Court of Appeals, District of Columbia Circuit, March 29, 1974)

1. THE $50 LIABILITY LIMIT COVERING UNAUTHORIZED USE OF CREDIT CARDS COVERS ALL CREDIT CARDS, WHETHER USED FOR BUSINESS OR CONSUMER PURPOSES

Congress never intended that the limitation on liability, set forth in the 1970 amendment to the Truth in Lending Act, for "unauthorized use of a credit card" should be affected by the fact that certain "credit transactions" are exempted from the statute; all credit cards, whether used for business or consumer purposes, are covered by the $50 liability limit.

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*Reported in 495 F. 2d 1004 (1974). For case before the Commission, see 82 F.T.C. 191.

2. **AFFIRMATIVE DISCLOSURE REQUIREMENT OF F.T.C. ORDER WAS NOT OVERLY BROAD AS TO CORPORATION**

Order of Federal Trade Commission, requiring that an affirmative disclosure by corporation relating to liability for unauthorized use of credit cards be included in all advertising for corporate's "credit card registration service," was not overbroad as to corporation, which maintained services which did not involve notification of card issuers for purposes of limiting liability for unauthorized use; if an advertistment for the corporation was solely concerned with services having no relation, direct or indirect, to such notification, the order was not applicable and the affirmative disclosure did not have to be made.

3. **AFFIRMATIVE DISCLOSURE REQUIREMENT WAS ADEQUATELY SUPPORTED BY STATEMENT OF REASONS: EVEN THOUGH F.T.C.'S OPINION PROVIDED LITTLE JUSTIFICATION**

Federal Trade Commission did not fail to support its affirmative disclosure requirement with an adequate statement of reasons where, while the Commission's opinion itself provided little justification for the disclosure requirement, the Commission adopted as its own the administrative law judge's initial decision, which provided an adequate basis for finding that the required statement of the statutory limit on liability was necessary to prevent deception.

(Syllabus, with substituted captions, taken from 495 F. 2d 1004)

On petition for review of F.T.C. cease and desist order, court held that Congress never intended to limit the liability for unauthorized use of credit cards, as set forth in the 1970 amendment to the Truth in Lending Act, to credit cards used only for consumer purposes; all credit cards, whether used for business or consumer purposes, are covered by the $50 liability limit.

Order affirmed and enforced.

Stephen C. Rogers, Washington, D.C., for petitioners. *John H. Schafer, III*, Washington, D.C., also entered an appearance for petitioners.

Louis C. Keiler, Jr., Atty., F.T.C., with whom *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, F.T.C., was on the brief for respondent.

Richard P. Taylor, Washington, D.C., with whom *William E. Miller*, *Michael D. Campbell* and *Michael J. Malley*, Washington, D.C., were on the brief for Universal Air Travel Plan, American Airlines, Pan American World Airways, Inc., and Piedmont Airlines Inc., as *amici curiae* urging reversal.

Thomas J. O'Connell, Washington, D.C., Gen. Counsel, Board of Governors of the Federal Reserve System, *Carl D. Lawson* and *Arnold P. Lav*, Attys., Dept. of Justice filed a brief as *amicus curiae.*

Before BAZELON, *Chief Judge*, MACKINNON, *Circuit Judge* and CHRISTENSEN,* *United States Senior District Judge* for the District of Utah.

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*Sitting by designation pursuant to 28 U.S.C. § 294(d).

BAZELON, *Chief Judge:*

[**1005**] The Federal Trade Commission Order under attack here requires petitioner [1] to disclose in its advertising the statutory limitation on cardholders' liability for unauthorized use of their credit cards. Petitioner's central contention requires us to reconcile the 1968 Truth in Lending Act with its 1970 amendments. In addition, petitioner raises challenges concerning the breadth of the Commission's Order and the adequacy of the Commission's reasoning. Because we find petitioner's contentions without merit, we affirm.

I

For $9 a year, petitioner Credit Card Service Corporation notified credit card companies that a subscriber's cards had been lost or stolen. It also assisted subscribers in resolving billing errors and in obtaining new cards. Petitioner's advertising emphasized that an individual is liable for the full amount charged to a lost or stolen card until the card's issuer is notified. On August 24, 1971, the Commission issued a complaint alleging that such advertising had appeared after the effective date of the 1970 amendments to the Truth in Lending Act, which limit potential liability for a lost or stolen credit card to $50 per card.[2] After a hearing, an Administrative Law Judge found that petitioner had engaged in "unfair methods of competition" and "unfair or deceptive acts or practices" in violation of Section 5 of the Federal Trade Commission Act.[3] He ordered petitioner to cease and desist from representing that cardholders will have to pay for all goods and services obtained by unauthorized use of their cards.[4] He also required that the following notice be contained in future advertising of petitioner's service:

> IMPORTANT NOTICE
>
> Effective January 24, 1971, a Federal law provides that a cardholder has no liability for unauthorized use of his credit card unless all of the following four conditions are met. If the card issuing company (1) has notified you of your new limited liability, (2) has provided you with a pre-stamped envelope by which to notify them of a loss, (3) the card contains an approved method of identification, and (4) the use occurred before the [**1006**] card issuer is notified, then your liability is limited to $50 per card.[5]

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[1] "Petitioner" is used throughout this opinion to refer collectively to petitioner Credit Card Service Corporation and petitioner John P. Ferry, its President.

[2] Appendix 3–15.

[3] Initial Decision, April 4, 1972, Supplemental Appendix 12, 22. When this case was tried before the Federal Trade Commission, the presiding officer held the title of Hearing Examiner. This title was changed to Administrative Law Judge on August 19, 1972.

[4] *Id.* at 22–23.

[5] *Id.* at 24. This notice was required for written material offering the sale of petitioner's service to the public. A briefer notice was required for radio and television commercials. Id.

The Commission affirmed the decision of the Administrative Law Judge.[6]

II

Petitioner contends that the Truth in Lending Act as amended distinguishes between business credit cards and consumer (non-business) credit cards—only with the latter is cardholder liability for unauthorized use limited to $50. Petitioner maintains, therefore, that the Commission's Order will foster "incomplete and . . . inaccurate disclosures."[7] because it disallows representations that cardholder liability is unlimited when a business card is lost or stolen.

In order to evaluate this contention we must consider the statutory background. In 1968 Congress passed the Truth in Lending Act[8] in order "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him. . . ."[9] The statute regulated the advertising of credit[10] and required that the cost of credit be disclosed.[11] Because it was a consumer protection statute, § 1603(1) exempted from the Act "credit transactions involving extensions of credit for business or commercial purposes . . ."[12]

In 1970, Congress enacted Title V of Public Law 91–508 in order to regulate the credit card industry.[13] This legislation prohibited the unsolicited distribution of credit cards,[14] made the fraudulent use of such cards a federal crime,[15] and, in § 1643, limited cardholder liability to $50 for the "unauthorized use of a credit card." [16] Although other options [**1007**] were considered,[17] the 1970 legislation was passed as an amendment to the 1968 Truth in Lending Act. Petitioner maintains that because the credit card legislation is an amendment to the 1968 Act, it is subject to the § 1603(1) "business exception" in that Act. Therefore, petitioner concludes, when a credit card is issued or used primarily for business or commercial purposes, the $50 liability limit of § 1643 does not apply.

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[6] Final Order and Opinion of the Commission, Docket No. 8861, January 19, 1973, Supplemental Appendix 1–11. The Commission modified the Administrative Law Judge's decision in one respect not relevant to this appeal—an order by the Law Judge requiring restitution to certain consumers was found not to be an appropriate remedy. *Id.* at 7–9.

[7] *Id.* at 9.

[8] 15 U.S.C. § 1601 et seq.

[9] 15 U.S.C. § 1601.

[10] 15 U.S.C. §§ 1661–1664.

[11] 15 U.S.C. §§ 1636–1639.

[12] 15 U.S.C. § 1603:

This subchapter [The Truth in Lending Act] does not apply to the following:

(1) Credit transactions involving extensions of credit for business or commercial purposes . . . .

[13] 84 Stat. 1114, 1126–1127; 15 U.S.C. §§ 1602, 1642–1644.

[14] 15 U.S.C. § 1642:

No credit card shall be issued except in response to a request or application therefor. This prohibition does not apply to the issuance of a credit card in renewal of, or in substitution for, an accepted credit card.

[15] 15 U.S.C. § 1644:

Whoever, in a transaction affecting interstate or foreign commerce, uses any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain goods or services, or both, having a retail value aggregating $5,000 or more, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Simply on the face of the statutory language, this argument is unpersuasive. The statutory limit on liability comes into play only when there is an "unauthorized use" of a credit card.[18] Section 1603(1) exempts from the statute "credit transactions . . . for business . . . purposes." [19] In the case of unauthorized use, the only event that is arguably a "credit transaction" is the unauthorized use itself. Does this mean that unauthorized uses for business purposes are "credit transactions . . . for business . . . purposes" and therefore exempt from the Act? Surely Congress did not intend that when a card is wrongfully used for business purposes the cardholder is fully liable, but when it is wrongfully used for consumer purposes, the limit on liability is $50. Under that approach, if a thief used a stolen credit card to rent a getaway car, we would have to decide if the rental was for a "business purpose" in order to determine the extent of the cardholder's liability. Indeed, as this example indicates, many unauthorized uses of credit cards are not ordinary "credit transactions" at all, but rather instances of fraud. In sum, given the absence of specific statutory language or legislative history, we cannot impute to Congress the unlikely intention that an "unauthorized use" could be a "credit transaction" for purposes of the § 1603(1) exemption.

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[16] 15 U.S.C. § 1643:

(a) A cardholder shall be liable for the unauthorized use of a credit card only if the card is an accepted credit card, the liability is not in excess of $50, the card issuer gives adequate notice to the cardholder of the potential liability, the card issuer has provided the cardholder with a self-addressed, prestamped notification to be mailed by the cardholder in the event of the loss or theft of the credit card, and the unauthorized use occurs before the cardholder has notified the card issuer that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise. Notwithstanding the foregoing, no cardholder shall be liable for the unauthorized use of any credit card which was issued on or after the effective date of this section, and, after the expiration of twelve months following such effective date, no cardholder shall be liable for the unauthorized use of any credit card regardless of the date of its issuance, unless (1) the conditions of liability specified in the preceding sentence are met, and (2) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it. For the purposes of this section, a cardholder notifies a card issuer by taking such steps as may be reasonably required in the ordinary course of business to provide the card issuer with the pertinent information whether or not any particular officer, employee, or agent of the card issuer does in fact receive such information.

[17] Early legislative proposals would have placed credit card provisions under the Federal Deposit Insurance Act (*see* H.R. 12646, 90th Cong., 1st Sess.) and under Title 39 of the United States Code, which deals with the Postal Service (*see* H.R. 16542, 91st Cong., 2d Sess.).

[18] *See* note 16, *supra*.

[19] *See* note 12, *supra*.

Petitioner apparently agrees, since it does not argue that the nature of the unauthorized use governs the issue of liability limitation. Petitioner contends instead that § 1603(1) exempts business credit cards from the $50 limit, regardless of whether the cards are wrongfully used for business or consumer purposes.

Petitioner never explains why § 1603(1) which exempts certain "credit *transactions*" should apply to a particular class of credit *cards*. Of course, when an individual uses his card for business, that is a "credit transaction . . . for business . . . purposes." But in such a case, the liability limitation does not come into play because there has been unauthorized use. If, nonetheless, we assume that using a card for business purposes exempts an individual from the liability limitation, how long does that exemption last? Until the next time the card is used, for a non-business purpose? Under this approach, liability would depend on how a card was last used before it was lost or stolen.

Petitioner, of course, seeks to avoid this result. Its position seems to be that when a card is issued or used primarily for business, the card itself becomes "a credit transaction . . . for business . . . purposes."[20] Thus the **[1008]** card is exempted from the statute by § 1603(1) even on those occasions when it is not used for business. We are unwilling to assume that a credit *card* can be transformed into a credit *transaction* in this fashion.[21] Yet even if it could, petitioner's approach would be fraught with difficulty. For if § 1603(1) exempts business cards from the $50 liability limit it also exempts them from the other provisions of the 1970 credit card legislation—§ 1603(1) provides exemption from the whole Act, not just part of it.[22] This has disturbing consequences. As we have noted, the 1970 legislation makes the fraudulent use of credit cards a federal crime.[23] Thus, under petitioner's approach, the fraudulent use of business credit cards would not be a federal crime, while the fraudulent use of consumer credit cards would be. This unlikely result should not be attributed to Congress in the absence of specific statutory language or legislative history, neither of which are present here.

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[20] Thus petitioner states the question as whether "business credit cards fall within the exemption provision [of § 1603(1)]." Reply Brief for Petitioner at 9.

[21] Nor can the transformation be achieved by arguing that when a card is *issued* for business, that is a "credit transaction involving extensions of credit for business. . . ." Credit is extended when a card is used, not when it is issued. Moreover, even if mere issuance of a card *could* bring the § 1603(1) exemption into play, then cards issued for business would be exempt from *all* of the 1970 credit card legislation, with the unlikely and unworkable results discussed below.

[22] *See* note 12, *supra*.

[23] *See* note 15, *supra*.

Moreover, petitioner's approach would create practical difficulties. A credit card is often used for both business and personal transactions. Considerable litigation and uncertainty would result if courts had to determine if a card was used "primarily" for business.[24] This determination would be necessary in order to decide whether the $50 liability limit applied and, what is worse, to decide whether a thief committed a federal offense when he fraudulently used a credit card.[25]

[1] In sum, petitioner's attempt to apply the "business exception" to the $50 liability limitation requires stretching the statutory langauge, is unsupported by legislative history,[26] and has troublesome implications for other portions of the statute. We hold therefore that Congress never intended that the limitation on liability for "unauthorized use of a credit card" contained in § 1643 be affected by the fact that certain "credit transactions" are exempted from the statute by § 1603(1).[27] All credit cards, whether used for business or consumer purposes, are covered by the $50 liability limit.[28]

[**1009**] Our holding is in keeping with the overall purpose of the Congressional enactments at issue here. While the 1968 Truth in Lending Act was designed to protect consumers,[29] the 1970 legislation dealt with the credit card industry in general.[30] The latter legislation may have been passed as an amendment to the former in order to apply the regulatory framework already in place for the Truth in Lending Act to the credit card field as well.[31]

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[24] In its brief petitioner states the question as whether the exemption applies to cards "issued or used for business or commercial purposes." Brief for Petitioner at 6. We have added the word "primarily" to this formulation, since we do not understand petitioner to be contending that a card used otherwise is a "business credit card." *See* note 20, *supra*. If, however, petitioner *is* making such a contention its case is even weaker.

[25] Similar problems would arise in determining whether it was legal to issue a credit card in the absence of a request or application, since such issuance is banned by 15 U.S.C. § 1642. *See* note 14, *supra*.

[26] Petitioner concedes that the question is "not specifically addressed" in the legislative history of Public Law 91–508. Reply Brief for Petitioner at 5. As we note below, the general purposes of the 1968 and 1970 legislation imply that petitioner's effort to apply § 1603(1) to § 1643 should be rejected.

[27] The Board of Governors of the Federal Reserve System, in a clarifying amendment to Regulation Z issued pursuant to authority granted in the Truth in Lending Act (15 U.S.C. § 1604), has reached the same conclusion—"all cards, whether for business or consumer purposes, are covered . . . by the $50 liability limit." Brief for Board of Governors of the Federal Reserve System as Amicus Curiae; *see* 12 C.F.R. § 226.13(a) (4) and (6).

[28] Our conclusion is strengthened by the fact that § 1643 states that "a cardholder" shall not be liable for more than $50. *See* note 16, *supra*. The definitional sections of the Act provide that a "cardholder" could be a "corporation." *See* 15 U.S.C. § 1602(m), (d), (c). (A "cardholder" is a "person"; a "person" can be an "organization"; an "organization" can be a "corporation"). Thus the liability limit would appear to apply even to corporate cardholders, which is contrary to the contention that there is a "business exception."

[29] *See* text accompanying note 9, *supra*.

[30] *See, e.g.,* the reference to "any . . . credit card" in 15 U.S.C. § 1644 reproduced at note 15, *supra*.

III

We turn now to petitioner's remaining contentions. The Commission's Order requires that an affirmative disclosure regarding liability for unauthorized use of credit cards be included in all advertising for petitioner's "credit card registration service." [32] Petitioner maintains that because the disclosure is irrelevant to some of its services, such as helping cardholders resolve billing disputes, the Order is overbroad—it applies even when advertising relates solely to matters having nothing to do with liability for unauthorized use.

[2] We do not find the Commission's Order overbroad, because we do not think it reaches as far as petitioner fears. As we have noted, the Order applies only to petitioner's "credit card registration service." The Commission's Opinion described that service as one providing:

> as its principal service, notification on behalf of the subscriber to credit card companies of the fact that a subscriber's credit cards have been lost or stolen. It also offers assistance to the subscriber in resolving billing errors of credit card companies and in obtaining new cards when the subscriber's cards have been lost or stolen, or the subscriber's address has changed.[33]

Thus the Commission saw petitioner's "credit card registration service" as a bundle of subservices, including, in particular, notification of issuers for the purpose of limiting liability. If an advertisement for petitioner is solely concerned with services having no relation, direct or indirect, to such notification, the Order is not applicable and the affirmative disclosure need not be made. Such non-notification services are not "credit card registration services" within the meaning of the Commission's Order. The Commission, in its brief to this Court, appears to concede this point.[34] To read the Order as applying to advertisements having nothing to do with cardholder liability would be to assume that the Commission required an irrelevant disclosure, an assumption we are unwilling to make.

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[31] The Administrative Law Judge found that "it is quite obvious that the credit card provisions were inserted by Congress as an amendment to the Truth in Lending Act merely as a convenient place to insert such provisions for efficient administration by the Federal Reserve Board and the Federal Trade Commission." Initial Decision, *supra*, Supplemental Appendix at 20.

[32] Final Order, *supra*, Supplemental Appendix at 2.

[33] Opinion of the Commission, *supra*, Supplemental Appendix at 5.
See also Initial Decision, Supplemental Appendix at 21, Conclusion No. 1.

[34] Brief for Respondent at 27, note 16 ("Petitioners refer to various 'services' which they offer or may offer in the future (Br. 18–19), and argue that the required disclosure is irrelevant to these 'services.' The Commission's order, however, applies only to petitioners' 'credit card registration service' (Supp. App. 2).").

[3] Petitioner's final contention is that the Commission failed to support its affirmative disclosure requirement with an adequate statement of reasons. While the Commission's opinion itself provides little justification for the disclosure requirement, the Commission adopted as its own the Administrative [**1010**] Law Judge's initial decision.[35] That decision provides an adequate basis for the finding that the required statement of the statutory limit on liability was necessary to prevent deception.[36]

The Commission's Order is affirmed and enforced in its entirety.

So ordered.

ACTION ON SAFETY AND HEALTH, ET AL. v. F.T.C.*

No. 73–1266. F.T.C. File No. 99–142.

(United States Court of Appeals, District of Columbia Circuit, April 17, 1974)

1. Judicial Review Is Not Available if an Action Is Committed to Agency Discretion by Law

[758] If an action is committed to agency discretion by law, judicial review is not available.

2. Courts Should Recognize Basic Presumption Toward Judicial Review as Set Forth in Administrative Procedure Act if Particular Act Is Silent on Subject of Judicial Review

If a particular organic statute is silent on the question of judicial review of an agency's action, courts should recognize basic presumption favoring judicial review embodied in the Administrative Procedure Act.

3. F.T.C. Decision To Deny Appellants' Intervention Was Within Agency Discretion and Exempt From Judicial Review

Consent negotiation procedure between Federal Trade Commission and corporation alleged to have made false and deceptive advertising claims was promulgated by FTC pursuant to its enforcement discretion and FTC's decision to deny intervention to consumer protection organization was an agency action committed to agency discretion and therefore exempt from judicial review.

4. One Invoking Due Process Clause Must Specifically Denominate the Deprivation Suffered

It is incumbent upon one who invokes due process clause against government action to denominate specifically the deprivation he has suffered.

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[35] Final Order, *supra*, Supplemental Appendix at 1.

[36] *See* Initial Decision, *supra*, Supplemental Appendix at 12–27, esp. 19. Despite petitioner's objection, we do not find the affirmative disclosure, which tracks the statutory language, to be overly detailed or confusing.

* Reported in 498 F. 2d 757 (1974). *See also* page 539 herein.

5. SUFFICIENT INTEREST IN COMMISSION PROCEEDINGS WAS NOT DEMONSTRATED BY APPELLANTS

Consumer protection group which had sought to intervene in negotiations between FTC and manufacturer alleged to have made false and deceptive advertising claims was unable to demonstrate sufficient interest in Commission proceedings to entitle it to argue that Commission's procedures denied due process.

6. F.T.C. DID NOT ABRIDGE CONSUMER PROTECTIONS GROUP'S RIGHTS BY FAILURE TO PROVIDE EXPANDED PUBLIC PARTICIPATION EVEN THOUGH RIGHT TO PETITION GOVERNMENT IS CONSTITUTIONALLY GUARANTEED

Even if constitutionally guaranteed right to petition the government had any application to action in which consumer protection group sought to intervene in negotiations between FTC and manufacturer which had allegedly made false and deceptive advertising claims, FTC did not abridge consumer protection group's rights by failure to provide for expanded public participation.

(Syllabus, with substituted captions, taken from 498 F. 2d 757)

On action seeking review of FTC denial of intervention in precomplaint consent negotiations and seeking declaratory and injunctive relief, court held the intervention decision was committed to agency discretion by law and not judicially reviewable; that the consumer protection group did not show sufficient interest in the negotiations to be entitled to allege denial of due process because of the denial of leave to intervene; and that the F.T.C. had not abridged the group's rights in denying them leave to intervene.

Affirmed.

J. Skelly Wright, *Circuit Judge*, concurred and filed an opinion.

Peter H. Meyers, Washington, D.C., with whom *John F. Banzhaf, III*, Washington, D.C., was on the brief, for appellants.

James P. Timony, Atty., F.T.C., for appellee. *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, F.T.C., *Nicholas S. Reynolds*, Atty., F.T.C., *Howard E. Shapiro*, Atty., Dept. of Justice, and *Harold H. Titus, Jr.*, U.S. Atty., at the time the brief was filed, were on the brief, for appellee.

Before WRIGHT and TAMM, *Circuit Judges*, and WYZANSKI,* *United States Senior District Judge* for the District of Massachusetts.

[759] TAMM, *Circuit Judge:*

Action on Safety and Health, a consumer protection organization, appeals from an order of the United States District Court for the District of Columbia, per Richey, J., dismissing a complaint which sought 1) review of the Federal Trade Commission's (hereafter "Commission") denial of intervention in a pre-complaint consent negotiation; and 2) broad declaratory and injunctive relief concerning the

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*Sitting by designation pursuant to 28 U.S.C. § 294(d).

Commission's consent order procedures generally. We hold that the District Court properly dismissed appellants' claims and the judgment is therefore affirmed.

Before reviewing the factual background, it may be helpful to discuss briefly the Commission's consent order procedure contained in sections 2.31 to 2.35 of the Commission's Rules of Practice, 16 C.F.R. §§ 2.31–2.35 (1973). Under these rules the Commission may notify a "proposed respondent" of its intention to institute a formal proceeding against him. Such notification contains a form of the proposed complaint which the Commission will issue, as well as the proposed order which the Commission will seek. If the proposed respondent elects, within 10 days, to attempt a settlement, negotiations begin between the Commission's staff and the proposed respondent. If the parties are unable to agree, the Commission may commence formal adjudicative procedure pursuant to 16 C.F.R. § 3.11 (1973). If, however, an agreement is reached and accepted by the Commission, the provisionally accepted consent order is placed on the public record for a period of 30 days, during which time any interested party may file comments or views with the Commission. After reviewing any such public comments, the Commission may withdraw its acceptance of the proposed order or conclude the proceeding by final acceptance of the consent order either as originally proposed or as modified in light of comments received.

The facts underlying this appeal are not in dispute. On October 12, 1972, the Commission, pursuant to 16 C.F.R. § 2.31, declared its intention to issue a complaint charging Volvo, Inc. and others with violation of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970). The announcement was accompanied by both a proposed complaint and a proposed order. In sum, the complaint alleged that Volvo, Inc. had made false and deceptive advertising claims concerning the economy and durability of Volvo automobiles. The proposed order would have required Volvo, Inc. to cease and desist from making such claims unless it could substantiate the claims with appropriate facts.

At the request of Volvo, pursuant to 16 C.F.R. § 2.32, pre-complaint consent negotiations were begun. On November 6, 1972, during the negotiation period, appellants filed a motion with the Commission for leave to intervene in the negotiations. This motion [1] was denied by the Commission on December 14, 1972.

The Volvo-Commission negotiations resulted in a consent order which was submitted to the Commission on November 17, 1972. On January 10, 1973, appellants filed their complaint in District Court seeking: 1) review of the Commission's denial of intervention in the *Volvo* matter; 2) a declaration that the Commission's present consent negotiation procedures were constitutionally defective due to insufficient public participation; and 3) injunctive relief to prevent the Commission from utilizing the allegedly unconstitutional procedures until such procedures were revised to provide for greater public participation.

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[1] Appellants additionally filed a Motion for Stay of Consent Negotiations until the Commission could rule on their motion for intervention; both motions were denied December 14, 1972.

On January 29, 1973, after oral argument, the District Court issued an order dismissing the complaint. The District Court found, in pertinent part:

> [I]t appearing to the Court that it lacks jurisdiction of the subject matter hereof, for the reason that a grant **[760]** or denial of intervention in Commission non-adjudicative consent negotiations is entirely discretionary with the Commission and is not judicially reviewable; and that no showing has been made that defendant has clearly violated an important constitutional or statutory right of plaintiffs since the commission's consent order procedure, 16 C.F.R. sections 2.31–.35, affords plaintiffs ample and meaningful opportunity to comment on executed consent agreements prior to final acceptance or rejection of such agreements by the Commission. . . .[2]

Appellants noted their appeal to this court on February 1, 1973, and moved the District Court for an injunction pending appeal. The District Court denied the motion.[3] On March 13, 1973, the Commission provisionally accepted the proposed consent agreement and, pursuant to 16 C.F.R. § 2.34(b) placed the agreement on the public record for 30 days, thereby providing opportunity for public comment before the order was finally accepted. Appellants, on April 23, 1973, moved this court, under Rule 8(a) Fed. R. App. P., for an order staying the Commission from finally accepting the consent agreement pending appeal. This court denied appellants' motion for stay.[4] After the period for public comment had ended, the Commission, on June 26, 1973, issued the final order in the *Volvo* matter.

The first of appellants' two arguments before this court is that the trial court erred in finding that the grant or denial of intervention in consent negotiations is "entirely discretionary with the Commission and is not judicially reviewable."

Appellants admit that the sole *express* grant of judicial review in the Federal Trade Commission Act provides for review only of cease and desist orders and only at the request of respondents thereto.[5]

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[2] *Action on Safety and Health, et al.* v. *FTC,* Civil Action No. 49–73, D.D.C., Order (unpublished) filed January 29, 1973 at 1–2 ; J.A. at D–1 to D–2.

[3] *Id.,* Order filed February 14, 1973.

[4] Order of June 11, 1973.

[5] Brief of Appellants at 13. The Federal Trade Commission Act, 15 U.S.C. § 45(c) provides in pertinent part :

> Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States . . . .

However, appellants rely on cases such as *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), arguing that an explicit provision for review of certain enumerated types of administrative action does not necessarily preclude review of non-enumerated actions.[6] Thus, it is argued, unless the FTC Act contains "clear and convincing evidence" of an intent to withhold review, review must be granted.

[1, 2] We find that appellants' analysis, with its emphasis on a broad presumption favoring judicial review, is misleading in deciding the question presented. The question before us is not whether appellants have a broad right to seek review of Commission orders but whether review of this agency action is precluded by law. One who must rely upon the APA review provisions to overcome the silence of a particular organic statute must take the good with the bad. The statute and the cases make it clear that if an action is "committed to agency discretion by law," judicial review is not available. Our reading of *Abbott Laboratories* v. *Gardner*, *supra*, convinces us only that if a particular organic statute is silent on the question of judicial review, courts should recognize the basic presumption favoring judicial review, embodied in the Administrative Procedure Act, "so long as . . . *the action is not committed by law to agency* **[761]** *discretion*, 5 U.S.C. § 701(a)."[7] *Abbott Laboratories* v. *Gardner*, *supra*, at 140 (emphasis supplied). *See e.g.*, *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317, 78 S. Ct. 752, 2 L. Ed. 2d 788 (1958); *Curran* v. *Laird*, 136 U.S.App.D.C. 280, 420 F. 2d 122 (1969); *United States* v. *One 1961 Cadillac*, 337 F. 2d 730 (6th Cir. 1964); K. Davis, Administrative Law Treatise § 28.16 at 64-65 (1970 Supp.). Our inquiry must focus on the precise question of whether the power to grant or deny intervention in a consent decree negotiation has been "committed to agency discretion by law." If it has been so committed, § 701(a)(2) of the APA must control and judicial review is precluded.[8] Although the order of the trial court did not specifically mention § 701(a)(2) of the APA, we are satisfied that the trial court relied upon this provision in dismissing appellants' claim for lack of jurisdiction.

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[6] Brief of Appellants at 13–15.

[7] The Administrative Procedure Act exempts from judicial review "agency action . . . committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1970).

[8] Professor Davis makes it clear that inquiry must focus on the *action* taken. He states:

> The troublesome problem is not whether some administrative action is unreviewable because it is "committed to agency discretion by law" but is *how to discover what particular action is so committed and what is not.*

K. Davis, Administrative Law Treatise § 28.16 at 965 (Supp. 1970) (emphasis added). This analysis has been adopted by other courts. *Ferry* v. *Udall*, 336 F. 2d 706 (9th Cir. 1964), *cert. denied*, 381 U.S. 904, 85 S. Ct. 1449, 14 L. Ed. 2d 286 (1965).

The action of the Commission here under examination is the denial of appellants' motion to intervene in ongoing negotiation proceedings. The Federal Trade Commission Act is silent as to intervention in such consent negotiations. The Act speaks only of intervention in adjudications.[9] The Commission's Rules of Procedure make it clear that "Adjudicative proceedings . . . [do] not include . . . negotiations for the entry of consent orders." [10] The United States Court of Appeals for the Second Circuit has held that the Commission's consent order procedure was established pursuant to § 554(c) of the Administrative Procedure Act [11] and that such negotiation proceedings are clearly not adjudicative in nature. The Second Circuit stated:

> Nothing in the Administrative Procedure Act or in the basic principles of fair procedure precludes the Commission from creating and following a procedure for settling disputes without recourse to adjudication. *Consent negotiations are not a stage in adjudication* but a means of establishing whether adjudication can be avoided altogether. Like investigations, *consent negotiations are distinct from the adjudicative process and hence not governed by the standards which control adjudicative procedure.*[12]

When it passed § 554(c) of the APA, Congress clearly intended that the development of informal consent decree procedures be left to the individual agency's discretion. The court in *Bristol-Myers* v. *FTC*, *supra*, discussed the question of Congressional intent with regard to consent decree procedures, and stated:

> Congress intended such negotiating proceedings to be informal, without **[762]** the procedures inherent in trial-type hearings (right of examination and cross-examination, findings of fact and conclusions of law). *Recognizing that the formalism of trial-type proceedings might not be conducive to successful settlement negotiations, Congress left to the agencies the power to develop the precise nature of informal proceedings* that might be used to implement the statute. See. S. Doc. 248, 79th Cong. 2d Sess. 24 (1946), Atty. Gen.'s Manual on the Administrative Procedure Act (1947).
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> In an informal consent negotiation pursuant to 5 U.S.C. § 554 there is no examination or cross-examination of witnesses, no findings of fact and no conclusions of law. If the negotiations are unsuccessful, no order at all can be entered. At that stage only if the Commission decides to file a complaint does an adjudicatory

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[9] 15 U.S.C. § 45(b) (1970).

[10] 16 C.F.R. § 3.2 (1973).

[11] 5 U.S.C. § 554(c) (1970) provides:

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

[12] *Bristol-Myers Co.* v. *FTC*, 469 F. 2d 1116, 1119–1120 (2d Cir. 1972) (emphases added), *quoting* In the Matter of William H. Rohrer, Inc., 64 F.T.C. 1446 (1964); *accord, The Seeburg Corp.* v. *FTC*, 8 F.T.C. Stat. & Dec. 393 (E.D. Tenn. 1966), *aff'd, Seeburg Corp.* v. *FTC*, 425 F. 2d 124, 130 (6th Cir.), *cert. denied,* 400 U.S. 866, 91 S. Ct. 104, 27 L. Ed. 2d 105 (1970).

> stage commence. If, on the other hand, the negotiation is successful, the parties present an agreement with a staff report to the full Commission, which remains on record for 30 days.

469 F. 2d at 1120 (emphasis added).

We find the reasoning of the Second Circuit in *Bristol-Myers* v. *FTC*, *supra*, to be sound. Congress granted great discretion to the Commission to determine whether a potential respondent has violated the Act and whether a proceeding by the Commission against the violator would be in the public interest.[13] Neither the Federal Trade Commission Act nor the Commission's Rules of Procedure grant appellants any right to intervene in consent negotiations. Rather, the power to prescribe consent negotiation procedure is part of the general enforcement power of the Commission, and such enforcement decisions are generally not subject to judicial review.[14] In this area, concerned as it is with questions of administrative policy and allocation of scarce Commission resources, "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413, 78 S. Ct. 377, 379, 2 L. Ed. 2d 370 (1958).[15]

[3] Whether or not the denial of appellants' motion to intervene in the negotiations is agency action committed entirely to agency discretion is a question which must be answered by viewing the *source* of the Commission's power to act. We believe that the whole consent negotiation procedure was promulgated by the Commission pursuant to its broad enforcement discretion.[16] As such, we **[763]** hold that the deci-

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[13] 15 U.S.C. § 45(b) (1970). *See, e.g., Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611–612, 66 S. Ct. 758, 90 L. Ed. 888 (1946).

[14] *See, e.g., NLRB* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 63 S. Ct. 394, 87 L. Ed. 579 (1943); *Kixmiller* v. *SEC*, 160 U.S. App. D.C. 375, 492 F. 2d 641, 645 (1974) and cases cited therein.

[15] *Accord, FTC* v. *Universal Rundle Corp.*, 387 U.S. 244, 87 S. Ct. 1622, 18 L. Ed. 2d 749 (1967). The holdings in these two cases are not contrary to the result reached today. In both cases appellants were respondents under cease and desist orders and complained of failure to prosecute competitors. They were not, as here, merely aspiring intervenors in a *non-adjudicatory* setting.

[16] Appellants have directed our attention to various cases which they contend stand for the proposition that the APA does not preclude review in this case. Examination of these cases reveals that none concerns the non-adjudicative consent negotiation procedure. *Pepsico, Inc.* v. *FTC*, 472 F. 2d 179 (2d Cir. 1972) concerned intervenors who sought *review of a cease and desist order* which purportedly affected their rights directly. In *Rettinger* v. *FTC*, 392 F. 2d 454 (2d Cir. 1968) and *Robertson* v. *FTC*, 415 F. 2d 49 (4th Cir. 1969) petitioners seeking review were *actual respondents* in past proceedings which culminated in cease and desist orders. The question presented in both cases was whether proceedings begun subsequent to the issuance of cease and desist orders were "reopened adjudicatory proceedings" or "compliance" proceedings. The circuit courts in both cases denied jurisdiction. In *Elmo Division of Drive-X Co., Inc.* v. *Dixon*, 121 U.S. App. D.C. 113, 348 F. 2d 342 (1965), appellant was a *party to a prior consent decree*, and the question was whether the district court had jurisdiction to entertain a suit by appellant to enforce procedural rights which the Commission had granted to him in its prior decree.

Thus, none of these cases has any bearing whatever on the question *sub judice*.

sion to grant or deny intervention is an agency action committed to agency discretion and therefore is specifically exempt from judicial review under § 701(a) (2) of the APA.

Appellants' second argument is that the Commission's present consent order rules do not provide the public with "constitutionally required 'meaningful participation' in consent proceedings."[17] It is their position that "the 'meaningful' participation guaranteed by the First and Fifth Amendments requires the Commission to adopt procedures designed to permit greater public participation . . . ."[18] This result, it is argued, is compelled by "both the due process interest in fairness and the first amendment interest in public participation in decisions which affect the public."[19] The trial court dismissed this portion of the complaint stating that "no showing has been made that defendant has clearly violated an important constitutional or statutory right of plaintiffs since the Commission's consent order procedure . . . affords plaintiffs ample and meaningful opportunity to comment on executed consent agreements prior to final acceptance or rejection of such agreements by the Commission . . . ."[20]

[4, 5] The Commissions rules do not deny due process to appellants because appellants have not demonstrated an interest in the Commission proceedings sufficient to make a due process analysis possible. To put it another way, the mere incantation of the phrase "due process" is not enough to require judicial examination of the Commission's rules. Cases recently decided by the Supreme Court, *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), *Richardson* v. *Perales*, 402 U.S. 389, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971), make it clear that a deprivation cognizable under the Fifth Amendment due process clause still must be a deprivation of life, liberty, or property. In *Goldberg* v. *Kelly*, *supra*, there was no dispute that the termination of welfare benefits to appellees "adjudicate[d] important rights" of a property nature.[21] The Court in *Goldberg* stated:

> [C]onsideration of what procedures due process may require under any given set of circumstances must *begin with a determination of the precise nature* of the government function involved as well as *of the private interest that has been affected by governmental action.*[22]

It is incumbent upon one who invokes the due process clause against government action to denominate specifically the deprivation he has suffered. Only then can a court ascertain what procedural due process is required. *See Blackwell College of Business* v. *Attorney General*, 147 U.S.App.D.C. 85, 454 F. 2d 928, 932–933 (1971); *Bell* v. *Burson*, 402 U.S. 535, 540, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971).

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[17] Brief of Appellants at 20. It is not entirely clear, but apparently appellants assert that the Commission procedure is constitutionally defective in all events, regardless of whether they are entitled to judicial review of the Commission order denying them intervention in this particular matter.

[18] *Id.*

[19] *Id.* at 21.

[20] *Action on Safety and Health* v. *FTC*, *supra* note 2 at 1–2; J.A. at D–1 to D–2.

[21] *Goldberg* v. *Kelly*, 397 U.S. 254, 261–262 (1970).

[22] *Id.* at 263, *quoting Cafeteria Restaurant Workers* v. *McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 1749, 6 L. Ed. 2d 1230 (1961) (emphases added).

A careful reading of appellants' papers, both those filed in the trial court and those filed here, discloses that at no time have appellants stated with specificity what they have been deprived of by the Commission's action. Clearly it [**764**] is not life or liberty within the meaning of the Fifth Amendment. As to a "property" interest, we can find none. Appellants here cannot sustain an allegation that Commission proceedings against Volvo may affect later private actions maintained by any individual who claims to have been injured by deceptive advertising. The Federal Trade Commission Act does not confer a private right of action on any individuals. *Holloway* v. *Bristol-Myers Corp.*, 158 U.S. App. D.C. 207, 485 F. 2d 986 (1973).

Appellants, instead of demonstrating deprivation of a "property" interest, merely recite several cases which, they contend, confer on them the right to "meaningful participation" in the Commission's consent decree procedures. In each case cited by appellants, the interest protected was *first*, clearly articulated, and *second*, of a more substantial nature than the right of an undefined "public" to participate in agency enforcement proceedings at a stage prior to formal adjudication. In *Goldberg* v. *Kelly*, *supra*, the issue was termination of welfare benefits which affected the recipients' property interest in these benefits. *Armstrong* v. *Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L.Ed.2d 62 (1965) involved the right of a natural father to receive notice of the pending adoption of one of his children. In *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262 (2d Cir. 1968), the persons who pressed a due process claim were not members of the "public," but applicants for public housing, whose rights to such housing were directly affected by the governmental action. Similarly, *Blackwell College of Business* v. *Attorney General*, 147 U.S. App. D.C. 85, 454 F. 2d 928 (1971), held that the college's "approved" status was a valuable property in the nature of a license, which could not be revoked without due process protection.

In summary, we can find no merit in appellants' asserted Fifth Amendment "right to participation" in the Commission's proceedings. Before a court can evaluate the procedural due process to which a person is entitled, there must first be alleged with reasonable particularity the precise right which the government's act is said to have altered or diminished. Without such an allegation—of a right to life, liberty, or property—there is simply no constitutional claim. As we have observed *ante*, the decision to allow intervention in nonadjudicative consent decree negotiations is committed to agency discretion. The appellants cite no precedent for their assertion that they have any interest in these proceedings which would entitle them to any due process safeguards. Because they have failed to identify their right with precision, meaningful analysis is impossible. For these reasons, we believe their claim that the Commission's current Rules of Practice, 16 C.F.R. § 2.31–.35, violate the Fifth Amendment is without merit.

[6] Turning now to appellants' First Amendment claim, we note that appellants' presentation to this court is singularly unenlightening.[23] In support of their inchoate claim, bottomed apparently on the right to petition clause of the First Amendment, appellants offer neither relevant precedent nor reasoned analysis.[24] We have, out of necessity, **[765]** independently researched the relevant case law and find no judicial opinions to bolster appellants' case. This being the situation, we merely affirm the trial court, stating only that *if* the guaranteed right to petition the government has any application to this case, the Commission has not abridged appellants' rights by its failure to provide expanded public participation. While this resolution does not mark off the precise boundaries of the right to petition clause, we leave that task to a future day when the issue will be clarified and throughly briefed.

Affirmed.

J. SKELLY WRIGHT, *Circuit Judge* (concurring):

I am pleased to concur in Judge Tamm's excellent opinion because in my judgment it does not preclude the possibility of judicial review in all circumstances of consent orders issued by the Federal Trade Commission under 5 U.S.C. § 554(c)(1) (1970).

BORDEN, INC. v. F.T.C.*

No. 73-1502 F.T.C. Docket No. 8866

(United States Court of Appeals, Seventh Circuit, May 1, 1974)

1. COURTS WILL ORDINARILY NOT INTERFERE WITH AN AGENCY UNTIL ITS ACTION IS COMPLETED

Ordinarily, courts will not interfere with an agency until it has completed its action.

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[23] Appellants devote but one short paragraph of their brief to articulation and analysis of their First Amendment claim. This paragraph states, in full:

The Supreme Court has also indicated that the right of "meaningful access to the agencies and courts" is part of the right to petition the Government, protected by the First Amendment. *California Motor Transport Co.* v. *Trucking Unlimited,* [404] U.S. [508, 511,] 92 S. Ct. 609, 612 [30 L. Ed. 2d 642] (1972).

Brief of Appellants at 21.

[24] Appellants' brief (*see* note 23 *supra*) cites only *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972), a case which has nothing at all to do with "public" participation in anything. That case holds that a carrier's First Amendment right to initiate a court action does not give rise to immunity from civil liability if the initiation of the law suit is itself a violation of antitrust law.

*Reported in 495 F. 2d 785 (1974). *See also,* pp. 688 and 802 herein.

2. **VIOLATION OF RIGHT SECURED BY STATUTE; LEGAL ISSUE NOT INVOLVING AGENCY EXPERTISE; AND INABILITY OF ISSUE TO BE RAISED ON LATER JUDICIAL REVIEW ARE REASONS ALLOWING ADMINISTRATIVE REMEDIES TO BE BY-PASSED**

   Administrative remedies may be by-passed only if (1) agency has clearly violated a right secured by statute or agency regulation, (2) issue involved is a strictly legal one not involving agency's expertise or any factual determinations, or (3) issue cannot be raised on judicial review of a later order of agency.

3. **APPELLATE COURT WAS WITHOUT AUTHORITY TO ENLARGE RECORD WITH MATERIAL NOT MADE PART OF RECORD IN PREVIOUS DISTRICT COURT ACTION**

   On appeal from dismissal of complaint for declaratory and injunctive relief by reason of alleged failure of Federal Trade Commission to provide plaintiff with required notice and opportunity to submit information during an investigation into alleged illegal price stabilization, Court of Appeals was without authority to enlarge the record on appeal by admitting certain provisions of the Commission's administrative manual when it was not made a part of the record in the district court.

4. **FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES WAS GROUNDS FOR DISMISSING COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; ISSUE WAS PROCEDURAL AND REVIEWABLE UPON FINAL AGENCY ACTION**

   Complaint for declaratory and injunctive relief by reason of alleged failure of Federal Trade Commission to provide required notice and opportunity to submit information to plaintiff during an investigation into alleged illegal price stabilization was subject to dismissal for failure to exhaust administrative remedies in that asserted right to pursue informal settlement and explanation prior to filing of complaint did not appear plainly on face of agency rule, issue was one of procedural propriety which could be raised on appeal from final order of agency, and primary responsibility of interpreting rule rested with agency itself.

(Syllabus, with substituted captions, taken from 495 F. 2d 785)

On appeal from order of U.S. District Court for the Northern District of Illinois, Eastern Division, appellate court held that the complaint alleging failure by F.T.C. to provide required notice and opportunity to submit information was properly dismissed for failure to exhaust administrative remedies.

Affirmed.

Stuart S. Ball, *H. Blair White*, Chicago, Ill., for plaintiff-appellant.

Harold D. Rhynedance, Jr., *William A. Doying*, Attys., Federal Trade Commission, Washington, D.C., *James R. Thompson*, U.S. Atty., Chicago, Ill., for defendant-appellee.

Before KILEY, *Senior Circuit Judge*, SPRECHER, *Circuit Judge*, and JAMESON, *Senior District Judge*.*

[**786**] JAMESON, *Senior District Judge*.

Borden appeals from an order dismissing Count I of its two-count complaint seeking declaratory and injunctive relief to restrain the

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*Senior District Judge William J. Jameson of the District of Montana is sitting by designation.

Federal Trade Commission (Commission) "from any further proceedings" upon Count III of an administrative complaint issued against Borden on October 8, 1971.[1]

In November, 1965 Borden began selling private label fluid milk products in the Chicago area to stores of The Great Atlantic & Pacific Tea Company (A & P). On March 13, 1967 Borden was notified by the Commission that it was investigating whether these sales involved illegal price discriminations in violation of Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(f), or sales at unreasonably low prices or at prices below cost for the purpose of eliminating or lessening competition, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.[2] Pursuant to requests by the Commission, Borden furnished information and documentary evidence regarding its milk sales to A & P.

On June 1, 1971 Borden received a copy of a proposed Commission complaint, charging in Counts I and II that A & P had wrongfully induced discriminatory prices and in Count III that Borden and A & P had combined to effect price stabilization.[3] A formal complaint containing the same charges was filed on October 8, 1971. Borden was not charged with illegal price discrimination.

On October 26, 1972 Borden filed with the administrative law judge a motion to dismiss Count III of the Commission complaint for alleged violation of Commission Rule 2.6, 16 C.F.R. § 2.6, which provides:

> Any person under investigation compelled or requested to furnish information or documentary evidence shall be advised with respect to the purpose and scope of the investigation.

The administrative law judge denied this motion on February 13, 1973, and on April 24, 1973 denied Borden's motion for reconsideration or in the alternative for certification of the denial to the Commission pursuant to Rule 3.23, 16 C.F.R. § 3.23.

Borden commenced this action on May 8, 1973, alleging in Count I of its complaint that the "failure to provide the required notice and opportunity to submit information during the investigation was a clear and substantial breach of the requirements of the Commission's own Rule 2.6, and its unpublished rules and directives". Borden applied for a preliminary injunction. The Commission filed a motion to dismiss Count I for failure to exhaust administrative remedies.

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[1] The Commission initially contended that the dismissal of Count I was not appealable under 28 U.S.C. § 1292(a)(1) as an interlocutory order refusing an injunction, since Count II of the complaint remained as a basis for seeking injunctive relief. At oral argument the parties agreed that the issue with respect to appellate review is now moot, since the district court subsequently dismissed Count II of Borden's complaint.

[2] On January 21, 1969 the Commission by formal resolution authorized a Commission investigation of Borden and A & P with respect to possible price discrimination charges. Borden alleges that it was informed of this resolution in October, 1969.

[3] It is undisputed that Borden was not given notice that it was under investigation for possible charges of illegal price stabilization until it received the proposed complaint on June 1, 1971.

In a well-reasoned opinion entered June 7, 1973 the district court denied the application for a preliminary injunction and granted the motion to dismiss, holding that "it is deprived of jurisdiction of Count I by the doctrine of exhaustion of administrative remedies".[4] On this appeal Borden challenges only the ruling on the motion to dismiss. We affirm.

[1, 2] It is well settled that ordinarily courts will not interfere with an [**787**] agency until it has completed its action [5] and that administrative remedies may be bypassed only if (1) the agency has clearly violated a right secured by statute or agency regulation, *Leedom* v. *Kyne*, 358 U.S. 184, 188–189, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958); *Elmo Division of Drive-X Company* v. *Dixon*, 121 U.S. App. D.C. 113, 348 F. 2d 342, 346–347 (1965); (2) the issue involved is a strictly legal one not involving the agency's expertise or any factual determinations, *Jewel Companies, Inc.* v. *F.T.C.*, 432 F. 2d 1155, 1159 (7 Cir. 1970); *McKart* v. *United States*, 395 U.S. 185, 197–199, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969); or (3) the issue cannot be raised upon judicial review of a later order of the agency, *Jewel*, *supra* at 1159. We agree with the district court that none of these exceptions are applicable here.

Borden argues that under Rule 2.6 it was entitled to notice that it was being investigated for illegal price stabilization and "to submit exculpatory or explanatory information" during the investigative stages of the Commission's proceedings. In support of this contention Borden relies upon an unpublished directive implementing Rule 2.6, which reads:

> As a matter of standard operating procedure, in any matter in which a recommendation for a complaint is contemplated the proposed respondent should be * * * afforded an opportunity to furnish information respecting the acts or practices involved prior to submitting the matter to the Commission with recommendation for complaint.

This directive is from a citation "of a recent staff directive" in E. Pollock, Pre-Complaint Investigations by the Federal Trade Commission, 45 Chicago Bar Record 379, 381–82 (1964). Prior to oral argument Borden filed a motion to enlarge the record pursuant to Rule 10(e) F.R. App. Pro. to include the provisions of Section 6–051.7B of the Commission's Administrative Manual, which was made available to Borden during the pendency of this appeal pursuant to a request for disclosure under the Freedom of Information Act, 5 U.S.C. § 552. Section 6–051.7B provides:

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[4] Administrative hearings were commenced on June 11, 1973. The Commission completed its case in chief just prior to oral argument on this appeal. Borden's defense was scheduled to begin on March 4, 1974.

[5] Borden's contention that no further administrative remedies are available is without merit. 16 C.F.R. § 3.54 (1973) prescribes the scope of review on appeals from initial decisions of administrative law judges. This would include a review of the judge's order denying the motion to dismiss the administrative complaint as to Borden, as well as adverse rulings with respect to the exclusion of evidence if obtained in violation of Rule 2.6.

> *Notifying the Respondent.* When a recommendation for complaint issuance is contemplated, the respondent should be notified that an investigation is being made and given the opportunity to furnish information on the acts or practices involved some time before submitting the matter to the Commission with recommendation for complaint. Where this procedure is not followed, the reason must appear in the memorandum transmitting the proposed complaint and order.[6]

[3] The request to the Secretary of the Commission for disclosure of the directive was made after the district **[788]** court's decision from which this appeal was taken. Rule 10(e) does not give this court authority to admit on appeal any document which was not made a part of the record in the district court. See *United States ex. rel. Kellogg* v. *McBee*, 452 F. 2d 134, 137 (7 Cir. 1971). The motion to enlarge the record accordingly is denied. In any event the staff directive as quoted in the Chicago Bar Record is substantially the same as Section 6–051.7B and was considered by the district court in determining the motion to dismiss.

Borden was fully apprised of the investigation of possible illegal price discrimination with respect to its milk sales to A & P. The Commission contends that Rule 2.6 in no way suggests that if the Commission staff in analyzing the evidence uncovers proof of additional or alternate violations, further notice must be given prior to notice through the proposed complaint. The staff directive, the Commission argues, is "a purely internal admonition designed to serve the efficient operation of the Commission rather than a mandatory rule conferring rights upon potential respondents".

[4] The district court correctly noted that in deciding whether exhaustion of administrative remedies should be required the initial consideration is whether the agency has violated a clear right. What-

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[6] By letter to counsel representing the Commission on the administrative complaint, Borden on February 22, 1973 requested voluntary disclosure of the directive mentioned in the Chicago Bar Record. This request was denied February 26, 1973 on the ground that "The Commission's internal directions and instructions to the staff are considered confidential." See 16 CFR § 4.10(a)(1) (1973). On March 15, 1973 Borden requested that the administrative law judge issue a subpoena duces tecum compelling production of the directive. This request was denied on April 18, 1973, the administrative law judge noting that the request for disclosure of confidential records should be addressed to the Secretary of the Commission. See 16 CFR § 4.11 (1973). No further action was taken by Borden until July 5, 1973, almost one month after the district court's dismissal of Count I of Borden's complaint on June 7, 1973. On that date Borden filed an appropriate request for disclosure with the Secretary of the Commission, and it was pursuant to this request that disclosure of Section 6–051.7B was obtained.

ever the merits of the parties' claims with respect to Rule 2.6 and the staff directive, we agree with the district court's conclusion that:

> Borden's asserted right to pursue informal settlement and explanation prior to the filing of a complaint does not appear plainly on the face of Rule 2.6. The unpublished rule cited as evidence of that interpretation simply states that a party *should* be given an opportunity to supply information respecting the matters under investigation. Granted that the latter rule begins with the phrase "as a matter of standard operating procedure," it is not clearly mandatory that such an opportunity be provided.[7]

Relying upon our decision in *Jewel, supra*, Borden contends that "it will be unable to raise the Commission's violation of Rule 2.6 on appeal of a final agency order." However, as the district court recognized, *Jewel* is distinguishable in a number of respects. We held in *Jewel, supra* at 1159, that exhaustion of administrative remedies was not required where the jurisdiction of the Federal Trade Commission was challenged on the ground that "one of the Commissioners did not properly exercise his statutory discretion in voting for the issuance of the complaint." We noted that review of a final order might not be adequate, since "if the question of the Commissioner's obligation is postponed until final appeal of a Commission order, the standard of review will be different," that it, "the court of appeals would only decide whether the final order is supported by the evidence and would not question the authority of the Commission in issuing the complaint." *Id.* In contrast, the issue here is one of the procedural propriety of the steps taken during the investigatory stage leading to an administrative complaint **[789]** and may be raised on appeal from the Commission's final order.[8]

Judicial review of proceedings of the Federal Trade Commission is governed by 15 U.S.C. §45(c), which provides for review of cease and desist orders by the courts of appeals. Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, provides:

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[7] The district court correctly pointed out that its conclusion is buttressed by the discretionary nature of 16 CFR §2.21 (1973), which provides for informal settlements during the investigatory stage and states:

"§2.21. Voluntary compliance.

"(a) The Commission, when it has information indicating that a person or persons may be engaging in a practice which may involve violation of a law administered by it, and if it deems the public interest will be fully safeguarded thereby may afford such person or persons the opportunity to have a matter disposed of on an informal nonadjudicatory basis.

"(b) In determining whether the public interest will be fully safeguarded through such informal administrative action, the Commission will consider: (1) The nature and gravity of the alleged violation; (2) the prior record and good faith of the parties involved; and (3) other factors, including, where appropriate, adequate assurance of voluntary compliance."

See also the Commission's explanatory statement of §2.21, 34 Fed. Reg. 19044, November 29, 1969.

[8] See *Sterling Drug Inc.* v. *F.T.C.*, 146 U.S. App. D.C. 237, 251, 450 F. 2d 698, 712 at n. 13 (1971) where the court noted that "the rule that agency decisions must be affirmed if supported by adequate findings of fact and substantial evidence in the record obviously does not apply where a proper hearing has not been held."

> Agency action made reviewable by statute * * * [is] subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

If the administrative proceedings subsequently result in a cease and desist order against Borden, Borden will have an opportunity on review to raise the issue of whether the Commission violated Rule 2.6 and its staff directives in failing to give Borden an opportunity to present exculpatory evidence during the precomplaint stage of the administrative process. We agree with the district court that "The issuance of the Commission's complaint would seem to constitute intermediate agency action and the decisions of the Administrative Law Judge [on Borden's motions to dismiss] would appear to be procedural rulings within the scope of the court of appeals' power to review under 5 U.S.C. § 704." See *Bristol-Myers Company* v. *F.T.C.*, 469 F. 2d 1116, 1117 (2 Cir. 1972); *Frito-Lay, Inc.* v. *F.T.C.*, 380 F. 2d 8, 10 (5 Cir. 1967).

In addition, the issue in *Jewel*, *supra* at 1159, was characterized as "inherently a legal one", involving "statutory construction." The district court correctly observed that:

> The nature of the legal question involved here differs in a significant way from that in *Jewel*. There, the legal question required the interpretation of a statute—a task to which the courts are accustomed and well suited and to which administrative agencies have no claim of expertise. 4 Davis § 30.01, at 241. In the area of interpretation of agency rules, however, the primary responsibility of interpretation rests with the agencies themselves and, as noted above, great weight is accorded their interpretations. Thus the determination of the jurisdictional issue in this case, unlike that in *Jewel*, is not susceptible to determination by the Court without delay.

Finally, the district court properly recognized that Borden's claim of irreparable injury based upon the cost and inconvenience of defending itself in administrative proceedings is not alone sufficient to justify judicial intervention in the administrative process. See *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 51–52, 58 S. Ct. 459, 82 L. Ed. 638 (1938); and *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 94 S. Ct. 1028, 1040, 39 L. Ed. 2d 123 (1974), where the Court reaffirmed the rule of *Myers* that "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."

We conclude that there are no exceptional circumstances which would justify Borden's attempt to bypass the administrative process, and that the district court properly dismissed Count I of Borden's complaint under the doctrine of exhaustion of administrative remedies.

Affirmed.

UNITED STATES *v.* J. B. WILLIAMS COMPANY, INC., ET AL.*

No. 236, Docket 73–1624. F.T.C. Docket No. 8547.

(United States Court of Appeals, Second Circuit, May 2, 1974)

1. NOTWITHSTANDING THE CRIMINAL NATURE OF ACTION, SIXTH AMENDMENT RIGHT TO JURY TRIAL DOES NOT APPLY TO CIVIL PENALTIES FOR ALLEGED VIOLATION OF F.T.C. CEASE AND DESIST ORDER

   [415] Sixth Amendment right to jury trial did not apply to suit by United States to recover civil penalties for alleged violation of FTC cease and desist order, notwithstanding contention that action was inherently criminal in nature.

2. EVEN THOUGH STATUTE IS SILENT ON RIGHT TO JURY TRIAL, GENERALLY THERE IS A RIGHT TO JURY TRIAL WHEN U.S. SUES TO COLLECT PENALTIES

   Generally, there is right to jury trial when United States sues to collect a penalty, even though statute is silent on right of jury trial.

3. LEGISLATIVE HISTORY OF CIVIL PENALTY SECTION OF F.T.C. ACT DOES NOT SUGGEST THAT CONGRESS INTENDED TO WITHHOLD RIGHT TO TRIAL BY JURY

   While a jury trial would not have been required if the FTC had sought an order of civil contempt in a court of appeals, nothing in the legislative history of the civil penalty provision of the FTC Act suggests that Congress intended to conform the procedures of that provision with those of the contempt provision and thus to withhold the right of jury trial.

4. JUDGMENT OF F.T.C. IN FRAMING REMEDIAL ORDERS MUST BE GIVEN MUCH WEIGHT

   Much weight must be given judgment of FTC in framing remedial orders.

5. CUSTOM AND "THE REMEDY SOUGHT" MILITATE STRONGLY IN FAVOR OF JURY TRIAL WHERE PRACTICABILITIES AND LIMITATIONS OF JURIES DO NOT MILITATE AGAINST RECOGNITION OF RIGHT TO JURY TRIAL

   The practicabilities and limitations of juries do not militate here against recognition of a right of jury trial, and custom before merger of law and equity and "the remedy sought" militate strongly in favor of it.

6. RIGHT TO JURY TRIAL EXTENDS, NOT JUST TO SOME, BUT ALL KINDS OF QUESTIONS OF FACT

   When there is right to jury trial, it extends to all kinds of questions of fact, not simply to some.

7. DEFERENCE TO F.T.C.'S CLAIM OF VIOLATION OF ORDER NOT REQUIRED BY CONGRESS

   Congress has not required deference to FTC's claim that its order has been violated.

8. PLAINTIFFS WERE ENTITLED TO HAVE JURY DECIDE MEANING OF TELEVISION COMMERCIALS ALLEGEDLY IN VIOLATION OF F.T.C. ORDER

   Manufacturer and advertising agency against whom United States brought suit for penalties for violation of cease and desist order of FTC were entitled to have jury decide meaning of television commercials which allegedly violated order.

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* Reported in 498 F. 2d 414 (1974). For judgment of U.S. District Court (S.D.N.Y.), *see* p. 483 herein. For case before the Commission, *see* 68 F.T.C. 481; *modified* 72 F.T.C. 865.

9. RIGHT TO FULL EVIDENTIARY HEARING ON ALL GENUINE ISSUES OF MATERIAL FACT BELONGS TO PARTY OPPOSING SUMMARY JUDGMENT MOTION

Party opposing summary judgment motion has right to full evidentiary hearing on all genuine issues of material fact.

10. PARTY OPPOSING SUMMARY JUDGMENT AND RAISING TRIABLE FACT QUESTIONS IN BENCH HEARING, HAS RIGHT TO ADDUCE EXPERT TESTIMONY OF LIVE WITNESSES AND CROSS-EXAMINE OPPONENT'S WITNESSES INSTEAD OF RELYING ON AFFIDAVITS

In a bench trial, if party opposing summary judgment raises any triable fact questions, such party has right to adduce expert testimony of live witnesses and cross-examine his opponent's witnesses rather than to have to rely on affidavits submitted in opposition to summary judgment motion.

11. DETERMINATION OF WHETHER ACCUSED COMMERCIALS OR PRODUCT COME WITHIN ORDER AS CONSTRUED IS A TASK APPROPRIATE FOR JURY WHILE DETERMINATION OF WHAT THE ORDER MEANT IS A TASK FOR THE COURT

Questions of whether television commercials violated FTC cease and desist order and whether new product was within reach of order which applied to any other preparation of substantially similar composition or possessing substantially similar properties involved determination of what order meant, which was task for court, and whether accused commercials or product come within or[416]der as so construed, a task appropriate for jury.

12. COURT WAS JUSTIFIED IN GIVING BROAD READING TO WORDS CONTAINED IN ORDER IN DETERMINING APPLICABILITY OF ORDER TO ANOTHER PRODUCT

In determining whether FTC cease and desist order applied to another product, court was justified in giving broad reading to words which were contained in order and which made order applicable to "or any other preparation of substantially similar composition or possessing substantially similar properties."

13. THAT THERE WAS NO GENUINE ISSUE OF FACT WITH RESPECT TO APPLICABILITY OF ORDER TO NEW PRODUCT BEING WITHIN SCOPE OF ORDER WAS ESTABLISHED BY THE RECORD

Record established that there was no genuine issue of fact with respect to whether new product distributed by manufacturer which was subject to FTC cease and desist order which applied to any other preparation of substantially similar composition or processing substantially similar properties was within scope of order.

14. F.T.C. DID NOT HAVE BURDEN OF SHOWING THAT ALLEGED VIOLATIVE COMMERCIALS WERE FALSE AND DECEPTIVE

FTC did not have burden of showing that commercials which were claimed to violate cease and desist order, if within order, were false and deceptive.

15. WHETHER ORAL AND/OR VISUAL CONTENT OF CHALLENGED ADVERTISEMENTS FELL WITHIN ORDER'S PROHIBITIONS IS FOR THE COURT TO DETERMINE

Fact that FTC did not have burden of showing that commercials which allegedly violated cease and desist order, if within order, were false and deceptive did not mean that once Commission establishes that cease and desist order is in effect and that particular advertisement has been disseminated which allegedly violates order, it is for court to determine as matter of law whether oral and/or visual content of challenged advertisements fell within scope of prohibitions in order.

16. QUESTION OF MEANING OR EFFECT OR WORDS IS FOR THE TRIER OF FACTS, TO BE DECIDED AFTER HEARING ALL MATERIAL EVIDENCE

Generally, when meaning or effect of words or acts is fairly disputed, question is for trier of facts to be decided after hear-in on material evidence.

17. INTERPRETATION THAT PHRASES "BLOOD-BUILDING POWER . . ." AND "BUILDS IRON POWER IN YOUR BLOOD FAST" SAY THAT PRODUCT BUILDS POWER IN INDIVIDUAL, WHICH IS IN VIOLATION OF CEASE AND DESIST ORDER, IS NOT REQUIRED AND PRECLUDES GRANT OF SUMMARY JUDGMENT

While advertisement that product carried "blood-building power to every part of your body" and that it "builds iron power in your blood fast" could be interpreted as saying that product builds power in individual and thereby violated portion of FTC order which enjoined dissemination of any advertisement representing that product would be beneficial in treatment or relief of tiredness symptoms, such interpretation was not required and precluded grant of summary judgment.

18. COURT MUST DRAW INFERENCE MOST FAVORABLE TO OPPONENT OF MOTION FOR SUMMARY JUDGMENT

On motion for summary judgment, court must draw inference most favorable to party opposing motion.

19. RECORD IN CIVIL PENALTY SUIT FAILED TO ESTABLISH THAT ADVERTISEMENTS VIOLATED CEASE AND DESIST ORDER ENJOINING DISSEMINATION OF ADVERTISEMENT REPRESENTING PRODUCT WOULD BE BENEFICIAL TO TIREDNESS SYMPTOMS

Record in suit against manufacturer and advertising agency by United States seeking penalties for violation of FTC cease and desist order failed to establish that advertisements which claimed that product carried "blood-building power to every part of your body" and that it "builds iron power in your blood fast" violated cease and desist order which enjoined dissemination of any advertisement representing that product or any similar preparation would be beneficial in treatment or relief of tiredness symptoms.

20. RECORD IN CIVIL PENALTY PROCEEDING CREATED JURY QUESTION AS TO WHETHER ADVERTISEMENT DEPICTING SAD/GLAD WOMAN WAS IN VIOLATION OF CEASE AND DESIST ORDER

Record in proceeding by United States seeking to recover penalties for violation of FTC cease and desist order created jury question as to whether advertisement, in which woman who is sad because of having discovered that she has "iron-poor blood" is told not to be sad and to be glad for product which can remedy deficiency and who is subsequently shown smiling, violated cease and desist order which enjoined dissemination of any advertisement representing that product would be beneficial in [417] treatment or relief of tiredness symptoms unless advertisement contained certain express disclosures.

21. NO TRIABLE ISSUE LEFT TO JURY WHEN RECORD IN CIVIL PENALTY ACTION ESTABLISHED THAT ADVERTISEMENTS VIOLATED ORDER PROHIBITING DISSEMINATION OF ADVERTISING WHICH CREATED IMPRESSION OF TIRED FEELING WAS CAUSED BY IRON DEFICIENCY OR LINKED TIRED SYMPTOMS WITH IRON DE-

FICIENCY WAS NOT THE ONE LEADING TO THE CEASE AND DESIST ORDER BUT WAS A NEW PRODUCT

Record in proceeding by United States to recover penalties for violation of FTC cease and desist order established, and thus left no triable issue for jury, that advertisements in which it was claimed that many healthy young women have little or no iron reserves and that some women even risk becoming anemic and tired, followed by suggestion to take product and maintain supply needed to prevent iron shortage violated order prohibiting the dissemination of any advertising which created impression that tired feeling was caused by iron deficiency or which linked tiredness symptoms with iron deficiency anemia even though product was not product involved in proceeding leading to cease and desist order but was new product.

22. NOTICE OF NONCOMPLIANCE IS NOT REQUIRED, IN CASES INVOLVING PENALTIES FOR VIOLATION OF F.T.C. ORDERS, IN TIME FOR VIOLATOR TO BRING HIMSELF INTO COMPLIANCE

Penalties for violation of FTC cease and desist order may be recovered without giving alleged violator notice of noncompliance in time to bring himself into compliance.

23. TO KNOWINGLY ALLOW DAILY PENALTIES ACCRUE WITHOUT GIVING NOTICE THAT COMMISSION BELIEVES ADVERTISING TO BE IN VIOLATION OF ORDER IS UNREASONABLE

It would seem unreasonable to permit FTC to knowingly let daily penalties accrue without giving notice of Commission's position that advertisements violate cease and desist order.

24. RECORD FAILED TO SHOW F.T.C. KNOWINGLY ALLOWED DAILY PENALTIES TO ACCRUE WITHOUT GIVING NOTICE

Record in proceeding to recover penalties for violation of FTC cease and desist order failed to establish that Commission knowingly let daily penalties accrue without giving notice of its position that advertisements violated order.

25. PENALTY WAS NOT LIMITED TO $5,000 PER DAY WHERE AUTHORIZING STATUTE PROVIDED THAT EACH SEPARATE VIOLATION OF ORDER SHOULD BE A SEPARATE OFFENSE

Where statute authorized penalty of $5,000 for each violation of FTC cease and desist order, and statute further provided that each separate violation of order should be separate offense, penalty was not limited to $5,000 per day.

26. DUPLICATE PENALTIES COULD NOT BE LEVIED AGAINST MANUFACTURER AND ITS ADVERTISING AGENCY WHERE AGENCY WAS WHOLLY-OWNED BY STOCKHOLDERS OF MANUFACTURER AND 95% OF ITS BUSINESS WAS THAT OF MANUFACTURER

Where advertising agency was completely owned by stockholders of manufacturer and advertising manufacturer's product constituted 95 percent of advertising agency's business, duplicate penalties for violation of FTC cease and desist order could not be levied against manufacturer and advertising agency.

27. ATTORNEY GENERAL WAS WITHOUT AUTHORITY TO SEEK $500,000 AGAINST EACH PARTY WHERE F.T.C. REQUESTED TOTAL SUM OF $500,000

Where FTC requested only a judgment against manufacturer and advertising agency in total sum of $500,000, Attorney General in suit to collect penalty was without authority to seek that amount against each.

28. It Would be Advisable To Grant Evidentiary Hearing on Amount of Penalties Assessed if Requested by Either the Government or Defendants

If either the Government or defendants requested, it would be advisable for court to grant evidentiary hearing on amount of penalty to be assessed against manufacturer and advertising agency for violation of FTC cease and desist order relating to advertising.

29. Good or Bad Faith, Public Injury, and Ability To Pay Are Factors Determining Size of Penalty To Be Assessed

Size of penalty to be assessed against manufacturer and advertising agency for violation of FTC cease and desist order relating to advertising should be based on number of factors including good or bad faith of defendants, injury to public, and defendants' ability to pay.

(Syllabus, with substituted captions, taken from 498 F. 2d 414)

On appeal from action by Government for civil penalties, court held that proceeding was not criminal in nature so that defendants had right to jury trial; defendants had right to jury trial on issues of fact; there were issues of fact as to whether some advertisements violated F.T.C. order; and that penalties could not be assessed against both manufacturer and advertising agency when manufacturer had complete control of advertising agency.

Judgments affirmed in part, set aside in part, and reversed and remanded in part.

Oakes, *Circuit Judge*, filed dissenting opinion.

Charles A. Horsky, Washington, D.C. (*John E. Vanderstar*, *Michael Boudin*, *Covington & Burling*, Washington, D.C., *Powell Pierpoint*, *Hughes Hubbard & Reed*, and *Henry Edward Schultz*, New York City, of counsel), for defendants-appellants.

Patricia M. Hynes, Asst. U.S. Atty. (*Paul J. Curran*, U.S. Atty., for the Southern District of New York, of counsel), for plaintiff-appellee.

Before Friendly, Feinberg and Oakes, *Circuit Judges*.

[418] Friendly, *Circuit Judge:*

On November 28, 1969, the Federal Trade Commission made a certificate to the Attorney General pursuant to § 16 of the Federal Trade Commission Act, 15 U.S.C. § 56. The Commission's letter stated it had reason to believe The J. B. Williams Company (Williams) and Parkson Advertising Agency, Inc. (Parkson) were liable for penalties under § 5(*l*) of the Act, 15 U.S.C. § 45(*l*)[1] for violation of a cease and desist order for which the Sixth Circuit had granted enforcement,

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[1] Throughout this litigation, § 5(*l*) read:

(*l*) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action

J. B. Williams Co. v. *FTC*, 6 Cir., 381 F. 2d 884 (1967), and recommended that the Attorney General institute "appropriate proceedings . . . for recovery of civil penalties as prescribed in said section." The appropriate proceedings were described in a draft complaint, which alleged 100 violations and sought "[j]udgment against defendants in the total sum of $500,000."

Five months later the Government began this action; the complaint alleged the same 100 violations, but unlike the Commission's draft complaint, demanded judgment for $500,000 against each defendant. The defendants answered and demanded a jury trial. Subsequently, the Government moved for summary judgment. Judge Motley granted this in the sum of $456,000 against Williams and $356,000 against Parkson with leave to Parkson to apply to pay its penalties in installments with interest, 354 F. Supp. 521 (S.D.N.Y. 1973). The defendants have appealed.

I. *The Facts*

The instant controversy began with the issuance of a complaint by the FTC in December 1962 relating to defendants' newspaper and television advertising for Geritol, an iron and vitamin product. The gist of the complaint was that the advertising gave the impression that Geritol was an effective general remedy for tiredness, loss of strength or a rundown feeling, whereas in fact it was effective only in the small minority of cases where these conditions were caused by a deficiency in iron or in the vitamins contained in Geritol. After proceedings which it is unnecessary here to detail, the FTC issued a cease and desist order on September 28, 1965. Paragraph 1(d), which both sides agree to be the broadest paragraph of the order, is set forth in the margin.[2] Williams and **[419]** Parkson petitioned for review of

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brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

Late last year § 5(*l*) was amended, although the basic structure of the penalty provision remained unchanged. Introduced by Senator Jackson as a rider to the Trans-Alaska Pipeline Authorization Act, 87 Stat. 576 (Nov. 16, 1973), the amendment extended the penalty clause to all Commission orders rather than merely cease and desist orders, increased the maximum penalty per violation to $10,000, and empowered the district courts to grant injunctive relief in the enforcement of Commission orders.

[2] "(d) which represents directly or by implication that the use of such preparation will be beneficial in the treatment or relief of tiredness, loss of strength, run-down feeling, nervousness or irritability, unless such advertisement expressly limits the claim of effectiveness of the preparation to those persons whose symptoms are due to an existing deficiency of one or more of the vitamins contained in the preparation, or to an existing deficiency of iron or to iron deficiency anemia, and further, unless the advertisement also discloses clearly and conspicuously that: (1) in the great majority of persons who experience such symptoms, these symptoms are not caused by a deficiency of one or more of the vitamins contained in the preparation or by iron deficiency or iron deficiency anemia; and (2) for such persons the preparation will be of no benefit;"

the order under § 5(c) of the FTC Act, 15 U.S.C. § 45(c). In the review proceeding, the Sixth Circuit directed that the order be enforced except for a provision directing the petitioners to cease and desist from representing that iron deficiency or iron deficiency anemia can be self-diagnosed without a medical test. *J. B. Williams Co.* v. *FTC*, *supra*, 381 F. 2d at 891. The FTC entered a modified order on November 24, 1967. Williams and Parkson did not seek certiorari.

In October 1968, after receiving appellants' first compliance report, the FTC directed a public hearing on compliance. At the hearing it viewed representative Geritol television commercials and heard argument. Subsequently it issued an opinion in which it concluded that the advertising continued "to treat that portion of the population suffering from tiredness as equal to that portion of the population which experience tiredness due to iron deficiency anemia." The principal basis for that conclusion was that although the television commercials had dutifully announced that "the great majority of tired people don't feel that way because of iron-poor blood and Geritol won't help them," the effect of this disclaimer was largely obliterated by the visual presentation and by such phrases as "but it *is* a medical fact that many of the millions of people who have iron-poor blood are tired and need Geritol" (emphasis in original) or "but millions do have iron-poor blood and you could be one of the many who are tired for that reason and need Geritol." The FTC advised that "in order to avoid future enforcement proceedings" Williams and Parkson should immediately discontinue the broadcast of the television commercials provided the Commission or any similar ones. The Commission also directed Williams and Parkson to file a further compliance report by January 31, 1969.

The second compliance report stated that the company was currently using only three different television commercials (subsequently termed the "AA" advertisements), scripts of which were submitted with the report. These commercials warned viewers that they might be suffering from "iron-poor blood" and focused on Geritol's ability to cure iron deficiency. They spoke of Geritol's "blood-building power" and of its capacity to build "iron power in your blood fast." The report also described and included scripts for five other commercials (subsequently termed the "BB" advertisements), which were no longer being disseminated but which the company believed to be in compliance. Williams and Parkson included in the report a request to meet promptly with Commission representatives in order to facilitate the preparation of new advertising themes. On May 8, 1969, the Chief of the FTC's Compliance Division wrote Williams' counsel that "the Commission would be favorably disposed to accepting as compliance with its order to cease and desist the absolute discontinuance by J. B. Williams Company, Inc., of the BB advertisements submitted with your last report and the continued use of the AA advertisements only with deletion from them of all references to 'power'." [3] The letter also advised that Williams would have to eliminate all references in its labeling to prevention of tiredness. A week later, on May 15, counsel wrote that Williams and Parkson were willing to accept these conditions, although they did not concede either that the BB advertisements or the use of the word "power" in the AA advertisements violated the order. Counsel also agreed to the omission of all labeling references to **[420]** Geritol's ability to prevent tiredness, although not conceding "that the Commission's Order relates in any way to preventative claims." On June 6, the Commission wrote counsel,[4] acknowledging receipt of the May 15 letter, stating it was "of the view that the 'AA' commercials will comply with the order if all references to 'power' are deleted," and requesting another report within 30 days.[5]

The third compliance report, submitted on July 2, 1969, stated that Williams and Parkson had decided to stop using the AA commercials rather than revise them to eliminate the word "power"; that "[t]he process of removing these commercials from the air and substituting others for them was commenced promptly and was completed during June"; and that the word "power" would be deleted if the AA commercials were to be used again. In accordance with the Commission's request, Williams submitted scripts of television commercials and other promotional materials currently in use.

Shortly thereafter a new ground for controversy arose. Counsel advised the Commission that Williams was test-marketing a new product called FemIron. The Compliance Division asked for the formula and for copies of all current and proposed advertising materials. The company promptly responded, noting that FemIron was a food supplement, not a drug or tonic; that it did not contain vitamins, as Geritol does; that it was intended not to treat iron deficiency but merely to provide a supplemental source of iron for women in the child-bearing years. The letter suggested that for these reasons FemIron was not within the provisions of the cease and desist order making the order applicable not only to Geritol but to "any other preparation of substantially similar composition or possessing substantially similar properties, under whatever name or names sold." On July 16, a member of the Division of Compliance responded, indicating that the Commission's Division of Scientific Opinions believed that FemIron and Geritol possessed substantially similar properties. The letter indicated that the Commission would consider FemIron's status, whether the FemIron advertising violated the order, and, if so, "what action should be taken." On September 3 the FTC formally rejected the third compliance report. The Commission concluded that several of the Geritol commercials violated the cease and desist order and that FemIron was subject to the order. The letter stated an investigation would be made to obtain evidence of violations "for use in possible enforcement proceedings."

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[3] The Chief of the Compliance Division stated he was instructed to advise that Commissioner Elman dissented "from the foregoing action."

[4] The letter was received on June 9.

[5] On June 25 the Commission issued a formal statement, from which Commissioners Elman and Nicholson dissented. The former had filed an opinion arguing that the Commission should have requested the Attorney General to file an action for civil penalties.

The draft complaint which the FTC submitted to the Attorney General and the complaint which he subsequently filed alleged violations of three different types. Counts 1 through 4 related to the use of several of the AA commercials, without deletion of the word "power", between June 10 and June 20, 1969. Treating each day's exhibition of a different commercial as the unit of violation, the draft complaint sought penalties under these counts totaling $80,000; the final complaint sought that sum from each defendant. Counts 5–9 related to commercials of a new type submitted in the third compliance report, referred to as the "sad-glad" commercials, which were aired at various times between June 2 and September 8, 1969. In Counts 5 through 7 the unit for determining what constituted a violation was the same as in Counts 1 through 4; the penalties sought for these totaled $220,000 from each defendant. However, in Counts 8 and 9 the complaint used a more severe system of calculating penalties. It counted each broadcast, on June 2, 3, 4 and 6, as a separate violation; apparently the reason for the greater severity was that these commer[**421**]cials used the terms "blood-building power" and "iron power," as the AA commercials had done. The Government demanded penalties of $45,000 from each defendant on these counts. Counts 10 and 11 concerned two different FemIron commercials that were disseminated on various dates between September 2 and October 1. Here the unit of violation reverted to that used in the earlier counts; the penalties against each defendant aggregated $155,000. For all counts the penalties sought were thus $500,000 from each defendant. As stated earlier, the court granted summary judgment for $456,000 against Williams and $356,000 against Parkson. Rather than summarize the court's opinion here, we will discuss each of its rulings in connection with the various points of appeal raised by defendants.

II. *Appellants' Sixth Amendment Claims*

[1] The district court properly rejected appellants' claim that jury trial was required and summary judgment precluded because an action

to recover penalties under § 5(*l*) of the Federal Trade Commission Act is criminal in nature.

In many instances Congress has provided, as a sanction for the violation of a statute, a remedy consisting only of civil penalties or forfeitures; in others it has provided the usual criminal sanctions of a fine, imprisonment or both; in still others it has provided both criminal and civil sanctions. When Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word. This seems to us the clear intendment of *Hepner* v. *United States*, 231 U.S. 103, 29 S. Ct. 474, 53 L. Ed. 720 (1909); *United States* v. *Regan*, 232 U.S. 37, 34 S. Ct. 213, 58 L. Ed. 494 (1914), and *Helvering* v. *Mitchell*, 303 U.S. 391, 398–405, 58 S. Ct. 630, 82 L. Ed. 917 (1938). *Cf. United States* v. *St. Regis Paper Co.*, 355 F. 2d 688, 693 (2 Cir. 1966).

Appellants urge us to overlook Congress' express characterization of § 5(*l*) as a "civil" action and to hold the sanction imposed in this case criminal because of its allegedly punitive purpose. While Congress could not permissibly undermine constitutional protections simply by appending the "civil" label to traditionally criminal provisions, the statute here at issue is plainly not of that class. In the face of a long line of contrary authority, appellants have not directed our attention to any civil penalty provision that has been held sufficiently "criminal" in nature to invoke the protections of the Sixth Amendment.[6] Although appellants insist that the large size of the judgment entered below could have served no legitimate civil purpose, that argument is more fittingly addressed to the question whether the district court abused its discretion in assessing such a large penalty, see part VIII, *infra*.

III. *Appellants' Right to a Civil Jury Trial of Disputed Issues of Fact*

Appellants argue in the alternative that they were entitled to a jury trial under F.R.Civ.P. 38(a) which preserves inviolate "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States." That claim would, of course, be academic if, as the district court held, there were no triable issues of fact. *Hepner* v. *United States*, *supra*, 213 U.S. at 112–115. Since, for reasons detailed in the following section of this opinion, we hold that there were triable fact questions and a remand will thus be required, it is convenient to deal with the civil jury trial issue here.[7]

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[6] Whatever doubts lower courts may have had about the quasi-criminal nature of the early penalty clauses in various railroad regulation statutes, see part III, *infra*, were resolved in *Hepner* v. *United States*, supra, and *Chicago, Burlington & Quincy Ry.* v. *United States*, 220 U.S. 559, 578, 31 S. Ct. 612, 55 L. Ed. 582 (1911).

[422] Apparently there is only one reported decision where a court has squarely faced this question under § 5(*l*) of the FTC Act. In *United States* v. *Hindman*, 179 F. Supp. 926 (D.N.J. 1960), the court held that the defendant in a civil penalty suit under § 5(*l*) has a right to have a jury determine whether he has violated the terms of an FTC order when there is a triable dispute on that question. Against this is dictum from a Third Circuit decision, *United States* v. *Vulcanized Rubber & Plastics Co.*, 288 F. 2d 257, 258–259 n. 2 (3 Cir.), *cert. denied*, 368 U.S. 821, 82 S. Ct. 38, 7 L. Ed. 2d 26 (1961). The *Vulcanized Rubber* court affirmed a district court's grant of summary judgment to the Government in a § 5(*l*) case where, as the court of appeals held, "there was no issue of fact presented." However, in a footnote dictum two judges branded *Hindman* as erroneous. The criticism was based on two grounds: (1) that "the sole issue before the court [in *Hindman*] was whether or not the labeling practice was within the proscription of the order and not whether the labeling practice was deceptive," and (2) that "creating an issue of fact as the court did in *Hindman*, would usurp the function exclusively vested by Congress in the Federal Trade Commission to determine the issue of whether a labeling practice is misleading or deceptive to the public." While the first proposition is true enough in itself, it manifests some confusion. The district judge in *Hindman* fully agreed that the only issue before him was whether the order covered the practice in question; as to that issue he held that there was a triable factual dispute.[8] The second proposition seems unsound as applied to enforcement proceedings unless Congress has vested the FTC with power not only to make orders but to determine whether they have been violated—a position which was not taken by the Government although it is approximated by the dissent. No decision has ever intimated such a view. In *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 54, 68 S. Ct. 822, 832, 92 L. Ed. 1196 (1948), while insisting that the Commission has power to determine all issues essential to the issuance of an order subject only to judicial review on a substantial evidence standard, the Supreme Court recognized that "the enforcement responsibility of the courts, once a Commission order has become final either by lapse of time or by court approval, 15 U.S.C. §§ 21, 45, is to adjudicate questions concerning the order's violation . . ." Nothing was said in *Morton Salt* to indicate that the court's adjudication of violations of FTC orders, whether in contempt proceedings in a court of appeals or in penalty actions under § 21(*l*) or 45(*l*) in a district court, was to be more trammeled than in any other case where a court is given plenary powers of adjudication as distinguished from review of administrative action—much less, as was seemingly indicated in the *Vulcanized Rubber* dictum, that the Commission's determination was conclusive. In any event a district court decision and a dictum of two judges of the court of appeals of another circuit adversely reflecting upon it are scarcely dispositive either way, and thorough examination of the problem is thus in order.

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[7] It is not altogether clear whether Judge Motley decided this issue. At one point she said, 354 F. Supp. at 529, that "precedents in both the Supreme Court and the Court of Appeals for this circuit convince the court that the instant action is so analogous to a civil contempt proceeding that no jury trial can or should be required here." But later, 354 F. Supp. at 533 n. 6, after referring back to this passage, she stated, "In any case, the court need not reach this question, since the court holds *infra* that no dispute of material fact remains to be resolved."

[8] Professor Jaffe suggests that the court of appeals thus misunderstood what the district court had done in *Hindman*. He states, Judicial Control of Administrative Action 319 n. 237 (1965):

> The jury was to decide whether in the opinion of purchasers the questioned phrase meant the same thing as the proscribed one. Who better than a lay customer to decide?

[2] There can be no doubt that in general "there is a right of jury trial when the United States sues . . . **[423]** to collect a penalty, even though the statute is silent on the right of jury trial," 5 Moore, Federal Practice ¶ 38.31[1], at 232–33 (1971 ed.). The leading case supporting this proposition is *Hepner* v. *United States*, *supra*, 213 U.S. at 115, where the Court had no difficulty in concluding that in an action to collect a $1,000 penalty assessed for a violation of the Alien Immigration Act, "[t]he defendant was, of course, entitled to have a jury summoned." See also *United States* v. *Regan*, *supra*, 232 U.S. at 43–44, 47.

Many cases, arising under a broad range of other civil penalty and forfeiture provisions, have reached the same conclusion. In The Sarah, 8 Wheat. 391, 21 U.S. 391, 5 L. Ed. 644 (1823), the Court held that when goods were seized on land, a statutory libel of information entitled the defendant to a jury trial. The Court has consistently held since then that forfeitures occurring on land are civil actions at law, entitling the parties to a jury unless it was waived. *United States* v. *Winchester*, 99 U.S. 372, 374, 25 L. Ed. 479 (1878); *443 Cans of Frozen Egg Product* v. *United States*, 226 U.S. 172, 183, 57 L. Ed. 174 (1912); *C. J. Hendry Co.* v. *Moore*, 318 U.S. 133, 153, 63 S. Ct. 499, 87 L. Ed. 663 (1943). Similarly, actions for statutory penalties have been held to entail a right to jury trial, even though the statute is silent,[9] both where the amount of the penalty was fixed and where it was subject to the discretion of the court, see, *e.g.*, *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 178 F. 12 (8 Cir. 1910) (28-hour law); *Connolly* v. *United States*, 149 F. 2d 666 (9 Cir. 1945) (penalty under 25 U.S.C. § 179); *United States* v. *Jepson*, 90 F. Supp. 983, 984–986 (D.N.J. 1950) (Emergency Price Control Act of 1942); *United States* v. *Friedland*, 94 F. Supp. 721 (D. Conn. 1950) (Housing and Rent Act of 1947); *United States ex rel. Rodriguez* v. *Weekly Publications*, 9 F.R.D. 179 (S.D.N.Y. 1949) (*qui tam* action to recover statutory penalty for making a false claim against the Government).[10] Nothing to the contrary was determined in *Wirtz* v. *Jones*, 340 F. 2d 901, 904–905 (5 Cir. 1965), on which the Government relies. There the court, speaking through our brother Anderson, held that, despite decisions that suits by employees or by the Secretary of Labor at their request under § 16 (b) and (c) of the Fair Labor Standards Act for minimum wages and overtime pay entailed the right to jury trial, a different result ensued when the Secretary of Labor sued under § 17 "to restrain violations of section 15 of this title, including in the case of violations of section 15(a)(2) of this title the restraint of [**424**] any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter." Congress having made its intentions to have a court trial entirely clear, the court stated that "[t]he Seventh Amendment does not require Congress to blunt the most competent means of insuring general compliance with a key section of the Act by depriving the equity courts of a significant part of their inherent power."

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[9] The cases since the adoption of the Federal Rules generally do not discuss whether the right accrues under the provision of F.R. Civ. P. 38(a) relating to the Seventh Amendment or the provision relating to a statute. This is natural in light of the settled principle that "although a federal statute may not in express terms provide for a jury trial, it may create a cause of action, essentially legal, with an attendant right of trial by jury." See 5 Moore, Federal Practice ¶ 38.12, at 128.25 & n. 10 (1971). In that event the courts imply an intention to allow jury trial, see *Damsky* v. *Zavatt*, 289 F. 2d 46, 52 (2 Cir. 1961).

In *Curtis* v. *Loether*, 415 U.S. 189, 94 S. Ct. 1005, 1008, 39 L. Ed. 2d 260, 42 U.S.L.W. 4259, 4261 (1974), the Supreme Court recently gave broad scope to the entitlement to a jury trial in actions for the enforcement of rights provided by twentieth-century statutes. The Court there held that the Seventh Amendment applies to actions for damages under § 812 of the 1968 Civil Rights Act, 42 U.S.C. § 3612, reasoning that the right to jury trial attaches generally to actions enforcing statutory rights, "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." The statute there in question provided that "[t]he court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees." Although the Court found the language and the legislative history of the statute ambiguous, it held the mandate of the Seventh Amendment squarely applicable. Administrative adjudications such as NLRB backpay awards are distinguishable, the Court wrote, because in administrative proceedings "jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the [agency's] role in the statutory scheme." When the district court rather than the agency is assigned the adjudicative responsibility, however, and there is "obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law." [11]

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[10] Several of these cases were cited by this court in *Damsky* v. *Zavatt*, *supra*, 289 F. 2d at 51, in support of the proposition that "The right to jury trial exists in actions by the United States where it would in a similar action between private parties."

There is some contrary district court authority under the Emergency Price Control Act of 1942, *Creedon* v. *Arielly*, 8 F.R.D. 265, 268 (W.D.N.Y. 1948), and the Housing and Rent Act of 1947, *United States* v. *Shaughnessy*, 86 F. Supp. 175 (D. Mass. 1949); *United States* v. *Friedman*, 89 F. Supp. 957, 961 (S.D. Iowa 1950). However, these cases and the reasoning behind them have been sharply criticized, see 5 Moore, Federal Practice ¶¶ 38.11 [7], at 128.2, 38.37 [1], at 307–08 & nn. 11, 13; *Tanimura* v. *United States*, 195 F. 2d 329 (9 Cir. 1952); *Leimer* v. *Woods*, 196 F. 2d 828 (8 Cir. 1952); *United States* v. *Hart*, 86 F. Supp. 787 (E.D. Va. 1949); *United States* v. *Strymish*, 86 F. Supp. 999 (D. Mass. 1949); *United States* v. *Mesna*, 11 F.R.D. 86 (D. Minn. 1950); cf. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 401–402, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946).

[3] Not being able seriously to dispute that an action to recover a statutory penalty generally carries the right to a jury trial, the Government seeks to distinguish an action under § 5(*l*) because the penalties are collected for violation not of a statute but of an order of an administrative agency.[12] It is common ground that jury trial would not have been required if the FTC had sought an order of civil contempt in the Sixth Circuit.[13] The Government argues that § 5(*l*) was intended simply to provide an alternative means of enforcement and thus should not be read to invoke different procedures.[14] A short and

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[11] Still further support for our position is found in the Supreme Court's decision in *Pernell* v. *Southall Realty*, 416 U.S. 363, 94 S. Ct. 1723, 40 L. Ed. 2d 198 (1974). The Court noted that while Congress could have chosen to entrust landlord-tenant disputes "to an administrative agency," it instead provided that those disputes should be brought "as ordinary civil actions"; accordingly, the Court held, the Seventh Amendment required that a jury trial be available on demand. Section 5(*l*) of the FTC Act provides for just such a "civil action."

[12] We put it this way rather than "order of a court", see 15 U.S.C. § 45(c) ["To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission"], because § 5(*l*) applies equally when a FTC order becomes effective through failure of the aggrieved party to seek review.

[13] Very likely this would also be true in a proceeding for criminal contempt unless the Government sought imprisonment of more than six months. See *Cheff* v. *Schnackenberg*, 384 U.S. 373, 86 S. Ct. 1523, 16 L. Ed. 2d 629 (1966).

[14] We cannot forbear an expression of wry amusement at the Government's statement "that Congress did not require the Government to bring a proceeding before the already overburdened Sixth Circuit Court of Appeals." We are at a loss to understand how judicial loads were in any way lessened by the Government's bringing a proceeding which must have required a great many hours of study by a busy district judge and has demanded many more by a court of appeals quite as "overburdened" as the Sixth Circuit, which already was familiar with the case and could have proceeded without being obliged to consider most of the difficult questions here presented.

probably sufficient answer would be that if in **[425]** authorizing a civil suit by the chief law officer of the Government, a procedure which had always been thought to entail a right of jury trial, Congress had wished to withhold it (assuming *arguendo* that it could), Congress would have said so in unmistakable terms and not left this as a secret to be discovered many years later. At the very least, such a conclusion would require evidence in the legislative history that Congress intended the procedure under § 5(*l*) to be the same as in a civil contempt proceeding. A study of the development of the civil penalty provision in the FTC Act suggests just the opposite.

Section 5(*l*) was part of the Wheeler-Lea Act of 1938, 52 Stat. 111, which amended the original Federal Trade Commission Act of 1914. The Wheeler-Lea Act was directed mainly at extending the Commission's authority to reach all unfair and deceptive practices whether or not they had an anticompetitive effect, thereby overruling the restrictive interpretation given to the 1914 act in *FTC* v. *Raladam Co.*, 283 U.S. 643, 51 S. Ct. 587, 75 L. Ed. 1324 (1931). In addition, the 1938 amendments added a number of provisions intended to make the FTC's orders more effective. They provided that an FTC order would become final either after review and approval by a court of appeals or after the time for seeking review had expired, § 5(g); the Commission would no longer be required to prove a second violation before obtaining judicial enforcement of its order. In addition, the Wheeler-Lea Act empowered the reviewing court to issue an injunction *pendente lite* to prevent harm to the public, § 5(c); it established criminal penalties for violation of the statute under certain limited circumstances, § 14 (a); and it enabled the Commission to cause the institution of an action to recover a civil penalty for violation of the Commission's final orders, §§ 5(*l*), 16. The civil penalty provision was devised to complement the circuit court's contempt power, which had previously been the sole means of remedying violations. If the party sought review of the Commission's order in the court of appeals and the order was enforced there, the Commission could seek to remedy any subsequent violation of the order either through contempt proceedings before the court that enforced the order or through an action for recovery of the Civil penalty. If the party did not contest the order by seeking review in the court of appeals, the Commission's sole civil remedy for any subsequent violation would be through the penalty action.

The Wheeler-Lea bill underwent a number of false starts before it was finally enacted in 1938. The first version, S. 994, 74th Cong., 1st Sess., which was introduced in 1935, contained only the germ of the ultimate Act—it did nothing more than extend the FTC's authority to include unfair or deceptive practices in or affecting commerce, whether or not they adversely affected competition. That bill died on the Senate calendar. By the next year, the bill had grown to approximately its final size, with the addition of many of the procedural revisions that survived to enactment. That bill, S. 3744, 74th Cong., 2d Sess. (1936), contained a civil penalty clause roughly similar to the one ultimately enacted, although the penalties were much smaller and were set as fixed sums. According to that provision, after the Commission's order had become final any violation of the order would subject the offender to "a penalty of $500 for each such offense and of $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States." After passing the Senate, 80 Cong. Rec. 6603 (May 4, 1936), the bill died in the House Interstate and Foreign Commerce Committee. Two [**426**] companion and successor bills, H.R. 10385, 74th Cong., 2d Sess. (1936), and H.R. 3143, 75th Cong., 1st Sess. (1937), also died in committee. Finally, a parallel House bill was proposed, H.R. 5854, 75th Cong., 1st Sess. (1937), which contained language very similar to that finally adopted, but provided variable rather than fixed penalties. For violation of a final order, the penalty clause in that bill would have required a violator to "forfeit and pay to the United States a civil penalty of not more than $1000 and of not more than $50 for each day such failure continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States." This bill also died in committee. Finally, in 1938 the sponsors introduced S. 1077, 75th Cong., 1st Sess., the bill that was ultimately enacted. The first version of S. 1077, however, contained the earlier civil penalty clause providing for a flat $500 penalty and an additional penalty of $25 per day for violation of Commission orders. See S. Rep. No. 221, 75th Cong., 1st Sess. (1937). The House Committee objected, apparently considering the penalty too small, and substituted its own version, H.R. Rep. No. 1613, 75th Cong., 1st Sess. (1937). Under the House proposal, the maximum penalty would be $5000, but the court could assess lower penalties if the circumstances warranted. The conference committee adopted the House's version without comment, H. Rep. No. 1774, 75th Cong., 3d Sess. (1938), and in that form S. 1077 became law.

The principal debate about § 5(*l*) occurred in the House of Representatives between the bill's sponsor, Representative Lea, and Representative Kenney, who was urging that the bill be amended to include additional penalties, 83 Cong. Rec. 405–06 (Jan. 12, 1938). Representative Kenney's proposal would have provided for a flat $3000 civil penalty to be imposed on anyone violating § 12, the advertising section of the Act. Representative Lea objected to such a penalty on the basis that it would clog the courts and that it would risk punishing businessmen who inadvertently violated the law but were willing to conform if their violation was pointed out to them by the Commission. "The man with good intentions," Representative Lea remarked, "should not be penalized before he has had a chance to correct his mistake." 83 Cong. Rec. 392. Later in the debate, Representative Lea commented that the proposal to impose a civil penalty directly for violation of the statute "is not the practical way to deal with businessmen. This is going to destroy the principal virtue of the Federal Trade Commission procedure, which is to give the honest businessman a chance to adjust his difference without harassing him or bringing him into court, with the expense involved by such proceedings." 83 Cong. Rec. 406. Representative Halleck was of a similar view, 83 Cong. Rec. 401:

> The very fact that broad language is used [in the statute] should indicate to all of us, it seems to me, that we should not in every case inflict a criminal penalty or a civil penalty of a $3000 fine upon any person who happens unintentionally to violate the act. It is my idea that the committee had in mind when drafting this penalty clause the fact, which I think is clearly evident, that honest business people who are trying to operate honestly and within the law may inadvertently violate provisions of this bill. Certainly those people should not be prosecuted, hauled into Federal court and immediately subjected to the criminal prosecution urged here by some.

We see nothing in any of this to indicate that, in utilizing the historic remedy of a civil penalty for violations of FTC orders, including orders that had become final without having been affirmed by a court, Congress intended to strip the remedy of any of its traditional accoutrements, including the right to a jury trial of fairly disputed issues of fact—not, of course, as to the validity of the order but as to the fact of violation. Congress gravitated between small fixed penalties and a large maximum penalty, **[427]** apparently without any thought that the difference would have any effect on the procedure to be followed in enforcement actions.[15] If there is a word in the three years of legislative history suggesting that procedure under this penalty statute should differ from that which had been recognized in governmental forfeiture and penalty suits for over a century, we have not found it.

The conclusion that Congress did not intend a change in established practice is fortified by another bit of evidence. In both the reports and the debates, the sponsors of the Wheeler-Lea bill represented that the civil penalty provision was modeled on a similar provision in the Packers and Stockyards Act of 1921. See S. Rep. No. 1705, 74th Cong. 2d Sess. 7 (1936); H.R. Rep. No. 1613, 75th Cong. 1st Sess. 4

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[15] The Government attempts to distinguish *Hepner* v. *United States*, *supra*, on the ground that it involved a fixed penalty, while § 5(*l*) permits the district judge to determine the proper penalty up to a statutory maximum. The legislative background, however, demonstrates that Congress replaced the proposed fixed penalty with a variable one in order to give the penalty provision more flexibility, not to avoid the requirement of a jury trial.

(1937); 80 Cong. Rec. 6594 (1936) (Sen. Wheeler); 83 Cong. Rec. 397 (1938) (Rep. Reece). The provision in the Packers and Stockyards Act is clearly criminal and would thus ensure the defendant of a jury trial on demand. Although the dissent argues that the reference to the Packers and Stockyards Act constitutes only a "general reference to the fact that criminal sanctions were included in the Wheeler-Lea Amendments," that section was repeatedly cited as a model for § 5(*l*). In addition, the sponsors referred to a "similar provision" in the Securities Exchange Act of 1934, on which § 5(*l*) was modeled, 83 Cong. Rec. 397 (1938) (Rep. Reece). Despite the dissent's argument that the reference to the Securities Exchange Act was to the general review provisions, 15 U.S.C. § 78y(b), these would be so clearly irrelevant as to compel a conclusion that the reference was rather to the civil penalty provision, 15 U.S.C. § 78ff(b), added in 1936, establishing a $100 per day statutory penalty for any issuer of stock who failed to file with the Commission the information required in § 15(d) of the Act. Since it is incontrovertible that, under the *Hepner* line of cases, an issuer who denied liability would be entitled to a jury trial, this affords further evidence that the framers of the Wheeler-Lea amendments were not proposing anything different under § 5(*l*). A much older and more detailed model for § 5(*l*) was the civil penalty provision of the Hepburn Act of 1906, 49 U.S.C. § 16(8), which added to the Interstate Commerce Act a provision with language strikingly similar to § 5 (*l*):

> Any carrier, any officer, representative, or agent of a carrier . . . who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this title shall forfeit to the United States the sum of $5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

The following section, 49 U.S.C. § 16(9) provides that the forfeiture shall be payable to the United States, and "shall be recoverable in a civil suit in the name of the United States." While the question of jury trial under § 16(8) seems not to have arisen, courts applying similar civil penalty provisions in other contemporaneous railroad regulation statutes have granted jury trials without even questioning their availability. See, *e.g.*, *United States* v. *Atchison, Topeka & Santa Fe Ry.*, 163 F. 517 (8 Cir. 1908) (Safety Appliance Act); *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 178 F. 12 (8 Cir. 1910) (28-hour law); *United States* v. *Great Northern Ry.*, 220 F. 630, 136 C.C.A. 238 (7 Cir. 1915) (Hours of Service Law); *United States* v. *Kansas City Southern Ry.*, 202 F. 828, 835, 121 C.C.A. 136 (8 Cir. 1913) **[428]** (Hours of Service Law); *United States* v. *Northern Pacific Ry.*, 293 F. 657 (9 Cir. 1924) (Safety Appliance Act). It is hard to believe that at a time, before the *Hepner* decision, when the courts were having difficulty in concluding that penalty provisions were not actually criminal in nature, see *Johnson* v. *Southern Pacific Co.*, 117 F. 462, 54 C.C.A. 508 (8 Cir. 1902), *rev'd* on other grounds, 196 U.S. 1, 25 S. Ct. 158, 49 L. Ed. 363 (1904); *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 172 F. 194 (7 Cir. 1909); *United States* v. *Illinois Central R. R.*, 156 F. 182 (W.D. Ky. 1907), *rev'd*, 170 F. 542 (6 Cir.), *cert. denied*, 214 U.S. 520, 29 S. Ct. 700, 53 L. Ed. 1066 (1909), the civil penalty provision in § 16(8) of the Interstate Commerce Act was intended to deprive the defendant not only of his Sixth Amendment right to jury trial but of his Seventh Amendment right as well. Indeed, in the provision of the Hepburn Act for the enforcement of reparation orders, § 16(2), Congress had not gone further than to render the order *prima facie* evidence in an action where the defendant clearly had a right to jury trial, and the opinion sustaining this made it extremely doubtful the Court would have approved anything more drastic. See *Meeker* v. *Lehigh Valley R.R.*, 236 U.S. 412, 430–431, 35 S. Ct. 328, 59 L. Ed. 644 (1915).

Subsequent congressional enactments have shed no more light on the problem. In 1959 Congress extended the streamlined enforcement mechanism of the FTC Act to the Clayton Act. In revising § 11 of the Clayton Act, Congress followed the model of the Wheeler-Lea amendments almost to the letter, including the civil penalty provision, which became 15 U.S.C. § 21(*l*). As in the case of § 5(*l*), Congress apparently did not expressly confront the jury trial question, although in *United States* v. *Beatrice Foods Co.*, 344 F. Supp. 104, 111 (D. Minn. 1972), *aff'd*, 493 F. 2d 1259 (8 Cir. 1974), Judge Neville seemed to assume that factual disputes in penalty proceedings under both the Clayton Act and the FTC Act could be tried to a jury. Similarly, in amending § 5(*l*) last year, see note 1, *supra*, Congress gave no indication that it had ever intended the civil penalty provision to deny a jury trial when the fact of violation was fairly disputed.

[4] The dissent argues that according a jury trial would be inappropriate in a § 5(*l*) proceeding, citing one of the three factors referred to a footnote in *Ross* v. *Bernhard*, 396 U.S. 531, 538 n. 10, 90 S. Ct. 733, 738, 24 L. Ed. 2d 729 (1970), "the practical abilities and limitations of juries." The argument is that allowing a jury trial of disputed issues of fact would interfere with according appropriate deference to the FTC's determination that a violation had occurred. Reference is made to the recognized principle that much weight is to be given the judgment of the FTC in framing remedial orders, *e.g.*, *FTC* v. *National Lead Co.*, 352 U.S. 419, 429, 77 S. Ct. 502, 1 L. Ed. 2d 438 (1957); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, 85 S. Ct. 1035, 13

L. Ed 2d 904 (1965), a principle which, of course, is in no way unique to that agency, see, *e.g., Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 198, 61 S. Ct. 845, 85 L. Ed. 1271 (1941); *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 115, 118, 67 S. Ct. 133, 91 L. Ed. 103 (1946); *NLRB* v. *Seven-up Bottling Co.*, 344 U.S. 344, 346–350, 73 S. Ct. 287, 97 L. Ed. 377 (1953); *NLRB* v. *J. H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 263, 90 S. Ct. 417, 24 L. Ed. 2d 405 (1969).

[5–7] The first point in response is that the footnote in *Ross* v. *Bernhard* was part of an argument for applying the Seventh Amendment right to a jury trial where it had not been recognized before the merger of law and equity—not a suggestion that a type of statute which had uniformly been held to carry the right of jury trial should now be construed to eliminate it. A second is that while "the practical abilities and limitations of juries" may present problems in a complex action of accounting, see *Dairy Queen* v. *Wood*, 369 U.S. 469, [**429**] 478, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962), or in estimating damages awarded in lieu of the injunction in an intricate securities suit, see *Crane Co.* v. *American Standard, Inc.*, 490 F. 2d 332, at 343–345 (2 Cir. 1973), those problems do not arise when the jury is asked to determine only whether a television commercial has made various forbidden representations. In any event, the "limitations of juries" is only one of three factors mentioned in the footnote, and the two others, custom before the merger of law and equity, and "the remedy sought," here point strongly toward jury trial. A third answer to the dissent is that its argument proves too much; many actions under § 5(*l*) could present the most elementary factual questions, such as whether the defendant did or did not commit the acts charged (*e.g.*, if defendants here contended that a television station had broadcast commercials in the face of their disapproval.) These issues are the very sort which juries are traditionally called on to resolve.[16] But the fundamental failing in the argument is that Congress has not required deference to an agency's claim that its order has been violated, *NLRB* v. *Dell*, 309 F. 2d 867 (5 Cir. 1962) (Tuttle, Chief Judge); indeed, in contempt proceedings the burden on an agency claiming a violation is not the burden usual in civil cases but that of demonstrating a violation by "clear and convincing evidence," *NLRB* v. *Local 282, Teamsters*, 428 F. 2d

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[16] The district judge seemed to recognize that factual questions such as these would call for a jury. She cited two § 5(*l*) cases from the District of Maryland in which juries had been empanelled, *United States* v. *Americana Corp.*, Civ. No. 10858 (D. Md. 1960); *United States* v. *Fire Safety Devices*, Civ. No. 13254 (D. Md. 1962). She distinguished those cases, on the ground that "they involved the factual question of what *oral* representations were made by employees of the companies being sued. . . . Here, in contrast, the actual advertisements sued upon are before the court and their dissemination is undisputed." 354 F. Supp. at 533 n. 7. However, when there is a right to a jury trial, it extends to all kinds of questions of fact, not simply to some.

994, 1001–1002 (2 Cir. 1970); *NLRB* v. *Local 825, Operating Engineers*, 430 F. 2d 1225, 1229–1230 (3 Cir. 1970), *cert. denied*, 401 U.S. 976, 91 S. Ct. 1200, 28 L. Ed. 2d 326 (1971). While Congress placed the usual substantial evidence rule in § 5(c) of the FTC Act, dealing with judicial review of orders, it made no similar provision in § 5(*l*) with respect to determining the fact of violation.

This court's statement in *United States* v. *St. Regis Paper Co., supra*, 355 F. 2d at 693, that "[t]he duty and responsibility for determining what business practices fall within the purview of Section 5 and for determining whether cease and desist orders issued to eliminate the anti-competitive effects of those practices have been complied with or violated was delegated solely to the FTC," must be read in context. The court was there discussing the division of authority between the Commission and the Attorney General, not the division of authority between the Commission and the judiciary. The next sentence in the opinion makes this abundantly clear:

> While one objective of the 1938 Wheeler-Lea amendment, including Section 5(*l*), was to "streamline" the procedure for enforcing the Commission's cease and desist orders, it is nowhere indicated that Congress by providing a civil penalty enforcement procedure intended to transfer the responsibility for interpreting and investigating violations of such orders to the Attorney General.

[8] The court was not saying that the FTC was to be judge as well as prosecutor or even that its *ex parte* determination of violation was entitled to weight in an adjudication proceeding before a court.[17] Initiation of proceedings [**430**] under § 5(*l*) does not give the Commission's request a force it would not have in a petition for contempt. That being so, we see no practical difficulty in having a jury decide what television commercials mean—a task for which they have more experience than most judges. See Jaffee, *supra* note 8. Perhaps it would be wiser for Congress to allow the FTC to impose penalties for violations of its orders, subject to limited judicial review, as it has done in some other cases, see, *e.g.*, § 271 of the Immigration and Nationality

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[17] We fail to see what support for the dissent can be found in either *Holloway* v. *Bristol-Myers Corp.*, 485 F. 2d 986 (D.C. Cir. 1973), or *Farmington Dowel Prods. Co.* v. *Forster Mfg. Co.*, 421 F. 2d 61 (1 Cir. 1970). In *Holloway*, the court refused to imply a private right of action to enforce the unfair or deceptive practices sections of the FTC Act. There is virtually no discussion of § 5(*l*), and nothing in the court's opinion suggests that the Act should be read to bar a jury trial in a civil penalty suit. The dissent refers to a passage in which Judge Leventhal notes that the "substantive prohibitions of the statute are inextricably intertwined with provisions defining the powers and duties of [the FTC, which is] charged with its enforcement." 485 F. 2d at 989, but we see nothing in that excerpt either alone or in context to suggest that the FTC's conclusion that a defendant has violated a final cease and desist order should be given controlling weight in a § 5(*l*) proceeding. Similarly, the excerpt quoted from the *Farmington Dowel* case, 421 F. 2d at 75, simply recites the settled principle that a defendant in a civil penalty suit cannot collaterally attack the validity of the underlying cease and desist order—a principle which we unqualifiedly accept despite the many contrary intimations in the dissent.

Act, 8 U.S.C. § 1321,[18] predecessors of which were held valid in *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 29 S. Ct. 671, 53 L. Ed. 1013 (1909), and *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329, 53 S. Ct. 167, 77 L. Ed. 341 (1932). What is decisive is that, with that avenue known to be open, and with the Supreme Court having just sustained the provision in the National Labor Relations Act of 1935 authorizing the NLRB to award back pay, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48, 57 S. Ct. 615, 81 L. Ed. 893 (1937), Congress in enacting § 5(*l*) took a course that had been uniformly held to entail a right to jury trial although, of course, only when there was a fair dispute over the fact of violation.

IV. *The Existence of Triable Issues of Fact*

[9, 10] As noted above, defendants' right to jury trial under F.R. Civ. P. 38(a) would be without consequence for this case if, as the district court held, the Government's suit presented no triable issues of fact.[19] Determination of this question requires consideration of the nature of the issues presented and the proofs submitted.

The issues are of two somewhat different types. One is whether the commercials in question violated the cease and desist order. The other is whether FemIron was within the reach of the order, which applied to "any other preparation of substantially similar composition or possessing substantially similar properties, under whatever name or names sold." The district court held both to be questions of law, 354 F. Supp. at 532, 535.

[11] In actuality both inquiries involve a two-step process—determining [**431**] what the order means, concededly a task for the court, and deciding whether the accused commercials or product come within the order as so construed. As we said in *Artvale, Inc.* v. *Rugby Fabrics Corp.*, 363 F. 2d 1002, 1005 (2 Cir. 1966), "[t]he common approach seeking to dichotomize all decisions as either 'law' or 'fact' is too sim-

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[18] See also Marine Mammal Protection Act, 16 U.S.C. § 1375(a); Occupational Safety and Health Act, 29 U.S.C. § 666(1); Natural Gas Pipeline Safety Act, 49 U.S.C. § 1678.

[19] Since we hold that several of the counts presented triable issues of fact, we would be bound to reverse the award of summary judgment even if jury trial were not required, see 6 Moore, Federal Practice, ¶ 56.02 [7], at 2040 (1972). The difference would simply be that the trial would be to a judge.

There is no question that under F.R. Civ. P. 56, whether in a jury trial or a trial to the court, the party opposing the summary judgment motion has a right to a full evidentiary hearing on all genuine issues of material fact. In a bench trial, this means that if the party opposing summary judgment raises any triable fact questions, he has the right to adduce the expert testimony of live witnesses and cross-examine his opponent's witnesses rather than to have to rely on the affidavits submitted in opposition to the summary judgment motion. *Colby* v. *Klune*, 178 F. 2d 872, 873–874 (2 Cir. 1949); *Hycon Manufacturing Co.* v. *H. Koch & Sons*, 219 F. 2d 353, 355 (9 Cir.), *cert. denied*, 349 U.S. 953, 75 S. Ct. 881, 99 L. Ed. 1278 (1955); *Hanley* v. *Chrysler Motors Corp.*, 433 F. 2d 708, 711 (10 Cir. 1970).

plistic." See also *In re Hygrade Envelope Corp.*, 366 F. 2d 584, 588 (2 Cir. 1966). The different stance of the two issues here stems in part from the fact that with respect to the commercials there is no dispute concerning the meaning of the order; the commercials would clearly be in violation, for lack of the required affirmative statement as to the small proportion of people who suffer from iron deficiency, if they conveyed the impression that Geritol (or FemIron if within the order) would be beneficial generally for relief of tiredness, etc. That issue thus involved less and the FemIron issue more of what a court can determine better than a jury, perhaps about the only satisfactory criterion for distinguishing "law" from "fact." See Traynor, *J.*, dissenting in *Loper* v. *Morrison*, 23 Cal. 2d 600, 611–612, 145 P. 2d 1, 6–7 (1944).

[12, 13] In determining whether the order applied to FemIron, the court was justified in giving a broad reading to the words "or any other preparation [of substantially similar composition or] possessing substantially similar properties," 354 F. Supp. at 531. The order must be interpreted in light of its principal purpose, namely, to prevent the company from representing that a product useful only in overcoming problems arising from insufficient iron in the blood will be efficacious when the same symptoms are due to entirely different causes. The order is to be construed as an instrument to that end, not as a pharmacopoeia. It is undisputed that FemIron does not contain the vitamins present in Geritol and that it contains substantially less iron. Through their experts' affidavits, the defendants urged that because of these differences, FemIron was of only "supplemental" value—it could serve only to prevent iron deficiency—while Geritol was "therapeutic"—it could remedy a current deficiency. These differences, however, are not significant in determining whether FemIron is subject to the order. The very argument that FemIron is too mild to treat the syndrome for which Geritol is intended demonstrates that the major difference between the two products is merely one of dosage. It would be senseless to hold that the defendants can avoid the Commission's order simply by a process of dilution and relabeling. For the purpose of determining whether FemIron was within the reach of the order, the defendants' affidavits were thus inapposite. If anything, the lower concentration of iron in FemIron would render any commercials suggesting that it will relieve tiredness even more misleading than similar Geritol commercials. We agree with the district court that defendants' claim that FemIron was not within the order raised no genuine issue of fact and was appropriately decided in the Government's favor on its motion for summary judgment.

[14–16] On the other hand, while we agree with the court's premise that the FTC did not have the burden of showing that the accused commercials, if within the order, were false and deceptive, we are unable to see how this leads to the conclusion, 354 F. Supp. at 535, that:

> Once the Commission establishes that a cease and desist order is in effect and that a particular advertisement has been disseminated which allegedly violates that order, it is for the court to determine as a matter of law whether the oral and/or visual content of the challenged advertisement falls within the scope of the prohibitions in the order.

The general rule is that when the meaning or effect of words or acts is fairly disputed, the question is for the trier of the facts, to be decided after hearing all material evidence, *Washington Post Co.* v. *Chaloner*, 250 U.S. 290, 293, 39 S. Ct. 448, 63 L. Ed. 987 (1919) (libel); *Albert Dickinson Co.* v. *Mellos Peanut Co.*, 179 **[432]** F. 2d 265, 269 (7 Cir. 1950) (likelihood of confusion). The district court sought to counter this by saying, 354 F. Supp. at 535 n. 11, that the issue was analogous to the interpretation of a writing in a contract action, which is considered to be an issue of law for the court, citing 4 Williston, Contracts, § 616, particularly at 648–649 (3d ed. 1961). However, we pointed out in *Meyers* v. *Selznick Co.*, 373 F. 2d 218, 221–223 (2 Cir. 1966), after referring to this very passage in Williston, that "the traditional formulation goes considerably beyond the authorities, at least for the federal courts."[20] In addition, the Restatement of Contracts (Second) § 238(2) (Tent. Draft No. 5, March 1970), rejects the absolute position taken by Williston and states that even in the case of an integrated written agreement, interpretation is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn therefrom. In any event, the interpretation of television commercials is not a subject on which a judge can do so much better than jurors that the issue should inevitably be taken from them as one of law. Neither is it an issue which, if triable to a judge, lends itself to summary judgment, unless, of course, the evidence would warrant a directed verdict. See *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 624, 64 S. Ct. 724, 88 L. Ed. 967 (1944); *Empire Electronics Co.* v. *United States*, 311 F. 2d 175, 180 (2 Cir. 1962); *American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 388 F. 2d 272, 279 (2 Cir. 1967); 6 Moore, Federal Practice ¶¶ 56.02 [10], 56.04 [2], 56.15.

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[20] The traditional formulation may well have been founded on the illiteracy of juries and, later, on their inability to understand the complex vocabulary characteristic of many written instruments. See S. Weiner, The Civil Jury Trial and the Law—Fact Distinction, 54 Calif. L. Rev. 1867, 1932 (1966). Such considerations obviously have no application to the viewing of television commercials.

The commercials, which we viewed in the presence of counsel[21] can be divided into three groups: Counts 1–4, the AA commercials; Counts 5–9, the "sad-glad" commercials, with Counts 8 and 9 as a sub-group because of their use of the word "power"; and Counts 10–11, the Fem-Iron commercials. Our consideration of these must be conducted in light of the admonition in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 393, 85 S. Ct. 1035, 1047, 13 L. Ed. 2d 904 (1965):

> If respondents in their subsequent commercials attempt to come as close to the line of misrepresentation as the Commission's order permits, they may without specifically intending to do so cross into the area proscribed by this order. However, it does not seem "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 [72 S. Ct. 329, 331, 96 L. Ed. 367].

[17, 18] In its letters of May 8 and June 6, the Commission indicated that it found nothing wrong with the AA commercials except that each of them twice used the word "power." The first use was in a statement midway through each commercial that "Geritol-iron enters your bloodstream fast carrying its blood-building power to every part of your body." The second, coming at the end of the commercials, was in the statement that Geritol builds "iron power in your blood." The latter claim seems rather innocent; apparently Geritol is effective in combating iron-poor blood, and the cease and desist order does not prevent Williams from advertising this. The remark that Geritol builds "iron power" in the blood is so far from a representation that it is a generally effective remedy for tiredness that the Commission's objections on this score seem rather baseless. Both the Government [**433**] and the court below relied more heavily on the earlier remark, that Geritol-iron carried its "blood-building power" to every part of the body. The district court stated, 354 F. Supp. at 537, "[t]o say that Geritol builds power in your blood is the effective equivalent of saying that Geritol builds power in you." While this inference may be conceivable, it certainly is not one that a jury would be compelled to draw. It is settled that on a motion for summary judgment a court must draw the inference most favorable to the party opposing the motion, *United States* v. *Diebold, Inc.*, 369 U.S. 654, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962); *Cali* v. *Eastern Airlines, Inc.*, 442 F. 2d 65, 71–72 (2 Cir. 1971).

[19] To our minds the only criticism that can fairly be made of the "blood-building power" phrase is that, taken alone, it did not convey with sufficient clarity that Geritol's "blood-building power" was limited to cases of iron deficiency. However, it is no more proper to take one

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[21] Representative scripts will be found in the opinion of the district court, 354 F. Supp. at 536–543.

line of a commercial out of context than it is with any other spoken or written utterance. The whole theme of the AA commercials was that Geritol could remedy "iron-poor blood," and the claim of potency would almost certainly be taken in that sense.[22] The serious question with respect to Counts 1–4 thus is not whether summary judgment in favor of the Government was proper, as we think it clearly was not, but whether the Government is entitled to have them submitted to a jury at all.[23] However, defendants did not move for summary judgment on these counts and, although we could nevertheless direct it, see *Abrams* v. *Occidental Petroleum Corp.*, 450 F. 2d 157, 165–166 (2 Cir. 1971), *aff'd sub nom., Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582, 93 S. Ct. 1736, 36 L. Ed. 2d 503 (1973), we think it preferable to leave to the trial judge whether or not to direct a verdict on these counts in light of the evidence that will be presented.

[20] Counts 5 through 7 involve a commercial entitled "Vacation" and Counts 8 and 9 a commercial entitled "Two Women." The appellants have termed these two commercials their "sad-glad" series. The common theme is of a woman who is "sad" because of having discovered, apparently from a medical examination of some kind, that she has "iron-poor blood." She is told not to be sad on that account but to be glad for Geritol, which can remedy the deficiency. A later sequence shows her to be "glad." [24]

The district court found that these commercials violated the cease and desist order, 354 F. Supp. 539–541, on the following basis:

> Her smile may convey to viewers her happiness that she no longer has iron-poor blood, but it definitely conveys something else as well. It shows her in good spirits and makes her look stronger and healthier. The implication is that she was sad not simply because she had iron-poor blood, but because she was feeling run-down as a result of that fact. Now she is smiling not simply because she has iron-rich blood, but because she feels better as a consequence. Thanks to Geritol.

[**434**] While that is a possible inference, it is by no means the only one. We must confess we had thought that although the script did not demand the inference drawn by the district court, a viewing might

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[22] We see no basis for the district court's conclusion, 354 F. Supp. at 537:

> While the advertisement only speaks of the transformation of a person's blood cells, the advertisement strongly implies that the same transformation from paleness, weakness and deformity to red-bloodedness, strength and shapeliness will take place in the person himself.

[23] The Government makes much of the fact that the FTC had conveyed its objections to use of the word "power" and that defendants had agreed to delete them. But the agreement was expressly without concession and the FTC's assertion that use of this word was a violation did not make it so. Whether Williams' continued use of the word for a few weeks was deliberate or negligent, it is entitled to have the fact of violation determined by a neutral tribunal.

[24] As indicated above, the commercials in Counts 8 and 9 include the phrases "blood-building power" and "iron power." Our discussion of these slogans in reference to Counts 1–4 is equally applicable to the later counts.

well do so. To the contrary, the viewing led us to believe the defendants may well have succeeded in drawing the distinction the order demanded. Whether they did or not is for a jury to determine.

[21] We reach a different conclusion with respect to Counts 10 and 11, relating to the FemIron commercials. Here the scripts did not sufficiently disclose that iron deficiency anemia was not present in most women; in fact they claimed "that many healthy young women have little or no iron reserves," a vice similar to the one the Commission had properly found with respect to the commercials submitted in the first compliance report. The FemIron commercials then noted that "some women even risk becoming anemic and tired," followed by a suggestion to take FemIron and "maintain the supply you need to prevent iron shortage." The plain implication of the audio portion of the commercial was thus that FemIron is an effective remedy for tiredness and anemia—a clear violation of the order. In addition, the scripts for the FemIron commercials each directed that the woman prior to taking FemIron should be depicted as a "Tired Mother"; the woman pictured at the end of the commercial is directed to display a "Vital Look." Our viewing convinced us that the producers of the commercial had succeeded all too well in capturing the forbidden "tired-vigorous" dichotomy. We therefore sustain the grant of summary judgment on these counts.

V. *The Requirement of Notice*

In the interest of continuity, we have postponed consideration of certain arguments by defendants on the score of lack of advance notice of non-compliance and delay in giving such notice.

[22] Appellants' most extreme argument is that penalties under § 5(*l*) do not begin to accrue until the defendant has been given notice that he is not in compliance and has had a reasonable time to bring himself into compliance. This contention is based on *Continental Baking Co.* v. *Dixon*, 283 F. Supp. 285 (D. Del. 1968), a 1959 statement by the FTC's Assistant General Counsel to a subcommittee of the House Committee on the Judiciary which we quoted in *United States* v. *St. Regis Paper Co., supra*, 355 F. 2d at 695–696, and a remark by Chairman Dixon during the course of the hearing on the appellants' first compliance report.

We find nothing in § 5(*l*) or in reason that would require such action by the FTC in every case. The statements by the Assistant General Counsel and by Chairman Dixon, if read literally, would be at variance with a public statement by the Commission, 33 F.R. 19097 (1968), that the obligation of firms to comply arises, and liability for penalties may be incurred, on the effective date of the orders and is not suspended or deferred pending the submission of compliance reports or action thereon. Very likely all that was meant was that, as a matter of good practice, the FTC ordinarily would make some effort to induce compliance before invoking the heavy sanctions of § 5(*l*). Defendants received a full measure of consideration; indeed, the FTC took the rare step of according them a hearing and argument on the first compliance report. Acceptance of defendants' position would severely hamper the Commission in applying § 5(*l*) to advertising cases generally, since every determination of non-compliance could be countered with some change in the advertising. Both the Eighth and Ninth Circuits have recently held that the Commission is not required to give notice before bringing suit for civil penalties. *United States* v. *Beatrice Foods Co.*, 493 F. 2d 1259 (8 Cir. 1974); *United States* v. *Berkley*, No. 73–1070 (9 Cir. Sept. 5, 1973), *cert. denied*, 416 U.S. 970, 94 S. Ct. 1992, 40 L. Ed. 2d 558 (1974). Defendants further contend that the Commission nev**[435]**er actually stated that the AA commercial would be violative of the cease and desist order if the word "power" were left in the scripts. They also claim that the Commission's June 6 letter, with its request for a third compliance report, should be read as allowing appellants a reasonable time to remove the word "power" from the AA commercials that they were broadcasting at the time. However, the May 8 letter adequately conveyed the Commission's view that the AA commercials were unsatisfactory as long as they contained references to "power." The June 6 letter formally assured the appellants that they could safely broadcast the AA commercials without the word "power," but it in no way undercut the effect of the May 8 letter in informing appellants that the word "power" had met with Commission disapproval.

[23, 24] Relying on dictum in *United States* v. *ITT Continental Baking Co.*, No. C–1220 (D. Colo. Aug. 2, 1971) (Winner, J.), *aff'd and remanded*, 485 F. 2d 16 (10 Cir. 1973), *cert. granted*, 416 U.S. 968, 94 S. Ct. 1990, 40 L. Ed. 2d 557 (1974), defendants contend as an alternative to the extreme position which we have rejected, that any liability on Counts 5–9 should be limited because, although the third compliance report was filed on July 7, 1969, Williams was given no response until September 5, despite the fact that the letter received on that date was prepared by the staff in July and early August. Appellants further contend that any liability on Counts 10 and 11 should be limited because the Commission never responded to the submission of the FemIron commercials on September 8. We agree with Judge Winner that "it would seem unreasonable to permit the commission to knowingly let daily penalties accrue without giving notice of the commission's position at the earliest reasonable time." The difficulty lies in knowing when that occurs. It is undesirable for courts, unacquainted with the Commission's workload, to lay down lines that

would necessarily be arbitrary. Although perhaps a case will arise which is so extreme as to demand judicial intervention, the present is not one.[25] This is particularly true since, as we now hold, the Commission could have demanded even larger penalties than it did.

VI. *The $5,000-a-day Limitation*

[25] As indicated in the statement of facts, for most of the counts the Commission considered all the broadcasts of a particular commercial on a particular day to constitute a single violation; for Counts 8 and 9, however, it charged that each separate broadcast of the commercial was a separate violation. Appellants object to both methods of calculating violations, and insist that $5,000 a day was the maximum, regardless of the number of different commercials or the number of broadcasts on that day.

The language of the statute, note 1 *supra*, argues against defendants' position. Although the maximum penalty has since been doubled, the version in effect at the time the complaint was filed imposed a penalty of $5,000 "for each violation" and added that "[e]ach separate violation of such an order shall be a separate offense." The "day" concept entered only in a clause dealing with the situation where a defendant commanded to do some affirmative act has failed to do anything at all. Appellants say, with some force, that it is anomalous that a defendant who ignores a mandatory or[**436**]der of the Commission shall be liable for only $5,000 a day but one who affirmatively violates the order in 30 different places on the same day might be held for $150,000. The answer is that, as developed in the next point, Congress relied on the good sense of the FTC in making its certification to the Attorney General and, failing that, on the discretion of the court to prevent such an outrageous result.

VII. *Double Penalties Against Williams and Parkson*

Defendants object, on two independent grounds, to the award of duplicate penalties against Williams and Parkson.

[26] In the opinion accompanying the initial cease and desist order, the FTC said of Parkson, 68 F.T.C. at 536 n. 2 (1965), "in practicality

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[25] A far more extreme case is *United States* v. *American Greetings Corp.*, 168 F. Supp. 45, 50 (N.D. Ohio 1958), *aff'd* on opinion below, 272 F. 2d 945 (6 Cir. 1959). There the Commission remained silent for four years after the defendant filed his compliance report before suing for statutory penalties relating to conduct described in the report. Although the court did not hold that the Commission was estopped to assert that the defendant's practice was a violation of the Commission's cease and desist order, it stated that the Commission's actions were "certainly a circumstance to be considered in ascertaining the amount of the penalty to be imposed for violation of the Order." The court assessed only a nominal penalty for that violation.

it is Williams' advertising division. Parkson is completely owned by the stockholders of Williams and advertising Geritol is 95 percent of its business. The president of Parkson is also the vice-president and advertising director of Williams." An uncontradicted affidavit of the chief executive of Williams alleged that the two companies had the same principal officers; that Parkson acted as the advertising division of Williams and neither sought nor had any significant business for any other company; and that he had final authority over advertising for all Williams' products. A similarly uncontradicted affidavit of Williams' and Parkson's chief financial officer explained the *raison d'être* of Parkson and the business relations between the two companies as follows: The media offer advertising agencies, whether independent or wholly-owned, a price 15% less than a direct-purchasing sponsor. Williams created Parkson to obtain this lower price. However, instead of retaining part or all the discount as would an independent agency, "Parkson acts solely as an agent of Williams and as a conduit for the payment of Williams' advertising expenditures to the media." The officer added that Williams pays Parkson an amount sufficient to cover Parkson's operational expenses and to provide a profit of some $10,000 a year. Parkson's liquid assets as of June 30, 1971, were put at only $66,098, and its furniture, fixtures and leasehold improvements at $310,369.

The district court held that Parkson must nevertheless be treated as an entity separate from Williams. In so ruling, it relied on the letter of § 5(*l*) which provides that "[*a*]*ny* person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final" (emphasis supplied) shall be liable for the statutory penalties and the fact that the Sixth Circuit had affirmed the order as to both defendants, 354 F. Supp. at 546.

This is not the way courts have dealt with the problem whether two legally separate corporate entities should be regarded as one. As we said in *Bowater S.S. Co.* v. *Patterson*, 303 F. 2d 369, 372–373 (2 Cir.), *cert. denied*, 371 U.S. 860, 83 S. Ct. 116, 9 L. Ed. 2d 98 (1962), citing many cases:

> Whether a subsidiary corporation is to be considered a separate entity "cannot be asked, or answered, *in vacuo*," Latty, The Corporate Entity as a Solvent of Legal Problems, 34 Mich. L. Rev. 597, 603 (1936); the issues in each case must be resolved in the light of the policy underlying the applicable legal rule, whether of statute or common law.

We there rejected the contention that a steamship company under common ownership with a timber operation was not engaged in the latter business and hence was outside the ambit of the Norris-LaGuardia

Act, 29 U.S.C. § 113, in regard to a dispute between the timber operator and its employees. We said:

> Assuming, as we may, that plaintiff and Bowater's Newfoundland had sufficient independence to be regarded, in contract or tort litigation, as separate both from the ultimate parent, Bowater Paper Company, Ltd., and from each other, see Bartle v. Home Owners Cooperative, Inc., 309 N.Y. [**437**] 103, 127 N.E. 2d 832 (1955), it does not follow that they ought to be so regarded for application of the Norris-LaGuardia Act.

We did not think Congress meant the policies of that act "to be defeated by the fragmentation of an integrated business into a congeries of corporate entities, however much these might properly be respected for other purposes." Still more instructive is Mr. Justice Douglas' opinion in *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 402–404, 80 S. Ct. 441, 443, 4 L. Ed. 2d 400 (1960), holding that in an enforcement proceeding the Board was entitled to show that a group of "separate corporations are not what they appear to be, that in truth they are but divisions or departments of a 'single enterprise.' "

The same considerations which allowed the Labor Board in *Deena* to treat as one what nominally were several here require that in decreeing penalties a court should treat as one what nominally are two. It is human beings who cause violations of cease and desist orders; but no one suggests that § 5(*l*) contemplates a separate penalty against every person who had a hand in the offending commercials. What Congress intended was a single penalty from persons acting under single control. Under the district court's theory, if Williams had had five Parksons, each operating in a different region, there could have been a sextuple penalty for what in every practical sense was conduct by a single corporation. Naturally, a case of violation by a manufacturer and an independent advertising agency would present a different question.

[27] Alternatively, we hold that, under the circumstances of this case, where the FTC requested only a judgment against both defendants "in the total sum of $500,000," the Attorney General was without authority to seek that amount against each under the fair implications of our decision in *United States* v. *St. Regis Paper Co.*, *supra*, 355 F. 2d 688. The Government seeks to distinguish *St. Regis* on the basis that although the FTC there requested action by the Attorney General, see 355 F. 2d at 690 n. 1, it had made no certificate at all, and that the statute, 15 U.S.C. § 56, speaks of certifying "the facts" and not the relief sought. This respects the *St. Regis* holding but rejects the reasoning that supported it. The thrust of the majority's decision, 355 F. 2d at 695–698, was that Congress had placed the task of determining when and what penalties should be sought in the FTC

and not in theAttorney General.[26] The draft complaint forwarded in this case by the FTC to the Attorney General shows that the Commission took seriously its responsibilities concerning the amount of the penalty, notably by assessing penalties for each individual broadcast only in Counts 9 and 10. On the Government's theory the Attorney General would have been at liberty to apply this method to the other counts, as to which the Commission had chosen the more lenient course of charging each day of broadcasting as a single violation. This view is plainly at odds with the rationale of *St. Regis*. Again, the Chairman's letter referred to the opinion of Commissioner Elman that the defendants "should be held liable for all violations **[438]** of the order to cease and desist after it became final on December 31, 1967, and that the proceeding should not be limited in scope but should seek civil penalties for each advertisement." On the Government's view the Attorney General was free to take that line, although a majority of the Commission had decided that a lesser amount would serve the purposes of the Act. If the Attorney General could not take either of these courses—and under *St. Regis* he could not—we fail to see what authority he had to double the Commission's demand of $500,000.[27]

VIII. *The Request for an Evidentiary Hearing on the Amount of the Penalties*

Not disputing that determination of the amount of penalties within the maximum is committed to the informed discretion of the district judge,[28] see *United States* v. *ITT Continental Baking Co.*, 485 F. 2d

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[26] The recent amendments to the enforcement provisions of the FTC Act have gone even further in placing responsibility for enforcement in the Commission's hands. Section 16 of the Act, 15 U.S.C. § 56, has been amended to provide:

> Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 14 or under subsection (*l*) of section 5 of this Act, it shall—(a) certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection; or
>
> (b) after compliance with the requirements of section 5(m), itself cause such appropriate proceedings to be brought.

Section 5(m), another new addition, provides that the Commission can appear through its own attorneys in circumstances where the statute requires it to be represented by the Attorney General, if it notifies the Attorney General of its proposed action and gives him 10 days to take the action instead.

[27] Appellants claim that the judgment entered below was "enormous by current standards." While most reported judgments under § 5(*l*) have been much smaller, see 3 CCH Trade Regulation Rptr. ¶ 9701.40, assessments in excess of $50,000 are not unknown. See, *e.g.*, *United States* v. *Americana Corp.*, 3 CCH Trade Regulation Rptr. ¶ 9701.40, at 17,83–3 (D. Md. 1965) ($100,000); *United States* v. *Bostic*, 336 F. Supp. 1312, 1321 (D.S.C.), *aff'd* on opinion below, 473 F. 2d 1388 (4 Cir. 1972), *cert. denied*, 411 U.S. 966, 93 S. Ct. 2146, 36 L. Ed. 2d 686 (1973) ($80,000); *United States* v. *Ancorp National Services, Inc.*, 367 F. Supp. 1221 (S.D.N.Y. 1973) ($204,200).

[28] There is no need to dispute that assessment of penalties is for the judge rather than the jury.

16, 21 (10 Cir. 1973), appellants contend they were entitled to an evidentiary hearing on such relevant subjects as their good faith belief that the accused commercials did not violate the order and the degree of harm caused by any that did. They argue with force that such a hearing was an indispensable preliminary to the court's findings that broadcasting of the commercials in Counts 1–4 and 8–9 revealed "a total lack of good faith with respect to the dissemination of these advertisements and, if not wilful violations of the order, at least reckless disregard of its prohibitions;" [29] that the broadcast of the commercials in Counts 5–7 "amounted to gross negligence and bordered on recklessness;" and that the FemIron advertisements in Counts 10 and 11 "were in wilful disregard" of the order, 354 F. Supp. at 552–553. In view of our holding that summary judgment was proper only on Counts 10 and 11, it is only the denial of a hearing as to these counts that is now before us, although the issue may arise if the jury should find for the Government on other counts after a trial.

[28, 29] While there appears to be no authority on the point, we would think it desirable that the court accord an evidentiary hearing on the amount of the penalty if this is reasonably and seasonably requested either by the defendants or by the Government. As the court below recognized, the size of the penalty should be based on a number of factors including the good or bad faith of the defendants, the injury to the public, and the defendants' ability to pay. 354 F. Supp. at 548. See *United States* v. *Universal Wool Batting Corp.*, 1961 Trade Cases ¶ 70,168 (S.D.N.Y. 1961); *United States* v. *Vitasafe Corp.*, 212 F. Supp. 397 (S.D.N.Y. 1962); *United States* v. *Wilson Chemical Co.*, 1962 Trade Cases ¶ 70,478 (W.D. Pa. (1962), *aff'd*, 319 F. 2d 133 (3 Cir. 1963); *United States* v. *H. M. Prince Textiles, Inc.*, 262 F. Supp. 383, 389 (S.D.N.Y. 1966); *United States* v. *Bostic*, *supra*, 336 F. [**439**] Supp. at 1321. The enormous range of penalties available to the district court in the usual civil penalty case renders it of critical importance that the court have adequate information on the issues to be considered in assessing the penalty. However, we are not disposed to reverse the judgments in this case on Counts 10 and 11 solely because of the denial of a hearing. These commercials would have been clear violations of the order if made with respect to Geritol, and the only possible mitigating circumstance could be defendants' belief that FemIron was not within it. Although on notice of the Commission's contrary view, the appellants proceeded to broadcast commercials for their new product that unquestionably transgressed the restrictions and disclosure requirements of the order. The court had a considerable

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[29] Not content with this, the judge added that these violations "were only slightly less egregious than if defendants had disseminated the very advertisements relied upon by the FTC when it originally issued the order." 354 F. Supp. at 552. In light of our belief that the AA advertisements in Counts 1–4 would have been submittable to a jury barely, if at all, and that the commercials in Counts 8–9 raised a disputable issue of fact, we consider this, as well, as the characterization quoted in the text to be clearly erroneous.

amount of information about the dispute over FemIron, and it does not seem likely that an evidentiary hearing would have produced any different result.

The judgments against Williams on Counts 10 and 11 are affirmed; all judgments against Parkson are set aside; the judgments against Williams on Counts 1 through 9 are reversed and the cause is remanded for a jury trial on these counts as against Williams only. No costs.

OAKES, *Circut Judge* (dissenting):

I dissent with all respect. My colleagues' decision today, of importance to the Federal Trade Commission and would-be deceptive American advertisers generally, is a first at an appellate level. They hold that an advertiser subject to a reviewed and final order of the Federal Trade Commission to cease and desist from deception is entitled not only to a plenary trial, but one with a jury, on the question whether the order has been violated by a "new" commercial (see note 10 *infra*). They reach this decision not only despite lengthy administrative proceedings, at every step of which the advertiser participated adversarily, the proceedings culminating in the order which was finalized after review by another circuit court of appeals. They appear to me for all significant practical purposes to ignore extensive administrative proceedings, formal and informal, *subsequent to* the judicial upholding of the order, during the course of which additional proceedings the advertiser was given ample opportunity to modify its "new" commercials so as to comply with the outstanding order but chose instead—in defiance of the Commission's warnings—at the very least to skirt the edge of the order's terms. My colleagues give no weight whatsoever to the Commission's—I may say long-restrained—certification of facts of violation to the Attorney General, after a decade of administrative proceedings, in accordance with the prescribed statutory procedure. Their construction of the congressional purpose pulls the teeth of an enforcement statute enacted to ensure compliance with a judicially-reviewed cease and desist order, rendering the statute as ineffective as soft rubber dentures.

I cannot believe that Congress could conceivably have intended to make it so easy to evade Trade Commission orders. I do believe that my colleagues have overlooked the statutory scheme and hence misconstrued the stautory purpose; they have done so, regrettably I think, without support in the legislative history or, with one minor exception discredited in its own circuit, among the judicial authorities. Their underlying rationale escapes me. Hence this dissent.

I. THE "RIGHT" TO A JURY TRIAL

The point of departure for examination of the question whether appellants have a right to a plenary, jury trial under Fed. R. Civ. P. 38(a), which preserves "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution . . .," is 15 U.S.C. § 45(*l*),[1] the civil penalty provision under [**440**] which the Government brought this action. But it is not to be viewed in isolation, as if it were some separate statutory entity. Rather it must be examined in the context of the Federal Trade Commission Act as a whole, taking care to note the statutory scheme and underlying congressional policies concerning the control of deceptive advertising to determine the role and the implementation function of § 45(*l*). Aside from the general goal of seeking to divine the legislative purpose, there are three good reasons that force consideration of the role played by § 45(*l*) in the overall regulatory scheme devised by Congress. The first of these is stated in the majority's opinion as follows: "Congress apparently did not expressly confront the jury trial question [with respect to § 45(*l*)]. . . ."[2] Secondly, with only one exception, and that a case subsequently subjected to severe criticism by its own circuit court of appeals,[3] no case among the many cited in part III of the majority opinion holds that, in an action brought by the United States to recover civil penalties for violation of the valid order *of an administrative agency*, the defendant has a right to a jury trial as a matter of statutory or constitutional law. Thirdly, and perhaps most importantly, we must determine whether the recognition of the right to a plenary, jury trial would tend to subvert the entire statutory structure by which the FTC has been charged with the regulation of false and deceptive advertising[4] **[441]** The majority opinion attempts to interpret § 45(*l*) as if it existed in a statutory vacuum. I would reject that approach, relying on the Supreme Court's recent statement that "our task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose." [5]

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[1] Prior to its recent amendment, this section read as follows:

> Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

This section was recently amended, Act of Nov. 16, 1973, Pub. L. No. 93–153, § 408, 87 Stat. 591–592, for the purpose of ensuring the "prompt enforcement of the laws the Commission administers." *Id.* at § 408(b), 87 Stat. 591. Although there is no legislative history on this particular amendatory Act, Congress was clearly expressing its dissatisfaction with both the speed and force by which FTC orders were being enforced. There is some indication that Congress viewed § 45(*l*) proceedings as essentially equitable by importing into those proceedings the power to issue mandatory injunctive relief "and further equitable relief," this power to be exercised by the district courts. Of course, such relief could previously be granted by the court of appeals granting enforcement of the cease and desist order, in this case the Sixth Circuit, so we must assume that Congress had some reason to lodge this same power in the district courts in § 45(*l*) proceedings.

One possible view is that Congress viewed the record in a § 45(*l*) proceeding to be more amenable to review by a district court because of the nature of the informal proceedings that constitute a critical portion of that record. *See* part IIA *infra*. Regardless of what view is taken, it seems highly doubtful that Congress would have incorporated what are clearly *equitable* remedies into a § 45(*l*) proceeding to increase the district court's power to deal with offenders if Congress had realized that § 45(*l*) carried with it the right to a jury trial. Indeed, the inclusion of injunctive power in § 45(*l*) as amended lends support to the Government's argument that civil penalties and injunctive relief are in fact alternate remedies.

[2] The absence of direct evidence as to congressional intent leads to the conclusion that intent

> must be ascertained by examining the purposes and objectives of the FTCA [Federal Trade Commission Act] as a whole in terms of objective criteria, i.e., the relevant inquiry is "how, one supposes, it [the legislative scheme] * * * would appear to a 'reasonable' interpreter."

United States v. *St. Regis Paper Co.*, 355 F. 2d 688, 693 (2d Cir. 1966), *quoting* Bishin, The Law Finders: An Essay in Statutory Interpretation, 38 S. Cal. L. Rev. 1, 3 (1965). *See also* note 28 and accompanying text *infra; Holbrook* v. *United States*, 284 F. 2d 747, 752 (9th Cir. 1960) ("a significant consideration . . . is a comparison between the results to which each such consideration would lead").

A. *The Statutory Scheme and Administrative Proceedings*

Under 15 U.S.C. § 45, the FTC is responsible for making the initial determination that any party may be engaging in unfair or deceptive practices in commerce. Briefly, if the FTC deems a proceeding under § 45(b) "would be to the interest of the public," the party in question is served with a notice, hearings are held, and if the FTC determines from the hearings that a violation has occurred, "it shall make a report in writing in which it shall state its findings as to the facts and shall issue . . . an order [requiring that party] to cease and desist from using such method of competition or such act or practice." 15 U.S.C. § 45(b). Under 15 U.S.C. § 45(c), any party subject to such a cease and desist order may then obtain review of that order in a court of appeals. The standard of review set forth in the statute to be applied by the circuit courts of appeals is that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." *Id.*[6]

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[3] *United States* v. *Hindman*, 179 F. Supp. 926 (D.N.J. 1960), *criticized in United States* v. *Vulcanized Rubber & Plastics Co.*, 288 F. 2d 257, 258–259 n. 2 (3d Cir.), *cert. denied*, 368 U.S. 821, 82 S. Ct. 38, 7 L. Ed. 2d 26 (1961).

[4] Reduced to its simplest terms, the point is that if a court or jury of 12 is given the power to decide de novo the question whether a given advertisement is deceptive, *i.e.*, the "meaning of the commercials." Brief for Applicants at 29, then the FTC, at least insofar as deceptive advertising is concerned, would be stripped of the major function presently performed by it in the regulatory scheme—deciding what is and what is not deceptive advertising. *See* note 13 *infra*. Other considerations urged upon us by the Government, such as the need for streamlined procedures commented on by this court in *United States* v. *St. Regis Paper Co.*, 355 F. 2d at 693, are also important, but the nub of the problem remains whether the FTC on the one hand, or a judge or jury on the other, is to pass on whether specific advertisements are deceptive under the Federal Trade Commission Act.

[5] *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 631–632, 93 S. Ct. 2469, 2484, 37 L. Ed. 2d 207 (1973), *quoting Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 488, 68 S. Ct. 174, 92 L. Ed. 88 (1947).

[6] This has generally been held to bind the court of appeals to the "substantial evidence" rule. *Charles Pfizer & Co.* v. *FTC*, 401 F. 2d 574 (6th Cir.), *cert. denied*, 394 U.S. 920, 89 S. Ct. 1195, 22 L. Ed. 2d 453 (1968); *Montgomery Ward & Co.* v. *FTC*, 379 F. 2d 666 (7th Cir. 1967).

If either party desires to adduce evidence in addition to that adduced in the hearings, application may be made to the court of appeals which, if it grants the application, *orders the evidence to be taken before the FTC.*[7] The court of appeals then enters a decree affirming, modifying or setting aside the FTC order and enforcing the order to the extent affirmed. Certiorari to the Supreme Court is available under 28 U.S.C. § 347.

In the case now before us, the above procedures were followed and culminated in the enforcement on review by the Sixth Circuit Court of Appeals, with some modification, of the FTC order directed against appellants here. The original complaint against appellants was issued in December of 1962; the court order granting enforcement was entered August 11, 1967, more than 4½ years later. *J. B. Williams Co.* v. *FTC*, 381 F. 2d 884 (6th Cir. 1967) (*Williams I*). *Williams I* in short represented the culmination by way of judicial review and sanction of an extended administrative process that had found Geritol commercials to be in violation of §§ 5 & 12 of the Federal Trade Commission Act.[8]

[442] *After* a cease and desist order is granted enforcement by a court of appeals, and *only* thereafter, can the FTC move to force compliance or exact penalties for noncompliance. In this case, as the majority opinion points out the FTC and appellants followed the administrative procedure, 16 C.F.R. § 3.61, whereby after issuance of a cease and desist order compliance reports are submitted by appellants to the FTC, and it reviews the reports or institutes proceedings to enforce compliance. The first such report on October 23, 1968, resulted in the calling of a further public hearing by the FTC which was held on November 14, 1968, in which it was determined that appellants' advertising was *not* in compliance with the cease and desist order.[9] The FTC, rather than moving immediately to force compliance (by way of injunction) or to penalize noncompliance (by way of an action under § 45(*l*)), gave appellants what amounted to a "second chance," a fair warning that future noncompliance would necessitate more drastic moves by the FTC.[10] It published on December 2, 1968, an opinion which required the submission of a second compliance report. That report, submitted on January 31, 1969, by appellants, dealt with the "AA" commercials before us in counts 1–4 and included the scripts for what before us are the "BB" commercials, counts 5–9. The FTC studied this report and, without holding hearings but after consultation between the FTC staff and appellants' representatives, advised appellants by letter of what steps might be taken to achieve compliance with the order, viz., deleting all references to "power" in the "AA" commercials. *By letter dated May 15, 1969, the appellants accepted the Commission's conditions and agreed to remove the word "power."* The violations alleged in counts 1–4 occurred between June 10, 1969, and June 20, 1969, *more than three weeks after appellants had agreed to stop using them.* The "sad-glad" commercials referred to in counts 5–7 were used from and after June 14, 1969, and *before* they were submitted to the Commission in the third compliance report filed on June 7, 1969; appellants did not request advice from the Commission as to whether such use would constitute compliance. Counts 8–9 are based on "sad-glad" commercials which also use the word "power," and these were disseminated between June 2, and June 6, 1969, *over two weeks after the May 15, 1969, letter* of appellants. As to counts 10–11, the FemIron counts, [**443**] the Commission did not even know of FemIron advertising until it appeared on network television; the Commission staff advised on July 16, 1969, the Commission itself on September 3, 1969, in rejecting the third compliance report, that FemIron was subject to the order. These procedures indicate that after cease and desist order has been enforced by a court of appeals, the FTC plays the key role in determining whether its own order has been violated and in seeking sanctions for such violation, and its sound administrative practice as followed here gives a previously deceptive advertiser[11] who is subject to an outstanding order ample opportunity to demonstrate his belated good faith compliance with the Act. Even given some unasserted right of appellants to secure a narrow review by way of a declaratory judgment as to whether a specific commercial is in compliance with such an order,[12] it seems beyond dispute that the FTC is to use its expertise in construing the order and applying it to "new" advertising.[13] Here indeed it did so. To the extent that the majority opinion is a substitution of judicial judgment for that exercise of administrative expertise, it is unsupportable.

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[7] "The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken . . . ." 15 U.S.C. § 45(c).

[8] Part III of the majority opinion purports to decide the question whether the 11 commercials which are the subjects of this action violated the cease and desist order without so much as a passing reference to the Sixth Circuit decision that gave that order the imprimatur of the judiciary. Regardless whether Judge Motley correctly defined the court's function, she cannot be faulted for her statement that "correct interpretation of the order requires the court to consider not only its plain language, but relevant proceedings before the FTC and the Sixth Circuit's decision as well." *United States* v. *J. B. Williams Co.*, 354 F. Supp. 521, 532 (S.D.N.Y. 1973) (*Williams II*).

[9] Those specific advertisements are not the subject of this action, but the Findings and Opinion of the FTC concerning them is most relevant, since the present controversy may not properly be considered in an administrative vacuum. *See* part II *infra*.

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[10] While the FTC questioned its own hesitation on this question at a later date, the legislative history of § 45(*l*) indicates that Congress desired disputes between the FTC and advertisers to be worked out without resort to court action where possible. If the outcome of this case is to require the FTC, after 11 years of proceedings, to go before a judge or jury and prove to either, de novo, that certain commercials are false and deceptive, something that it has spent more than a decade and enormous public resources to do, it may well be that the FTC in the future will be forced to resort to the courts more quickly and as frequently as possible. There would appear to be no other way to deal with those advertisers who, as appellants here, can at best be described as intransigent. One cannot help but suppose that the burdens on the federal courts, *see* H. Friendly, Federal Jurisdiction: A General View Part II (1973), will be further exacerbated with the multiple review Judge Friendly's opinion would propose. *Cf. Weinberger* v. *Bentex Pharmaceuticals, Inc.,* 412 U.S. 645, 653, 93 S. Ct. 2488, 2494, 37 L. Ed. 2d 235 (1973): "The deluge of litigation that would follow if 'me-too' drugs and OTC drugs had to receive *de novo* hearings in the courts would inure to the interests of manufacturers and merchants in drugs, but not to the interests of the public that Congress was anxious to protect . . . ." *See also* the remarks of Rep. Chapman quoted in the text at note 21, *infra.*

On November 28, 1969, the FTC, apparently convinced at this point that appellants both had violated—it did not use but could have used the word "flouted"—the cease and desist order and could probably be expected to do so in the future, took the first step necessary to exact penalties for such noncompliance. This step was not, as seems to be suggested by the majority opinion, merely the submission of a "draft complaint" by the FTC for rubber-stamp approval and prosecution by the Attorney General. It was, rather a certification *of facts* previously found by the FTC transmitted to the Attorney General, "whose duty it shall be to cause appropriate proceedings to be brought for the enforcement [of § 45(*l*)]." 15 U.S.C. § 56. The importance of this procedure to the functioning of the entire regulatory scheme has been the subject of extensive consideration by this court in *United States* v. *St. Regis Paper Co.*, 355 F. 2d 688 (2d Cir. 1966). There, in an opinion rejecting the claim that the Attorney General could himself bring a penalty action under § 45(*l*) without having had the *facts* of an alleged violation certified to him by the FTC, the court went carefully into both the sparse legislative history and policy reasons supporting the conclusion that only the FTC has the statutory power to initiate proceedings under § 45(*l*). The opinion is replete with numerous references to the agency's expertise involved in determining wheth**[444]**er one of its orders has been violated, but the following passage stands out:

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[11] [T]here is substantial evidence to support the finding of the Commission that most tired people are not so because of iron deficiency anemia, and the failure to disclose this fact is false and misleading because the advertisement creates the impression that the tired feeling is caused by something which Geritol can cure.
Williams I, 381 F. 2d at 889.

[12] At least one court has held that the FTC's rejection of a compliance report is subject to review in a declaratory judgment action, but only at the risk of the petitioner, who cannot use that review to stay or otherwise jeopardize the public's interest in securing possible penalties. *Floersheim* v. *Weinberger,* 346 F. Supp. 950 (D.D.C. 1972).

[13] The term "new" is used here to describe commercials that were the subject of the cease and desist order but which have been modified to any extent in an attempt to comply with the order. The change of a single word in a commercial might bring that commercial into compliance or might leave it in its prior state of noncompliance. Whatever effect changes might have, the "new" commercial is different from the commercials that were the immediate subjects of the cease and desist order, yet obviously the Commission cannot be required to start its proceedings all over again. The cease and desist order must, therefore, be regarded as a flexible instrument to be interpreted in such a manner that it cannot be flouted by changes in the form of commercials that do not affect the substance of the false or deceptive impression conveyed by those commercials. *See FTC* v. *Ruberoid Co.,* 343 U.S. 470, 473, 72 S. Ct. 800, 96 L. Ed. 1081 (1952). This is elementary.

> To relinquish jurisdiction to the Attorney General after the issuance of a cease and desist order would be most unrealistic, for the Commission alone *knows the scope of its orders* and has been "provided with staffs to institute proceedings and to follow up decrees and police their obedience. . . ."

United States v. *St. Regis Paper Co.*, 355 F. 2d at 696 (emphasis added), *quoting in part United States* v. *Morton Salt Co.*, 338 U.S. 632, 640, 70 S. Ct. 357, 94 L. Ed. 401 (1950). Again,

> The duty and responsibility for determining . . . whether cease and desist orders issued to eliminate the anti-competitive effects of [certain] practices have been complied with *or violated was delegated solely to the FTC.*

Id. at 693 (emphasis added.) This quote is not, as intimated in the majority opinion, being used to support the proposition "that the FTC was to be judge as well as prosecutor." The fact that 15 U.S.C. § 56 requires the FTC to proceed through the Attorney General after a fact certification is itself conclusive that the FTC is neither to be sole judge nor prosecutor. The majority's reference to "ex parte" determinations of violation is inexplicable, given the facts of this case, in which—before the penalty action was initiated—there was a full public hearing and argument on the first compliance report, as well as numerous meetings between the parties and the exchange of correspondence on the second and third compliance reports. And, contrary to the assertion that the agency's determination of violation is "not entitled to weight in an adjudication proceeding before a court," it clearly emerges in the *St. Regis* opinion that the acknowledged expertise of the FTC in interpreting its own orders *is* to be given some weight in the § 45(*l*) action. The underlying premise of the majority that no weight is to be accorded to the FTC's certification of facts in and of itself emasculates the penalty provisions of the Act.

The soundness of the *St. Regis* opinion has recently been reinforced by the decision of the Court of Appeals for the District of Columbia in *Holloway* v. *Bristol-Myers Corp.*, 485 F. 2d 986 (1973). There, plaintiffs asserted a private right of action to enforce 15 U.S.C. §§ 45(a), 52(a)(1) and 54(a), existing by implication from the statutory scheme. In rejecting this implied right Judge Leventhal addressed himself to the inseparability of the dual functions of the FTC in determining whether violations had occurred as well as acting in an enforcement capacity: "the substantive prohibitions of the statute are inextricably intertwined with provisions defining the power and duties of a specialized administrative body [the FTC] charged with its enforcement. . . ." *Id.* at 989 (footnote omitted). *See also FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473, 72 S. Ct. 800, 96 L. Ed. 1081 (1952). As pointed out by this court in *St. Regis*, what would be meat to the FTC might well be poison to the Attorney General. 355 F. 2d at 695. The certification *of facts* by the Commission to the Attorney General is in and of itself a determination of violation of the cease and desist order.

Section 45(*l*) having been invoked in this case as one of three possible means of securing compliance with the cease and desist order, the statutory scheme has run full course. The question what right to a plenary or jury trial might exist under § 45(*l*) cannot be treated, I repeat, without considering the question what weight must be accorded to the "facts" found by the FTC and certified to the Attorney General under 15 U.S.C. § 56.

Appellants here do not claim any generalized right to a jury trial on all disputed issues of "fact" that may arise or did arise in the "compliance" phase of these 11-plus years of administrative and judicial proceedings. Rather, appellants claim a right to a jury trial on two issues which appellants choose to charac[**445**]terize as factual: (1) the meaning of the commercials and (2) the meaning of the word "properties" as applied to the product FemIron in counts 10–11. The majority ultimately concedes that the latter question is a purely legal question that was in the province of the court below to resolve. In my view, for reasons that will appear below, the court in making that determination should give great deference to the agency's own views on that question. The narrow question remains whether appellants were entitled to a trial de novo (indeed a jury trial) on the "meaning" of the 11 commercials.[14]

B. *Expertise and the "Meaning" of Commercials*

The principal function performed by the FTC in the administration of the deceptive advertising provisions of the Federal Trade Commission Act is the determination of what advertising actually violates that Act. The FTC is also responsible for making broader policy that may affect the whole spectrum of advertising,[15] but the one area in which its expertise has never been seriously questioned is in determining whether a given advertisement is "deceptive."

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[14] As the majority opinion at footnote 16 suggests, Judge Motley's opinion below seems to acknowledge that certain factual questions arising out of the compliance phase of the proceedings might, in some instances, require a jury trial. Such a factual question might be on what date, or on how many occasions, a commercial was transmitted to the general public in violation of an order. Even if these issues—which in no way resemble the issue of the meaning of the commercials—were "the very sort which juries are traditionally called on to resolve," Judge Friendly's opinion at 25, it would not mean that Congress did not delegate to the FTC the responsibility for determining such "facts," subject only to review for lack of substantial supporting evidence. 5 U.S.C. § 706(2)(E).

While due process might mandate that such facts not be determined on completely *ex parte* basis, the compliance phase of the proceedings were not so conducted. As discussed in the body of this dissent at note 7 *supra,* there is no reason why a district court in a § 45(*l*) proceeding could not grant a motion to adduce additional relevant evidence before the FTC, should a party in appellants' position assert such a due process deprivation. *Cf. CIBA Corp.* v. *Weinberger,* 412 U.S. 640, 644, 93 S. Ct. 2495, 2498, 37 L. Ed. 2d 230 (1973) ("Cases may arise where there has been no formal administrative determination of the 'new drug' issue, it being first tendered to a district court. Even then, however, the District Court might well stay its hand, awaiting an appropriate administrative determination of the threshold question"). This question is not before us because appellants make no such claim.

The case law on this "expertise" is unequivocal and so voluminous that it is necessary only to illustrate the point. As the District of Columbia Court of Appeals recently stated,

> The Commission has developed a fund of knowledge as to the probable impact upon purchasers of particular advertising representations, and in recent years has been active in the evolutions of new and innovative remedies to correct false advertising and to undo the effects of deceptive trade practices.

Holloway v. *Bristol-Myers Corp.*, 485 F. 2d at 998–999.[16] The Supreme Court had earlier stated its view on this precise question:

> This statutory scheme necessarily gives the Commission an influential role in interpreting § 5 [15 U.S.C. § 45] and in applying it to the facts of particular cases arising out of unprecedented situations. Moreover, as an administrative agency which deals continually with cases in the area, the Commission is often in a better posi[**446**]tion than are courts to determine whether a practice is "deceptive" within the meaning of the Act. This Court has frequently stated that the Commission's judgment is to be given great weight by reviewing courts. *This admonition is especially true with respect to allegedly deceptive advertising since the finding of a § 5 violation in this field rests so heavily on inference and pragmatic judgment.*

FTC v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, 85 S. Ct. 1035, 1042, 13 L. Ed. 2d 904 (1965) (emphasis added).

There is no reason of which I am aware that this expertise is suddenly to be discarded once an order has been made and reviewed, as the majority does.[17] Viewing the Federal Trade Commission Act as an integrated whole, *see* note 2 *supra*, which is the way Congress viewed it, I simply cannot agree that the storehouse of information acquired, and experience gathered by the FTC on the question of the effect of advertising on consumers, the "meaning of commercials," is to be disregarded, or that Congress intended it to be disregarded, at what might be—owing to the intransigence or greediness of an advertiser—the most critical point of the entire process, that of penalizing those who would defy the will of Congress as expressed in the Act.[18]

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[15] *See generally Holloway* v. *Bristol-Myers Corp.*, 485 F. 2d 986 (D.C. Cir. 1973); *United States* v. *St. Regis Paper Co., supra.*

[16] *See also Niresk Indus. Inc.* v. *FTC*, 278 F. 2d 337, 341–342 (7th Cir.), *cert. denied*, 364 U.S. 883, 81 S. Ct. 173, 5 L. Ed. 2d 104 (1960); *Carter Prods., Inc.* v. *FTC*, 268 F. 2d 461, 495 (9th Cir.), *cert. denied*, 361 U.S. 884, 80 S. Ct. 155, 4 L. Ed. 2d 120 (1959). *See also* the enormous amount of regulation of deceptive advertising by opinions, "guides" and rules in dozens of industries 16 C.F.R. § 15.1–15.427; 16 C.F.R. Parts 17–253.

[17] Their opinion makes passing reference to the "weight" to be accorded FTC findings of violations in framing remedial orders, but makes no attempt to explain why this expertise is irrelevant in a § 45(*l*) proceeding.

[18] The majority says that "While Congress placed the usual substantial evidence rule in § 5(c) [15 U.S.C. § 45(c)] of the FTC Act, dealing with judicial review of orders, it made no similar provision in § 5(*l*) [15 U.S.C. § 45(*l*)]." But review may be had under the Administrative Procedure Act. 5 U.S.C. §§ 701, 706. *See Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. at 653–654.

C. *The Legislative History*

This court has previously referred to the legislative history of § 45(*l*) as "sparse," *United States* v. *St. Regis Paper Co.*, 355 F. 2d at 692, and it is conceded by all that neither the statute itself nor the legislative history make any direct reference to the jury trial question. In such a situation we should be doubly aware of Justice Jackson's admonition in *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384, 396, 71 S. Ct. 745, 751, 95 L. Ed. 1035 (1951), that "to select casual statements from floor debates, not always distinguished for candor or accuracy as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions."

I do not draw the same inferences as the majority does from my examination of the legislative history as is available to guide us. The Wheeler-Lea Amendments of 1938 to the Federal Trade Commission Act had a tortured history of congressional inaction and compromise which has been thoroughly recounted elsewhere. *See generally Holloway* v. *Bristol-Myers Corp.*, 485 F. 2d at 992–994. It appears that some members of Congress successfully held up passage of the final bill by their strenuous advocacy of the position that control and regulation of deceptive advertising should be placed within the jurisdiction of the Food and Drug Administration. The opponents, who eventually prevailed, made the argument that the FTC, as a "quasi-judicial" body, was in a better position to deal with this category of practices.[19]

[**447**] Section 5(*l*) of the Amendments, now 15 U.S.C. § 45(*l*), was one of the provisions adopted to make cease and desist orders more effective. Prior to the adoption of the Amendments, enforcement of a cease and desist order could be had only after new proceedings, presumably full-blown hearings, had been instituted to ascertain whether the order had been violated. One of the purposes of new § 5(*l*) was to streamline the procedure as follows:

> The order of the Commissioner would definitely become final as provided in Section 5 and become operative as to further transgressions without the initiation of new proceedings as now required after the violation occurs.[20]

H.R. Rep. No. 1613, 75th Cong., 1st Sess. 6 (1937). These "new proceedings," at least in the mind of Representative Chapman, represented a frustration of the purposes of the administrative process because of the very nature of the advertising beast:

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[19] H.R. Rep. No. 1613, 75th Cong., 1st Sess. 5 (1937) (emphasis added):

The Federal Trade Commission as an independent, *quasi-judicial body*, has a procedure better calculated to handle multitudinous types of advertising and to do its work to the greater confidence and satisfaction of the public than any purely administrative body. Its work carries with it the combined elements of searching investigation, orderly procedure, prevention rather than penalization in minor cases, and that *judicial fairness* essential to the enlistment of confidence by the public.

[20] A similar "streamlining" occurred when Congress adopted the language of § 45(*l*) into 15 U.S.C. § 21(*l*), which now governs the enforcement of the Clayton Act. *See infra.*

> Advertising copy is frequently changed as a matter of good advertising technique. By the time the cease-and-desist order or an injunction becomes effective the advertiser, as a matter of course, will change his copy. He can continue this process indefinitely without running any risk whatever of penalty, and when he has run the gamut of all the claims he can plausibly make for his product, he can then change its composition, as patent-medicine manufacturers have so frequently done, and repeat the process over and over again.[21]

83 Cong. Rec. 400 (1938).

At two points during the House debate, brief comments were made, although not directly referring to the jury trial question, that cast some light on the question why there was any need in the first place for a complex regulatory scheme to prevent and regulate deceptive advertising. Representative Sirovich, relatively early in the debate, made reference to "the American gullible public." 83 Cong. Rec. 394 (1938). Later in the debate, Representative Coffee reiterated and fortified this prior statement by reference to "the gullible people." *Id.* at 416. Congress, these remarks indicate, was supremely aware that the average American citizen was often unable to discern the false from the true when subjected to the sales pitches of the advertising industry. One might even group within the classification of "gullible" us federal judges.[22] If this be true, it is certainly permissible to draw the inference that a jury would not have been considered by Congress to be the most useful tool to implement the purposes of the Federal Trade Commission Act had Congress directly considered the question.[23]

[448] The only other "clue" in the legislative history derives from a brief reference to the fact that the civil penalty provision was based on similar provisions in the Packers and Stockyards Act of 1921 and the Securities Exchange Act of 1934. *See, e.g.*, S. Rep. No. 1705, 74th Cong., 2d Sess. 7 (1936). The provision of the former, 7 U.S.C. § 195, is clearly criminal and therefore has no relevance here, unless it is seen as a general reference to the fact that criminal sanctions were included in the Wheeler-Lea Amendments. There is some question as to what provision of the Securities Exchange Act was being referred to, and for what purpose, by the Wheeler-Lea lawmakers in their reports and debate. H.R. Rep. No. 1613, 75th Cong., 1st Sess. 4 (1937), clearly indicates that the reference to the Securities Exchange Act of 1934 was to 15 U.S.C. § 78y(a), which is nothing more than the general provision under which decisions or orders of the SEC are subjected to judicial review, as opposed to 15 U.S.C. § 78ff(b) (referred to by the majority opinion). The reference to the Securities Exchange Act of 1934 may thus have been simply a general reference to features incorporated into the Wheeler-Lea Amendments. Specifically, the reference in the House Report goes to the inclusion of a provision making FTC orders final unless appealed within a 60-day period. Neither the remarks of Senator Wheeler, 80 Cong. Rec. 6594 (1936), nor those of Representative Reece, 83 Cong. Rec. 397 (1938), relied upon by the majority, make reference to any specific provision of the Securities Exchange Act of 1934. In S. Rep. No. 1705, 74th Cong., 2d Sess. 7, 8 (1936), specific reference is made to 15 U.S.C. § 78y(b) with respect to granting the courts of appeals the power to issue temporary injunctions, and 15 U.S.C. § 78y(a) with respect to the time for appeals. S. Rep. No. 221, 75th Cong., 1st Sess. 7 (1937), in pertinent part, is merely a reprint of S. Rep. No. 1705, and thus adds no reference to 15 U.S.C. § 78ff(b) or otherwise clarifies this question. None of the sources standing for the proposition that the Congress considered § 45(*l*) to be patterned on the Securities Exchange Act of 1934 make reference to the majority's § 78ff(b); they refer only to 15 U.S.C. § 78y(a) and (b).[24]

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[21] This statement is clearly applicable to the court's disposition of the Femiron "properties" question.

[22] I know of nothing to support the majority's assertion that jurors "have more experience than most judges" when it comes to deciding whether a commercial is "deceptive." In the final analysis I suspect, and I believe Congress insists, that the FTC has the greater expertise and wherewithal to decide that question than "the American gullible public," subject always to review for arbitrary, capricious or unlawful exercise of that function. 5 U.S.C. § 706(2)(A).

[23] As will be discussed, the logic of the majority's position would probably compel reexamination of the Supreme Court's decision in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48, 57 S. Ct. 615, 81 L. Ed. 893 (1937) (jury trial right denied in back pay case), which was recently reaffirmed in *Curtis* v. *Loether*, 415 U.S. 189, 94 S. Ct. 1005, 39 L. Ed. 2d 260, 42 U.S.L.W. 4259, 4261 (1974). In *Jones & Laughlin*, the Court said: "The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit." 301 U.S. at 48–49.

D. *Reasoning by Reference to Other Statutes*

Given the paucity of legislative history bearing on the issue before us, one is tempted to reason by analogy to other statutory provisions that may "look like" § 45(*l*). But as the foregoing has, I hope, made clear, to reason by analogy is at best dangerous where a statutory penalty provision was adopted as part of and integral to a complex regulatory scheme formulated by Congress with certain objectives in mind, and at worst looking to one's "own heart for his decision" as opposed to "seeking to divine out of the confused, often conflicting and half-conscious aspirations which lie behind a statute some resultant of those forces in keeping with what was consciously contemplated." A. Cox, Hand and the Interpretation of Statutes, 60 Harv. L. Rev. 370, 373 (1947).

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[24] Assuming, *arguendo*, that the reference was in fact to 15 U.S.C. § 78ff(b), and assuming, *arguendo*, that a violator of that section would be entitled to a jury trial—a question that so far as I know has never been litigated—it is readily apparent that the question to be decided by the jury, *i.e.*, whether certain documents required to be filed by 15 U.S.C. § 78o(d) had in fact been filed, does not involve any prior SEC findings made as the result of formal or informal hearings.

The analogy to the Interstate Commerce Act penalty section, 49 U.S.C. § 16(8), drawn in the majority opinion seems to me not in the least persuasive. This provision is said to be "almost certainly" "the true model" for § 45(*l*). If this were so, of course, one might have expected some reference to it in the legislative history of § 45(*l*), especially giv[**449**]en the apparently inaccurate reference to provisions in the Stockyards Act of 1921 and the Securities Exchange Act of 1934. Nevertheless, two features of § 16(8) stand out most prominently: first, the question whether the right to a jury trial obtains under that section has never been either litigated or decided; second, the language of § 16(8) is itself sufficiently different from that of § 45(*l*) to render any analogy without significance.

As for "other contemporaneous railroad regulation statutes," to which the majority refers, perhaps including 49 U.S.C. § 16(2), which deals with civil complaints by persons against carriers in reference to an ICC order for the payment of money, the only thing necessary to say is that what is or was good for the railroads probably has little or nothing to do with the control of deceptive advertising by the FTC.

As to the language of § 16(8) itself, that section differs, *inter alia*, in that it requires an ICC order to be *knowingly* violated. Not only does § 45(*l*) have no such requirement, but the Supreme Court has said flatly that specific intent is *not* a requisite to violation of an order issued by the FTC in a false advertising case. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. at 393. It seems evident that the penalty provisions governing ICC orders are plums while here we have a different, if less sweet, fruit.

One analogy, completely neglected by the majority, remains to be explored which should at least theoretically be more fruitful because it involves the incorporation of § 45(*l*) as an enforcement tool in Clayton Act proceedings. This provision, now 15 U.S.C. § 21(*l*), as its legislative history shows, was patterned after § 45(*l*) because the FTC had shown a more than two-decade history of being unable effectively to enforce the Clayton Act with the limited means available. S. Rep. No. 83, 86th Cong., 1st Sess. 2 (1959). Without detailing the enforcement procedures then existing, suffice it to say that one of the specific objections to the earlier procedure was that "enforcement of the court's order must be secured in a subsequent contempt proceeding, which requires proof that new activities of the respondent have violated the court's order." H.R. Rep. No. 580, 86th Cong., 1st Sess. (1959), U.S.

Code Cong. & Admin. News, p. 1805 (1959) Congress, although it did not confront the jury trial issue directly, can hardly be thought to have wanted to substitute, for an ungainly system of new hearings and review, a procedure that would require the agency in effect to try its whole case de novo before a court or a jury. Now Chief Judge Coffin of the First Circuit captured what I take to be the essence of § 21(*l*) when he said that "Congress has provided that a final Commission order can be the unimpeachable basis of a Justice Department suit against a defendant for violation of such order, with fines up to $5000 for each violation." *Farmington Dowel Products Co.* v. *Forster Manufacturing Co.*, 1 Cir., 421 F. 2d 61, 75 (1970). *The point here is that once an order of the FTC is final, one subject to such an order has already had his "day in court" and is on notice thereafter that violations are subject to severe penalties without the interposition of renewed hearings and trials of issues that have been previously decided.*[25] The unsupported assumption of the district court in *United States* v. *Beatrice Foods Co.*, 344 F. Supp. 104, 111 (D. Minn. 1972), *aff'd*, 490 F. 2d 332 (8th Cir. 1974), that jury trial is available [**450**] where there is an issue of material fact, does not control the question. Indeed, in affirming the *Beatrice* judgment the Eighth Circuit paid no heed to the lower court's dicta regarding a jury trial and examined § 21(*l*) in much the same light as this dissent examines § 45(*l*), 490 F. 2d 332. Very clearly were there such an issue the district court could "stay its hand" pending a determination thereof by the agency. *Cf. CIBA Corp.* v. *Weinberger*, 412 U.S. 640, 644, 93 S. Ct. 2495, 37 L. Ed. 2d 230 (1973).

E. *Judicial Precedent, and, Parenthetically, Constitutionality*

As stated, there is only one case that has held that a right to a jury trial obtains in an action under § 45(*l*). In *United States* v. *Hindman*, 179 F. Supp. 926 (D.N.J. 1960), the question was whether an order issued by the FTC prohibiting the use of the label "custom-made" was sufficient to cover a label, "custom-tailored," subsequently adopted for use by the defendant. The totally fallacious premise upon which the district court arrived at its conclusion that a jury trial was required was as follows:

> we must bear in mind the principle that the meaning to be given such representations as these [presumably both "custom-made" and "custom-tailored"] is not

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[25] If a modified commercial is within the order, the issue of its "deceptiveness" or "meaning" has already been litigated before the FTC even though that precise commercial was never actually before the FTC prior to the compliance phase of the proceedings. Whether it is within the order is a question in the first instance for the exercise of agency discretion, subject only to review for abuse or if exercised arbitrarily, capriciously or contrary to law, 5 U.S.C. §§ 701, 706. *Cf. CIBA Corp.* v. *Weinberger*, 412 U.S. 640, 93 S. Ct. 2495, 37 L. Ed. 2d 230 (1973). *See also* note 10 *supra* and the text at note 21 *supra*.

> the meaning which would be attached to them by experts, but by the average man who would be likely to purchase the articles in question and to whom those representations are thus made.

Id. at 927–928. The statement is a non sequitur in the first place: while the question of deceptiveness relates to laymen being deceived, expertise on what is deceptive is important. Beyond this, according to the *Hindman* court, neither "expert" testimony nor the expertise of the FTC itself plays any role whatsoever in determining what advertisements are or are not deceptive. One is forced to wonder what the district court thought the FTC was in business to do.

Not surprisingly, the *Hindman* court's holding was categorically rejected, albeit in dictum, by its own court of appeals in *United States* v. *Vulcanized Rubber & Plastics Co.*, 288 F. 2d 257, 258–259 n. 2 (3d Cir.), *cert. denied*, 368 U.S. 821, 82 S. Ct. 38, 7 L. Ed. 2d 26 (1961). After recounting the facts as presented to the *Hindman* court, the Third Circuit said that the *Hindman* court's holding

> was erroneous, *since the sole issue before the court was whether or not the labeling practice was within the proscription of the order* and not whether the labeling practice was deceptive. . . . Moreover, creating an issue of fact as the court did in Hindman, *would usurp the function exclusively vested by Congress in the Federal Trade Commission* to determine the issue of whether a labeling practice is misleading or deceptive to the public.

(Emphasis added.) As the text of *Vulcanized* makes clear, the court there based its statement concerning the "sole issue before the court" on its reading of *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 54, 68 S. Ct. 822, 92 L. Ed. 1196 (1948). In its petition for a writ of certiorari to the Supreme Court, Vulcanized conceded that to be the correct application of Mr. Justice Black's language in *Morton Salt*,[25a] but nevertheless argued that the FTC had never passed on the labeling of its combs "rubber-resin"; rather, Vulcanized insisted, the order went only to combs labeled "rubber" or "hard rubber."

Although the Third Circuit remarks with respect to the *Hindman* case and a jury trial may be "dictum," it is relevant to consider that the Government there had been awarded summary judgment by the district court, which award was affirmed and certiorari denied. Thus, what appellants here would certainly characterize as a "factual" dispute was resolved *as a matter of law* by all the courts which passed on that issue, even though Vulcanized character**[451]**ized the dispute, one involving the meaning of an order, as a factual one.[26]

[25a] Brief for Petitioner at 12.

[26] Professor Jaffe, who is right in so many things but like the rest of us not in all, agrees with *Hindman,* asking "Who better than a lay customer to decide?" L. Jaffe, Judicial Control of Administrative Action 319 n. 237 (1965). But like the *Hindman* court and my colleagues here, the good professor fails to give any weight to—indeed, he does not mention—whatever administrative proceedings, formal or informal, led up to the FTC's certification of facts to the Attorney General or the certification itself. This is what the court in *Vulcanized* saw, and with it I agree.

There is, of course, a series of cases relied on heavily by the majority, the "leading" one of which we are told is *Hepner* v. *United States*, 213 U.S. 103, 29 S. Ct. 474, 53 L. Ed. 720 (1909). These cases generally hold jury trials to be available in actions for civil penalties or forfeitures. In my view they are totally inapposite for *in none of them* was there a prior administrative proceeding culminating in a judicially upheld administrative order, the violation of which was in issue; in all of them the question of violation of a statute was being tried for the first time and *ab initio*. Here, however, appellants were long ago found by the FTC, in turn upheld by the Sixth Circuit Court of Appeals on review, to have engaged in deceptive advertising; the only question is whether a "new," ever so slightly changed commercial is within the reach of that order, not whether there was deceptive advertising in the first instance. Any intimation that Congress was in the Federal Trade Commission Act "opting" for "the *Hepner* principle" strikes me as, however sophisticated, wholly sophistical.

The most recent discussion by the Supreme Court of the right to trial by jury in civil cases is to be found in *Pernell* v. *Southall Realty*, 416 U.S. 363, 94 S. Ct. 1723, 40 L. Ed. 2d 198, 42 U.S.L.W. 4595 (1974). In *Pernell*, the Court held that an action to recover possession of real property brought in the District of Columbia pursuant to D.C. Code § 16–1501 entailed the right to a jury trial under the seventh amendment. The Court stated that it "has long assumed that actions to recover land, like actions for damages to a person or property, are actions at law triable to a jury." *Id.* at 4597, 94 S. Ct. at 1727. The Court then went on to distinguish *Block* v. *Hirsh*, 256 U.S. 135, 41 S. Ct. 458, 65 L. Ed. 865 (1921), a case relied upon heavily by the lower court in denying a right to a jury trial, in the following way:

> *Block* v. *Hirsh* merely stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication. See *Curtis* v. *Loether*, 415 U.S. at 189 [94 S. Ct. 1005]. See also *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 [57 S. Ct. 615, 81 L. Ed. 893] (1937).

42 U.S.L.W. at 4601, 94 S. Ct. at 1733. The Court pointed out that under the statutory scheme operative in the District of Columbia, *no administrative agency was involved either as a factfinder or as an adjudicator*, each dispute coming fresh to the courts, and the Court said "We may assume that the Seventh Amendment would not be a bar to a congressional effort" to delegate the resolution of such disputes to an administrative agency without the right to a jury trial being granted. 42 U.S.L.W. at 4601, 94 S. Ct. at 1733. The majority opinion in this case finds "further support" for its holding on the seventh amendment issue in the *Pernell* decision by stating that § 45(*l*) "provides for just such a 'civil action.' " Consistent with oversimplification

of the application of the *Hepner* line of cases to this issue, however, the majority ignores the fact that § 45(*l*) is not an isolated "civil action" provision but rather is a provision conceived with and embedded in a complex statutory scheme that is the very foundation of an administrative agency's power.

[452] In *Curtis* v. *Loether*, 415 U.S. 189, 94 S. Ct. 1005, 39 L. Ed. 2d 260, 42 U.S.L.W. (1974), the Court rejected an argument that a damage action brought under § 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612, was not to be tried to a jury if the defendant timely requested that it be so tried. The plaintiff in *Curtis* relied heavily on two cases, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937), and *Katchen* v. *Landy*, 382 U.S. 323, 86 S. Ct. 467, 15 L. Ed. 2d 391 (1966), to support her claim that the seventh amendment was not applicable to her right of action. In *Jones & Lauglin*, note 23 *supra*, the Court had upheld the award of back pay in an NLRB proceeding, rejecting a seventh amendment claim; in *Katchen*, the Court upheld over a seventh amendment claim the Bankruptcy Act's grant of summary jurisdiction in a trustee's action to compel a claimant to surrender a voidable preference. In commenting in *Curtis*, Mr. Justice Marshall, writing for a unanimous Court, stated that *Jones & Laughlin*

> stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, *where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the* [*agency's*] *role in the statutory scheme.*

42 U.S.L.W. at 4261, 94 S. Ct. at 1008 (emphasis added). Mr. Justice Marshall then commented on both *Jones & Laughlin* and *Katchen*, writing that

> These cases uphold congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment. But when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, *where there is obviously no functional justification for denying the jury trial right*, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.

Id. (emphasis added) (footnote omitted). The emphasized language above is apparently a reference to one of the three factors listed as critical to determining the "legal" nature of an issue by Mr. Justice White in *Ross* v. *Bernhard*, 396 U.S. 531, 538, n. 10, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970). If one thing stands out from the discussion above of the legislative history of § 45(*l*), it is that Congress thought its constituents sufficiently "gullible" that to protect them from deceptive advertising, the FTC, as a "quasi-judicial" administrative agency, alone would have the expertise and resources to define and adjudicate what is or is not deceptive advertising. If any aspect of the FTC's role in the statutory scheme is made clear by the cases decided since 1938, it is that the FTC, and only the FTC, is in a position to deal with the question of deceptive advertising which "rests so heavily on inference and pragmatic judgment."[27] Indeed, it is the law of this case as previously determined by the Sixth Circuit, [**453**] *Williams I*, 381 F. 2d at 890, that the FTC is not required to "take a random sample to determine the meaning and impact of the advertisements." On the issue of meaning, what would a jury finding be other than a "random" sampling?

The argument is made that the two "other" factors listed in footnote 10 of *Ross* v. *Bernhard*, *supra*, *i.e.*, "the pre-merger custom" and "the remedy sought," are said here to "point strongly toward jury trial." As for the former it is necessary only to reiterate that § 45(*l*) was and is one part of a complex regulatory scheme that, it so happens, was enacted almost contemporaneously with the merger of law and equity in the federal courts. Thus, the stark fact is that there is *no* "pre-merger" custom or practice to which we can look for guidance. As to the "remedy sought," here it is a civil penalty, recently raised by Congress to a maximum of $10,000 per violation, that serves the purpose of punishing those who would defy the orders of the FTC. The question of the meaning of the commercials is, in conclusion, not a question for trial de novo, whether by court or jury. It is a question which Congress entrusted to an administrative process and where there is a functional justification for denying the jury trial right. As such the seventh amendment does not apply. *NLRB* v. *Jones & Laughlin Steel Corp.*, *supra*. *See Curtis* v. *Loether*, *supra*.

II. CONSIDERATION OF THE ELEVEN COUNTS

A. *The Function of the District Court*

This opinion would be incomplete if I did not delineate what I believe to be the precise function to be played by the district court in a penalty proceeding under § 45(*l*). Although it could be argued that the underlying administrative law tests, now incorporated in the Administrative Procedure Act, might be read into § 45(*l*), we are confronted, as with the jury trial question, with the fact that Congress has never directly addressed this question. It would not be amiss to proceed with the words of Professor Llewellyn in mind:

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[27] *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, 85 S. Ct. 1035, 1043, 13 L. Ed. 2d 904 (1965). The majority's statement that jury inadequacy is not a factor "when the jury is asked to determine only whether a television commercial has made various forbidden representations" is surprising. In *Crane Co.* v. *American Standard, Inc.*, 490 F. 2d 332 (2d Cir. 1973), in considering whether Standard should be accorded a jury trial on the amount of damages recoverable in an "intricate" securities case, Judge Friendly's opinion for the court stated that "It would be hard to think of tasks less appropriate for performance by a jury . . . ." 490 F. 2d 332, 344. One such "less appropriate" task for a jury would be to decide a question that has for all practical purposes, taken 11 years of hearings, meetings, litigation, a full-fledged judicial review, discussion and correspondence, and more hearings, plus the unquestioned application of agency expertise, all at great expense to the public treasury, to decide. It is most difficult to see appellants' claim for a plenary or jury trial as anything other than "the tactics of delay and procrastination" that the Supreme Court tells us have been the hallmark of another industry's efforts to thwart the regulatory efficacy of another agency. *See Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. at 626–627.

> Here [where Congress did not directly consider a question is passing a statute that has been on the books for many years] the quest is not properly for the sense originally intended by the statute, for the sense sought originally to be *put into it*, but rather for the sense which *can be quarried* out of it in the light of the new situation.[28]

This "situation" is "new" only in the sense that no case has ever addressed itself directly to the question what weight is to be accorded the FTC's determination that its cease and desist order has been violated. I view it as nothing more or less than the traditional question of what the scope-of-review is and on what record it is to be based.[29]

As previously noted, *see* note 8 *supra*, Judge Motley stated that her consideration was to be based on the plain language of the cease and desist order, the Sixth Circuit's decision enforcing that order, and "relevant proceedings before the FTC." This is eminently sound as a starting point. What, however, are "relevant proceedings before the FTC"? On what type of record is a § 45(*l*) proceeding brought in the district court to proceed?

Relevant proceedings include, of course, the record generated in the administrative process which led to the enforcement of the cease and desist order, as modified, by the Sixth Circuit. The importance of this record cannot be overemphasized, because as I have recounted at some length both the FTC and appellants litigated, albeit in administrative proceedings, the very questions that are now before this court in the form of modified commercials. This record has already been subjected to "substantial evidence" review in the [**454**] Sixth Circuit, whose decision binds any future consideration of the implications of that record *and* the reach of the cease and desist order.

But also before the district court (and hence before us on appeal) are the records of the administrative proceedings that were generated subsequent to the Sixth Circuit decision. These proceedings during the "compliance" phase consisted of public hearings, findings of the FTC, correspondence, meetings between representatives of the FTC and appellants, and the certification of facts by the FTC to the Attorney General along with transmittal of a draft complaint. It may be said that these proceedings are, on balance, informal, as opposed to the formal hearing procedures called for in § 45(c). As previously discussed relative to the adoption of 15 U.S.C. § 21(*l*), one feature of § 45(*l*) is to avoid the expense and delay of further *formal* proceedings after a cease and desist order has become final. At that point, justice must be swift as well as just. This point is nowhere better expressed than by Mr. Chief Justice Warren, writing for the Court in *FTC* v. *Colgate-Palmolive Co.:*

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[28] K. Llewellyn, The Common Law Tradition—Deciding Appeals 374 (1960), *quoted in Farmington Dowel Prods. Co.* v. *Forster Mfg. Co.*, 421 F. 2d 61, 73 (1st Cir. 1970).

[29] As to which see, *e.g.*, 4 K. Davis, Administrative Law chs. 29 & 30; 5 U.S.C. §§ 701, 706.

> If respondents [subject to a final cease and desist order] in their subsequent commercials attempt to come as close to the line of misrepresentation as the Commission's order permits, they may without specifically intending to do so cross into the area proscribed by this order. However, it does not seem "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." [30]

I take this passage to indicate the traditional standard of review for both the district courts and appellate courts in a § 45(*l*) proceeding: great deference is to be accorded to the FTC at this stage in the proceedings. As Mr. Chief Justice Warren made clear, the due process rights of those subject to cease and desist orders are largely protected by the compliance procedures themselves. 380 U.S. at 394 & n. 22.

This type of deference has been the subject of very recent Supreme Court consideration in *Camp* v. *Pitts*, 411 U.S. 138, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973). There a decision of the Comptroller based on informal procedures [31] was thought by the court of appeals to require de novo review by the district court. In reversing, the Supreme Court held that the review was not to be de novo but rather upon the informal administrative record compiled below, and that review on such a record was to be on the "arbitrary, capricious" standard of 5 U.S.C. § 706(2)(A) and not on the "substantial evidence" test of 5 U.S.C. § 706(2)(E) "which is appropriate when reviewing findings made on a hearing record. . . ." *Id.* at 141–142.[32] The Court went on to hold that the district court had the power "to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." *Id.* at 143.

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[30] 380 U.S. at 393, *quoting Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340, 72 S. Ct. 329, 96 L. Ed. 367 (1952).

[31] The procedures there were not unlike those used during the compliance phase of this case. *Compare* 12 C.F.R. § 4.12(d) (1967) *and* 12 C.F.R. § 5.4, *with* 16 C.F.R. § 3.61 *and United States* v. *St. Regis Paper Co.*, 355 F. 2d at 697.

[32] Nothing in the *Camp* Court's reference, 411 U.S. at 142, to its decision in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415, 91 S. Ct. 814, 823, 28 L. Ed. 2d 136 (1971), is to the contrary. In *Overton Park*, the Court made clear that, under the Administrative Procedure Act, de novo review is authorized only "when the action is adjudicatory in nature *and* the agency fact-finding procedures are inadequate . . . [or] when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." *Id.* (emphasis added).

While *Camp* is not controlling, it serves to point the way.[33] If the dis[**455**]trict court in a § 45(*l*) proceeding, after reviewing the record before it and hearing argument, deems the record inadequate for any purpose, there is no reason why it could not entertain a motion by either party for remand to the FTC to adduce the necessary facts and to have the FTC pass on those facts.[34] Such a procedure is already explicitly available to the court of appeals on initial review, and we do no violence to the statutory scheme by "quarrying" out of it this flexible tool. Indeed, the only reason we can perceive for not doing so is that those subject to a cease and desist order might rightly be thought to have the burden *ab initio* to bring such facts to the attention of the FTC under 16 C.F.R. § 3.61 during the compliance procedure.

If any doubt remained as to whether the district court below was required or empowered to hold a plenary trial on the questions as to which appellants assert a right both to a plenary and jury trial, one need only look to the type of evidence appellants seek to have introduced at such a trial to recognize that the attempt is nothing more than one to secure formal hearings which have been denied by Congress. Appellants demand, *inter alia*, a trial "in which its [sic] witnesses could be heard and in which it [sic] would have the opportunity to cross-examine Government witnesses taking contrary positions." Brief for Appellants at 23. It is difficult to see how such a proceeding would be anything less than equivalent to formal hearings, albeit before a judge presumably possessing no expertise whatsoever. Congress could have provided for formal hearings or plenary trials ad nauseum; it did not do so. *See* H.R. Rep. No. 1613, 75th Cong., 1st Sess. 6 (1937).[35]

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[33] It might be argued that *Camp* is irrelevant to the question here because review there is based on the Administrative Procedure Act and that it would be inappropriate to import into the Federal Trade Commission Act concepts of review that are of general applicability. While any such "borrowing" must of necessity be done with great care, I see no reason why it cannot be done as long as the result is consistent with and furthers the purposes of the Federal Trade Commission Act. Moreover, it is not as if the Administrative Procedure Act sprang into life full-blown like Minerva; rather it was the embodiment of an extensive structure of administrative law which the courts and commentators had been constructing, albeit with some confusion and inconsistency, for several decades. As previously noted, *see* note 12 and accompanying text *supra*, at least one federal court *has* asserted jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 704, to review the FTC's rejection of a compliance report submitted by a party subject to a valid cease and desist order. *Floersheim* v. *Weinberger*, 346 F. Supp. at 955. That court took jurisdiction on the basis that an order of the FTC issued in the compliance phase "may have the effect of a supplemental Cease and Desist Order without the benefit to the petitioner of judicial review." *Id.* Passing the question of the validity of the district court's assertion of jurisdiction, it is still noteworthy that the court sharply restricted its review in a § 45(*l*) proceeding:

> Review here is confined to a determination whether substantial evidence on the entire record . . . supports the Commission's response to the Report of Compliance *so that the response cannot be said to have been arbitrary or clearly wrong.*

Id. at 957 (emphasis added). In a penalty action based on the *Floersheim* violations would not that action be res judicata?

[34] *See* note 14 *supra*; *cf. CIBA* v. *Weinberger*, 412 U.S. at 644.

B. *The Function of the Appellate Court*

Taking the position that the question whether these 11 commercials violated the cease and desist order is a question to be decided without plenary trial to judge or jury, I address briefly the question of what function we perform at [**456**] the appellate level. As to questions of law decided by the district court, the court of appeals can exercise full powers of review as to the soundness of the conclusions reached. To the extent that any questions decided by the district court implicate the discretion of that court, *e.g.*, the question of amount of penalty assessed, it is our obligation to defer to the decision of the district court unless that discretion has been abused or arbitrarily or capriciously exercised, such deference to be at least as great as in the case of, say, a criminal sentence of a youthful offender where reasons are required to be stated. *See United States* v. *Kaylor*, 491 F. 2d 1133 (2d Cir. 1974) (*en banc*).

C. *The Order and the Sixth Circuit Decision*

Having set out the pertinent parts of the cease and desist order below,[36] it may not be amiss to quote at some length the Sixth Circuit's summary of that order, by which, of course, this court is bound:

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[35] Appellants elaborate on the true purpose of this plenary trial by suggesting that the Government has an obligation at this stage in the proceedings to present "experts in advertising, surveys of viewers, or poll or sample evidence." Brief for Appelants at 37. Passing the fact that the law of this case is that the FTC is under no obligation at any time to take a "random sample," *Williams I*, 381 F. 2d at 890, I am struck by the trial envisioned by appellants and the statement by the majority that deciding the question whether these 11 commercials make "forbidden" representations is a rather easy one after all and quite appropriate for a jury. Maybe my brethren saw something in the commercials we viewed that I did not, but I was impressed by my lack of expertise on the subject of meaning and deceptiveness.

[36] Appellants were prohibited, *inter alia*, from:

1. Disseminating or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement

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(b) which represents directly or by implication that the preparation is a generally effective remedy for tiredness, loss of strength, run-down feeling, nervousness or irritability;

(c) which represents directly or by implication that the preparation is an effective remedy for tiredness, loss of strength, run-down feeling, nervousness or irritability in more than a small minority of persons experiencing such symptoms;

(d) which represents directly or by implication that the use of such preparation will be beneficial in the treatment or relief of tiredness, loss of strength, run-down feeling, nervousness or irritability, unless such advertisement expressly limits the claim of effectiveness of the preparation to those persons whose symptoms are due to an existing deficiency of one or more of the vitamins contained in the preparation, or to an existing deficiency of iron or to iron deficiency anemia, and further, unless the advertisement also discloses clearly and conspicuously that: (1) in the great majority of persons who experience such symptoms, these symptoms are not caused by a deficiency of one or more of the vitamins

> The Commission's Order requires that not only must the Geritol advertisements be expressly limited to those persons whose symptoms are due to an existing deficiency [of vitamins or iron] . . . , but also the Geritol advertisements must *affirmatively disclose* the negative fact that a great majority of persons who experience these symptoms do not experience them because they have a vitamin or iron deficiency; *that for the great majority of people experiencing these symptoms, Geritol will be of no benefit.* Closely related to this requirement is the further requirement of the Order that the Geritol advertisements refrain from representing that the symptoms are generally reliable indications of iron deficiency.

381 F. 2d at 886–887 (footnotes omitted) (emphasis added). The Sixth Circuit's decision explained that its use of the word "symptoms" included the symptoms of tiredness, loss of strength, rundown feeling, nervousness or irritability. *Id.* at 886 n. 3.

It is beyond dispute here that in the 11 commercials before this court, *no* commercial even purported to make the affirmative disclosure required by the order and the Sixth Circuit's reading of that order.[37] At this point, it is obvious [**457**] that appellants embarked upon a course of action which would, in all probability, bring them "close[r] to the line," *see* text at note 30 *supra*, of violating the order than had they decided instead to make the affirmative disclosures required by the order and the Sixth Circuit opinion.[38] Of course, such was their right, but they had been duly warned by the FTC of its determination to ensure that, absent affirmative disclosures, the commercials could not even by inference refer to the "tiredness" symptom.[39] The absence of any such disclosures serves to sharpen focus on the words of the order itself, which forbade representation "directly *or by implication* that the preparation is a generally effective remedy for tiredness, loss of strength, run-down feeling . . . ." The precise question for this court, as it was for the court below, is whether appellants came so close to the

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contained in the preparation or by iron deficiency or iron deficiency anemia; and (2) for such persons the preparation will be of no benefit;

(e) which represents directly or by implication that tiredness, loss of strength, rundown feeling, nervousness or irritability are generally reliable indications of iron deficiency or iron deficiency anemia. . . .

In re J. B. Williams Co., FTC No. 8547 (Nov. 24, 1967) (modified order to cease and desist).

[37] Appellants' use of the affirmative disclosure, "The great majority of tired people don't feel that way because of iron poor blood, and Geritol won't help them," in commercials run prior to the 11 commercials before this court was rejected as insufficient by the FTC in an opinion handed down on December 2, 1968. In re J. B. Williams Co., FTC No. 8547 (Dec. 2, 1968). That decision is not subject to challenge here, but is part of the compliance phase record that was appropriately before the court below and is before this court on appeal.

[38] The Sixth Circuit described the affirmative disclosure provisions as being the "main thrust" of the FTC's order, *Williams I*, 381 F. 2d at 888. Given this interpretation of the order, it can fairly be said that adoption of a strategy that totally ignored the "main thrust" of the order would necessarily incur a greater risk of noncompliance unless radical changes were made not only in the appearance but in the substance of the commercials themselves.

[39] *See* In re J. B. Williams Co., FTC No. 8547 (Dec. 2, 1968) at 7.

line as to warrant deference to the FTC's conclusion that the line was crossed, "directly or by implication."

Counts 1–4 involve commercials denominated as the "AA" commercials. The pertinent portion of the commercial that is the basis for count one is set out in the margin;[40] the Government's argument centers on the inclusion of the phrases "iron power" and "blood-build[**458**]ing power." Appellants were given notice by the FTC *prior* to the dissemination of these commercials that it was the opinion of the FTC that these commercials violated the cease and desist order *and* that they would be in compliance with the order if the reference to "power" were deleted. Instead of acceding to this opinion by discontinuing the commercials, or attempting to litigate the issue,[41] appellants assumed the risk that *their* interpretation of the FTC's cease and desist order would prevail over the interpretation of that order by the very agency that had framed it.

Unless as an appellate court we sit to try de novo, the question before us on counts 1–4[42] is not, as the majority would have it, whether the inference drawn by the district court concerning the use of the word "power"[43] is either the "most likely" or "one that a jury would be compelled to draw." As for the inference being the "most likely," it is clear that such a standard would be in direct conflict with the idea

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[40] The stage directions and text of this commercial are as follows:

1. MS ON TED MACK IN LIBRARY, STANDING NEXT TO LIGHT BOX. HE FLIPS SWITCH, LIGHTING UP LEFT HALF OF SHADOW BOX TO SHOW BAD BLOOD CELLS AND TITLE: "IRON-POOR BLOOD BEFORE GERITOL."	1. MACK: (O.C.): Hello, I'm Ted Mack. Your blood-stream has been called your lifeline. Look! You could have iron-poor blood cells like these . . . pale, few in number, badly shaped.
2. DISSOLVE TO FILM CLIP OF "POOR" & "RICH" CELLS. IN THIS SEQUENCE WE WILL USE OUR FILM OF THE BLOOD CELLS FRAMES 2 AND 3.	2. If that's so, take Geritol to build more blood cells . . . better shaped . . . rich in iron . . . like these.
3. CUT BACK TO SHOW MACK STANDING BY LIGHT BOX. HOLDS UP BOTTLE OF TABLETS.	3. There's no finer, more effective way to build iron-rich, red blood than with Geritol.
4. CUT TO TWO BOTTLES, BACK TO MACK.	4. Geritol-iron enters your blood-stream fast carrying its blood-building power to every part of your body.
5. TITLE: "TWICE THE IRON IN A POUND OF CALF'S LIVER."	5. Just 2 Geritol tablets or two tablespoons of Geritol liquid contain *twice* the iron in a pound of calf's liver.
6. CUT TO BOTTLES SHOT. TITLE: BUILDS IRON POWER FAST.	6. Take Geritol. It builds iron power in your blood *fast!* Geritol really works!

[41] See notes 12 & 33, *supra*.

[42] The commercials involved in counts 2–4 are set out in the appendices to the district court opinion, *Williams II*, 354 F. Supp. at 554–556; the similarities between those three commercials and the commercial in count 1 are such that they can be considered under the same analysis that applies to count 1. The word "power" is the key to the discussion of all four.

[43] "To say that Geritol builds power in your blood is the effective equivalent of saying that Geritol builds power in you." *Id.* at 537.

that the FTC functions to protect "the vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions." *Aronberg* v. *FTC*, 132 F. 2d 165, 167 (7th Cir. 1942). The standard to be applied in a direct review proceeding is whether such an inference might reasonably be drawn by *some* members of the general public, not by either all members of the general public or by a majority of the public.[44] Neither judges nor jurors are in a position to second-guess the FTC's opinion on this question. Again, the standard that should be applied here is whether the finding by the FTC, that some members of the general public would draw that inference, is arbitrary or capricious.[45]

On its face, the inference drawn by the district court below is unassailable under this standard. The relationship between the word "power" as used in the context of these commercials and the condemned practice of unqualified reference to "tiredness," etc., in the cease and desist order clearly supports the district court's conclusion on these counts.[46]

[459] Counts 5–9 involve commercials that appellants term the "sad-glad" commercials. In counts 5–7, the theme is that a woman has been made "sad" because she has discovered that she has "iron-poor blood." After taking Geritol, this same woman suddenly becomes glad. Appellants argued below that the "sad-glad" theme was essentially a play to "basic human emotion" and "human interest," and that there were no inferences to be drawn between "sadness" and "tiredness," etc. The district court, emphasizing the visual effect of the commercials, stated that the commercials

> may be easily perceived as a contrast between feeling weak and run-down and feeling lively. The wife, who looks dreary and perhaps run-down in her "sad"

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[44] The argument might be made that we do violence to the standard rule relating to summary judgment that a court must draw the inference most favorable to the party opposing the motion, and the majority's reference to this rule seems to put the argument in those terms. But this argument is based on the erroneous assumptions that the court in a § 45(*l*) proceeding has been given the authority to draw the "most likely" inference in the first place and that the Government must show, to prevail on its motion for summary judgment, that *no* other reasonable inferences might be drawn. As demonstrated in the text above, neither of these assumptions is true. The Supreme Court has recently had occasion to comment on the increased flexibility of the use of the summary judgment procedure in a case involving review of an administrative decision where no jury trial right obtained. *See Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. at 621–622.

[45] Again, the fact that this "finding" was not made after formal hearings is completely irrelevant unless appellants can make an argument that such denial rises to the level of violation of constitutional due process, as to which *see* note 14 *supra*.

[46] The majority's opinion at footnote 23 states perfunctorily that "the FTC's assertion that use of this word [power] was a violation did not make it so . . ." amounts to a complete negation of agency expertise in the compliance phase of the proceedings and is a substitution of judgment on a mixed question of law and fact. If a court is dissatisfied with the reasoning, or lack of it, tendered by an agency to support its findings where only informal proceedings have been utilized to produce a record, that court has the power to demand such further evidence as is required for the execution of the court's limited responsibilities. *See Camp* v. *Pitts*, *supra*.

> state at the beginning of the advertisements, looks energetic when she gives a broad smile at the end of the advertisements.

United States v. *Williams*, 354 F. Supp. 521, 539 (S.D.N.Y. 1973) (*Williams II*). The district court properly points out that

> The common-sense response of many viewers to the advertisements—that the wife is not sad only because of the *knowledge* that she has iron-poor blood, but because of the *effects* that this condition has had and is having on her.

Id.[47] Having introduced into these commercials by implication the very symptoms that were the subject of the cease and desist order, appellants' argument that the commercials are without the order border on the frivolous.[48]

The commercials which are the subjects of counts 8–9 are of the same "sad-glad" motif as those in counts 5–7 and additionally involve the use of the word "power." The district court held, and there can be no doubt, that these commercials clearly violated the order. *See Williams II*, 354 F. Supp. at 543.[49]

The commercials involved in counts 10–11 present two distinct questions. The first question is whether FemIron comes within the scope of the order as "any other preparation . . . possessing substantially similar properties, [**460**] under whatever name or names sold." I would affirm the district court's conclusion as well as its reasoning on this point, *Williams II*, 354 F. Supp. at 531–532, adding only the comment that the marketing of FemIron, in effect, to evade the reach of the order was a strategy addressed specifically by Representative

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[47] To have "iron-poor blood," as an abstract proposition, would seem to have little or no meaning other than that condition might be thought by the layman suffering from it to affect his life through the symptomatic expression of that condition. This is not to say that some people might not be "sad" merely because a label had been attached to them as the result of a medical examination (which is presumably the only way one would be made aware of one's "condition"). It is to say that the layman's focus is apt to be on the symptoms of the underlying condition rather than on the condition itself. As has been said, "The physician may . . . need to exert the full prestige of his position to induce an asymptomatic individual to alter his habits . . . or to follow a therapeutic program throughout the rest of his life. Harrison's Principles of Internal Medicine 7 (6th ed. 1970). It goes without saying that questions of effect on the viewing public long subjected to deceptive advertising by a particular advertiser are best resolved by the FTC on the basis of its intimate knowledge of and experience in such matters.

[48] Appellants' claim that they thought the "sad-glad" theme would be acceptable to the FTC is quite curious in light of the FTC's prior decision, *see* note 39 *supra*, which went out of its way to point out that the "before-and-after" technique employed by appellants was considered to be in violation of the order. App. at 58–59. *This finding has never been challenged by appellants*, and is one that should be taken into consideration by the district court and this court in judging how close these commercials came to the "border line" of the FTC order. Even in the de novo review engaged in by the majority the December, 1968, decision is relevant.

[49] With respect to counts 5–9, the majority argues that the conclusion of the district court represents only "a possible inference [but] by no means the only one." *Supra* at 3180. Under the logic of the majority opinion, as discussed *supra*, an advertiser would always escape penalties for violation of a cease and desist order if more than one plausible inference could be drawn from a given commercial. This argument is untenable.

Chapman during the debate over the Wheeler-Lea Amendments in 1938. *See* text accompanying note 22 *supra.*

Thus I join with the majority in agreement that the FemIron commercials violated the order. In these commercials, a "tired mother" was juxtaposed against the "vital look" of a woman who took FemIron, and to this visual counterpoint was added the comment, "You see, some women even risk becoming anemic and tired." I would only add that the "tired-vigorous" dichotomy seen so clearly by the majority opinion in the FemIron commercials seems to this lay observer to be the very same sort of effect created by the "sad-glad" motif of the commercials in counts 5–9. There is perhaps a difference in the degree of success with which the dichotomy was drawn, but the visual impression in the FemIron commercials need not even have been fortified by the "tired" language to bring these commercials within the order, in my view as in the view of the FTC.

The conclusions I would reach are identical to those reached by the district court which apparently did not give *any* weight to the FTC's finding that the commercials violated the order. But as I have reiterated above, ignoring, as the majority does, the expertise of the FTC at a stage that can only be labeled as critical in the enforcement process runs counter to the entire regulatory scheme put forth in the Federal Trade Commission Act. Particularly with respect to the word "power" as used in counts 1–4, the benefit of the doubt, were there any, would have to go with the FTC, in the light of the history of appellants' advertising. This is not because the FTC is the sole judge of the question, which it is not; it is rather because, assuming the good-faith application of agency expertise during the compliance phase of the proceedings, a good-faith application not directly challenged here by appellants, the FTC has worked closely with the advertising of Geritol for over a decade. If its conclusion as to the inference to be drawn from the word "power" is entitled to any less respect than others it makes during the course of carrying out its assigned tasks, this can only be because that decision was not made as the consequence of formal hearings, but as has been said, Congress intended this to be the case. That Congress has the "leeway" to establish such procedures is beyond dispute. *Cf. Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 622, 93 S. Ct. 2469, 37 L. Ed. 2d 207 (1973). The FTC, as its press release of June 25, 1969, makes clear, was at that time and had been throughout the compliance phase *unanimously* of the view that the use of the word "power" violated the order. The only dissent within the FTC was expressed by Commissioner Elman, joined by Commissioner Nicholson, who criticized his three colleagues for their extraordinary efforts to encourage voluntary compliance rather than instituting court proceedings to force compliance. App. at 104–07. It is nothing other than this unanimous view of the commissioners of the FTC that the majority overturns by suggesting that appellants may be entitled to summary judgment on counts 1–4. This is pure and simple judicial usurpation of the administrative process.

III. NOTICE

Appellants make two arguments concerning notice: (1) that penalties under § 45(*l*) do not accrue until one subject to an order has been notified by the FTC that he is not in compliance and until a reasonable time has been allotted to bring himself into compliance; (2) that liability on counts 5–11 should be limited because the FTC either failed to respond or delayed response to the submissions of appellants to the FTC in [**461**] connection with the commercials involved in those counts.

The first argument is based on the language of *Continental Baking Co.* v. *Dixon*, 283 F. Supp. 285, 287–288 (D. Del. 1968) (application for stay of penalties under § 45(*l*) denied), where it was said that penalties under § 45(*l*) could not accrue until the FTC made a "finding" of noncompliance and this finding, indicating the extent of noncompliance, was communicated to the alleged violator. The court there reasoned that any other interpretaiton would raise "serious questions of due process." *Id.* at 288. What these "serious questions" might be one is left to ponder, but the appellants' argument here is that a warning of noncompliance is required by the "breadth of the Commission's orders." Brief for Appellants at 40.

But, of course, the Sixth Circuit found that this very order "is not unduly vague and fairly apprises the Petitioners of what is required of them." *Williams I*, 381 F. 2d at 891. This holding is itself dispositive of appellants' constitutional claim; there is no authority standing for the proposition that due process requires or could be thought to require any additional notice. Certainly if civil rights advocates must contest the constitutionality of a temporary injunction enjoining their demonstration through the courts before disobeying it, *Walker* v. *City of Birmingham*, 388 U.S. 307, 87 S. Ct. 1824, 18 L. Ed. 2d 1210 (1967), it can hardly be argued here that appellants' right to engage in activity not protected by the constitution, *i.e.*, dissemination of false and misleading advertising, requires greater constitutional protection.

Appellants' argument based on statutory grounds is equally without merit. The legislative history of § 45(*l*) reveals that one purpose of that section was to render orders final so that they might "become operative as to further transgressions. . . . " H.R. Rep. No. 1613, 75th Cong., 1st Sess. 6 (1937). In floor debate, Representative Lea stated that § 45(*l*) provided "for making the order of the Federal

Trade Commission *automatically* backed up by the court when it becomes final." 83 Cong. Rec. 392 (1938) (emphasis added). The statement of record by the FTC on this question, 33 Fed. Reg. 19097 (1968), is clearly consistent with § 45(*l*) and the legislative history of that section.

Appellants' other notice claim—that the FTC failed to respond or delayed response to submissions by appellants to the FTC, thereby somehow exposing appellants to greater penalties than they would conceivably have been subject to had the FTC jumped through their hoop more quickly—is in my view frivolous. It seeks to place on the agency the burden of leading an advertiser subject to a cease and desist order through the mine-field laid by that advertiser's attempts to read the order for as little as it is worth. Taken as an allegation of bad faith on the part of the FTC, it is unsupported and I agree with the majority that we need not comment on what measures a district court might take to remedy such a situation, as where a delay of four years occurred. *See generally United States* v. *American Greetings Corp.*, 168 F. Supp. 45 (N.D. Ohio 1958), *aff'd on opinion below*, 272 F.2d 945 (6th Cir. 1959).

Finally, it puts the appellants' notice argument in its true light to recollect as the majority does—I need not repeat here—the facts of the administrative proceedings following the Sixth Circuit's denial of the petition to review the cease and desist order which had become final on December 31, 1967. *See* Part 1A *supra.* My only regret is that these proceedings were treated by the majority only in connection with the notice contentions.

IV. PENALTIES

The majority and I agree that § 45(*l*) as written allows for the imposition of a $5,000 (now $10,000) penalty "for each violation" with each violation being a "separate offense." Appellants argue that the "day of continuance" language should be read to limit penalties imposa[**462**]ble on any given day to $5,000 regardless of how many times or in how many places a commercial is run during that day. The appellants point out that under this holding, one subject to a mandatory order of the Commission would be liable to a penalty of only $5,000 per day for disobedience, whereas one, like appellant, who violates an order in 30 different places on the same day might be subject to $150,000 in penalties. I am in complete agreement with the majority on this point when it states that "Congress relied on the good sense of the FTC in making its certification to the Attorney General and, failing that, on the discretion of the court to prevent . . . an outrageous result."

This conclusion flows directly from the import of the statutory scheme and particularly 15 U.S.C. § 56, discussed *supra*. It is also relevant to our disposition of appellants' claims that (1) the Government is limited by the "certification" of the FTC in this case to collecting a maximum of $500,000 in penalties and (2) that the penalties are not assessable against both appellants because they essentially constitute the same entity for purposes of § 45(*l*).

As for the first question, based on the interpretation of 15 U.S.C. § 56 *supra*, there is no answer to the proposition that the Government is bound by the FTC's certification of a $500,000 penalty, and no more, if that figure was so certified. My reading of *St. Regis Paper Co.*, *supra*, almost requires such a result and is supported by *Holloway* v. *Bristol-Myers Corp.*, *supra*. The dispute, then, centers on whether such a figure was in fact certified. The certification letter itself, App. at 296–301, indicated no figures for penalties except by reference to a draft complaint submitted by the FTC to the Attorney General, but that clearly limited the certification to "Judgment against defendants in the total sum of $500,000." App. at 324. I do not think we have to accept the reasoning of the district court that the draft complaint "was intended [merely] to facilitate the Attorney General's task." *Williams II*, 354 F. Supp. at 546. I thus can agree that FTC expertise and discretion were lodged in this decision to seek penalties limited to $500,000, and that this decision should be given force here, that is, that the total sum assessable against both appellants is $500,000.[50]

Because the district court's order was against J. B. Williams for $456,000 and Parkson for $356,000, I would affirm so much of it as pertains to J. B. Williams. The question then would be whether Parkson is liable for the remaining $44,000. These two corporations have, since 1962, represented themselves as separate entities before the FTC and before the Sixth Circuit. The majority would pierce the corporate veil to provide Parkson with immunity. I would not. The reason for not doing so is not merely because J. B. Williams was seeking to avoid the 15 per cent advertising agency fee (taken in the form of a discount by the media to the agency from the price paid by the sponsor). Rather it seems to me that it was well within the exercise of FTC discretion on the basis of the course of appellants' conduct to charge Parkson with responsibility. Its role as a captive, wholly-owned agency was to work out the violative advertising. The "pitch" worked out would—like that of the patent medicine salesman of years gone by—imply a lot and say little and thereby convey a meaning deceptively appealing while hopefully leaving law enforcement holding the bag by little changes in the pitch at the last moment. While the ethics of the independent advertising agencies of Madison Avenue may not necessarily rival those of Calpurnia, particularly when it comes to keeping a big customer's account, one would suppose that their fear, were they in Parkson's situation, of personal (or corporate) liability would result in coun-[**463**]sel to the client of moderation or restraint in dealing with the Commission's order. Here there was none since the "agency" is not just captive but slave. In *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437, 66 S. Ct. 247, 249, 90 L. Ed. 181 (1946), the Supreme Court said:

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[50] The logic in the majority's reliance on the certification in *this* regard but in no other is beyond my capacity to follow.

> While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person. One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public.

Parkson was subject to the cease and desist order. It violated the order. It should not escape responsibility—in my view to the extent of only $44,000—for that violation. Nor is it an answer to say that J. B. Williams might not have employed any agency; we are not here to deal in hypothetical exercises.

V. THE EVIDENTIARY HEARING

The question of the right of appellants to an evidentiary hearing on subjects such as their alleged "good faith belief" that the commercials did not violate the order is open in my view as to all counts. The question may be addressed in two ways: first, whether there is any right to such a hearing as a matter of law; second, if so, what is the appropriate forum for such a hearing?

The FTC's decision to seek penalties against appellants constituted a decision by it that appellants had not exercised good faith in its attempts to comply with the cease and desist order. In its statement released in June 25, 1969, a majority of the commissioners stated their belief that "the end result of these compliance negotiations will be the cessation of deceptive advertising for Geritol. . . ." App. at 102. The only inference to be drawn from the institution of this action under § 45(*l*) is that the three-member majority of the FTC that ascribed to the statement above on June 25, 1969, over the vehement objection of Commissioner Elman, joined by Commissioner Nicholson, no longer saw appellants' efforts as exhibiting "good faith" on November 28, 1969, when the certification of facts to the Attorney General took place. Indeed, a review of the relevant documents in this case, including but not limited to that statement, the findings and opinion issued by the

FTC on December 2, 1968, and the letter of certification itself, leave no doubt that the FTC exercised a patience toward appellants that in the history of administrative law must be rather remarkable.

Agreeing with the majority's statement that the district court's function with respect to penalties is limited to the prevention of an "outrageous result," there is not one scintilla of support in the evidence proffered by the appellants to be taken in a hearing that could possibly affect the outcome here. But even were this not so, the holding that the FTC exercised discretion in arriving at the $500,000 figure indicates that it is the FTC that is to pass in the first instance on the question upon which appellants now seek an evidentiary hearing in the district court. Who, better than the FTC, is in a position to determine the extent to which appellants exercise "good faith"? In a proper case, and this is not one, the district court has the power to order further evidence to be adduced before the FTC, and to review the FTC's conclusion under the "arbitrary or capricious" standard. As Judge Leventhal said in *Holloway* v. *Bristol-Myers Corp.*, *supra*, there are

> frequent references in the legislative history [of the Wheeler-Lea Amend[464]ments] to the Trade Commission's expertise in dealing with commercial practices, its abilities to act as a buffer in securing voluntary compliance through informal proceedings, *and its sound discretion in determining when formal enforcement measures were necessary.*

485 F. 2d at 995 (footnote omitted) (emphasis added).[51]

I would affirm as to J. B. Williams Co., Inc. I would modify, and as modified, affirm the judgment against Parkson Advertising Agency, Inc.

CONTROL DATA CORPORATION ET AL. v. F.T.C., ET AL.*

Civ. A. No. 4–74–Civ. 25 F.T.C. Docket No. 8940

(United States District Court, District of Minnesota, May 3, 1974)

On demand for disclosure of certain documents pursuant to the Freedom of Information Act, court denied access to one inter-agency memorandum and granted access to parts of another memorandum on the finding that parts of it which do not reflect the author's deliberative process are instructions to the staff.

Before Larson, *District Judge.*

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[51] While the FTC's special expertise may not be raised as a barrier inhibiting . . . judicial review . . . it does and should inhibit the notion *that a court may be injected into the pertinent subject-matter directly, without the benefit of FTC consideraion.*

Holloway v. *Bristol-Myers Corp.*, 485 F. 2d at 998 (footnote omitted) (emphasis added).

*Not otherwise reported. See also pp. 852, 1107, 1449, 1500 herein.

This matter comes before the Court upon plaintiffs' demand for disclosure of certain documents pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(3)(1970) (hereinafter FOIA).

The facts underlying the instant controversy have been set forth in detail in the Court's previous Memorandum in this case. *Control Data Corporation* v. *Federal Trade Commission*, No. 4–74–Civ. 25 (February 28, 1974). The Federal Trade Commission (hereinafter FTC or the Commission) has instituted administrative proceedings against the plaintiffs for alleged violations of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

After commencement of those proceedings, the plaintiffs made a motion to the administrative law judge conducting the initial hearing in the matter to dismiss the complaint. They contended that a 13-month lapse between their submission of a proposed consent decree and the Commission's rejection of the proposal and simultaneous initiation of the pending proceedings constituted prejudicial delay. To support their claim, they sought a subpoena duces tecum for FTC documents falling within four designated categories relating to this lapse in time.

The administrative law judge considered the prejudice issue to be premature. Accordingly, he denied granting the subpoena and also denied the motion to dismiss, without prejudice to its renewal subsequently in the proceedings.

The plaintiffs, following FTC procedures, then made a similar demand for the identical documents from the Commission. After two months passed without response from the Commission, the plaintiffs instituted this action.

In their complaint plaintiffs sought declaratory relief pertaining to certain of the Commission's procedural regulations that they claimed deprive them of a fair hearing in the administrative proceedings. They also sought disclosure under the FOIA of the same documents that they had previously demanded from the administrative law judge and the Commission.[1] Their complaint further sought to enjoin the pending administrative proceedings until determination by the Court of their rights under the FOIA.

Following the initiation of this action the FTC responded to the prior request for production of documents. The Commission disclosed a copy of Chapter 3.21 of its Operating Manual, a three-page document dealing with the Commission's general regulations relative to recommendations by its staff that administrative proceedings be initiated.

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[1] The following materials were sought from the administrative law judge, the Commission, and then in this action: documents regarding the Commission's practice or policy of preparedness for litigation at the time the Commission's staff recommends issuance of a notice of proposed complaint, documents regarding the time consumed by the Commission in evaluating and passing upon proposed consent decrees, documents regarding the 13-month lapse in time between submission of the proposed consent decree and the FTC's rejection of it, and documents regarding the effects of this time lapse.

The Commission further informed the plaintiffs that it had located two other documents pertinent to their request. But it claimed these documents to be exempt from disclosure under specific exemptions of the FOIA. It also said that no other documents relevant to the request exist.

The Court ruled that plaintiffs' failure to exhaust their administrative remedies precluded granting relief on their fair hearing claim. It further held that it would not enjoin the pending administrative proceedings. The primary basis for this determination was the Supreme Court's opinion in *Renegotiation Board* v. *Bannercraft Clothing Company, Inc.*, 42 L.W. 4203 (No. 72–822, Feb. 19, 1974), which was decided shortly after the instant case was taken under advisement.

The Court went on, however, to order the Commission to submit *in camera* the two documents that were claimed to be exempt from disclosure. It also required the Commission to substantiate its claim that no other documents exist relevant to the plaintiffs' request.

The two documents have been submitted and examined *in camera.* Additionally, the Commission has submitted an affidavit by its secretary supporting the claim that no other pertinent documents exist. (*Affidavit of Charles A. Tobin.*)

The affidavit demonstrates that the Commission has undertaken a reasonably thorough search for any relevant materials. It further assures that if any such documents do turn up in the future the plaintiffs will be so informed. This affidavit satisfies the Court as to the probable nonexistence of documents other than the one already disclosed and those involved here.

One of the documents claimed to be exempt is a 3½ page memorandum from J. Thomas Rosch, director of the Commission's Bureau of Consumer Protection, to the Bureau's professional staff concerning "Trial Preparation; Investigational Procedures" (hereinafter Rosch memorandum). The other is a single paragraph extracted from an 18-page memorandum from Richard C. Foster, assistant director of the FTC's Division of Marketing Practices, to the Commission apparently summarizing the Commission's files involving the instant plaintiffs (hereinafter Foster memorandum). The Court will consider each memorandum separately.

I. *The Rosch Memorandum*

The Rosch memorandum is divided into two parts. The first portion deals with the "Standard of Preparation" required by the staff before recommending to the Commission that a complaint be issued or a rule promulgated. It sets forth the standard and its underlying strategic rationale.

The second portion of the memorandum, the last 2½ pages, lays out a seven step procedure for conducting formal investigations by the staff. Two introductory paragraphs and three closing paragraphs contain Rosch's reasons for the procedures, means by which they may be implemented, and strategies to be pursued by the staff.

The Commission claims the memorandum to be exempt under two specific exemptions of the FOIA: (b) (2), "related solely to the internal personnel rules and practices of an agency;" and (b) (5), "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

The FOIA was enacted for the purpose of assuring citizens the right of access to many records of the Federal government. *E.g.*, *Vaughn* v. *Rosen*, 484 F. 2d 820, 823 (D.C. Cir. 1973), *cert. denied*, No. 73–1107, 42 L.W. 3520 (March 19, 1974); *Ethyl Corporation* v. *Environmental Protection Agency*, 478 F. 2d 47, 48 (4th Cir. 1973); *Stokes* v. *Brennan*, 476 F. 2d 699, 700–701 (5th Cir. 1973); *Soucie* v. *David*, 448 F. 2d 1067, 1076 (D.C. Cir. 1971); *Epstein* v. *Resor*, 421 F. 2d 930, 932 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970); *Long* v. *U.S. Internal Revenue Service*, 349 F. Supp. 871, 873 (W.D. Wash. 1972); *City of Concord* v. *Ambrose*, 333 F. Supp. 958 (N.D. Cal. 1971). In essence, it provides for disclosure of all governmental documents, unless they are covered by one of the nine specific statutory exemptions. *Vaughn* v. *Rosen*, *supra*, 823; *Getman* v. *N.L.R.B.*, 450 F. 2d 670, 672 (D.C. Cir.), *stay denied*, 404 U.S. 1204 (1971). The statutory exemptions are exclusive and are to be narrowly construed. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 88 (1973); *Montrose Chemical Corporation of California* v. *Train*, No. 73–1443, 1444, at 5–6 (D.C. Cir. Jan. 21, 1974); *Ethyl Corporation* v. *Environmental Protection Agency*, *supra*, 49.

"In short, the Act makes disclosure the rule and secrecy the exception." *Ethyl Corporation* v. *Environmental Protection Agency*, *supra*, 49. To this end, this Court, within the district in which both of the plaintiffs have their principal places of business, is empowered to conduct de novo review of the FTC's exemption claims. 5 U.S.C. § 552(a) (3). The Commission has the burden of justifying any claim of exemption under the FOIA. *Ibid.*

Initially, (b) (2) may be discounted as being inapplicable here. In enacting the FOIA the Senate and House had different views of the scope of (b) (2). The Senate considered (b) (2) to be narrowly restricted to relatively routine matters concerning the day-to-day activities of agency employees. In approving the measure, the Senate Judiciary Committee said that (b)(2)—

> **relates only to the internal personnel rules and practices of an agency. Examples of this may be rules as to personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like. S. Rep. No. 813, 89th Cong., 1st Sess., p. 8 (1965).**

The House Government Operations Committee took a much broader view of (b)(2). It said that it was intended to cover "[o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners . . . ." H.R. Rep. No. 1497, 89th Cong., 2d Sess., p. 10, *U.S. Code Cong. & Adm. News*, 89th Cong., 2d Sess., 2418, at 2427 (1966).

The cases are not uniform in interpreting (b)(2), but the weight of authority and the better view is expressed in those decisions adopting the more limited Senate version. *See Stokes* v. *Brennan*, *supra*, 702–703; *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787, 796–797 (6th Cir. 1972); *Benson* v. *General Services Administration*, 289 F. Supp. 590 (W.D. Wash. 1968), *aff'd on other grounds*, 415 F. 2d 878 (9th Cir. 1969); *Long* v. *U.S. Internal Revenue Service*, *supra*, 874; *Consumers Union of United States* v. *Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F. 2d 1363 (2d Cir. 1971); K. Davis, *Administrative Law Treatise*, 145, 174–175 (Supp. 1970), updating and republishing his article, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761 (1967). *But see Polymers, Inc.* v. *N.L.R.B.*, 414 F. 2d 999 (2d Cir. 1969), *cert. denied*, 396 U.S. 1010 (1970); *Tietze* v. *Richardson*, 342 F. Supp. 610 (S.D. Tex. 1972); *cf. City of Concord* v. *Ambrose*, *supra*.

There are three primary reasons for considering the Senate's view as more accurate. First, the language of the exemption suggests concern with the conditions of employment, not matters of policy. Additionally, adopting the House's version would lead to conflicts with other portions of the FOIA, notably (a)(1)(C) (requiring publication, *inter alia*, of agency "rules of procedure" in the Federal Register) and (a)(2)(C) (requiring that certain staff manuals and instructions be made available to the public). Moreover, the Senate's version was before the House when the House approved (b)(2) in the identical language as the Senate had passed. *See Hawkes* v. *Internal Revenue Service*, *supra*, 797; *Stokes* v. *Brennan*, *supra*, 703.

Treated in the narrow sense, compatible with the Senate's version, (b)(2) is inapplicable to the Rosch memorandum. This document sets out standards and procedures to be followed by the FTC staff in conducting the Commission's official functions. It has no bearing on the "employee-employer type concerns" that were central to the Senate's interpretation of the exemption. *Hawkes* v. *Internal Revenue Service*, *supra*, 797.

Attention must, therefore, be directed to whether the memorandum is exempt under (b)(5). In dealing with this provision, the Supreme Court has recognized that differentiating "between what may be withheld and what must be disclosed is not without difficulties." *Environmental Protection Agency* v. *Mink*, *supra*, 86.

On its face (b)(5) could "encompass nearly anything an agency puts in writing." Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047, 1048–1049 (1973). Despite its open-ended language, the provision is limited by its two underlying policy considerations: preventing premature disclosure that might unduly impede the proper functioning of the administrative processes,[2] and preventing inhibition of the free, frank exchange of information and recommendations among governmental personnel.[3]

Additionally, the exemption by its terms is limited to documents that "would not be available by law to a party . . . in litigation with the agency." § 552(b)(5). The language and legislative history of the provision demonstrate that (b)(5) was intended to incorporate "the same flexible, common-sense approach that has long governed" the discovery of Government documents by private parties engaged in litigation with Government agencies. *Environmental Protection Agency* v. *Mink*, *supra*, 91.[4]

In *Mink*, the Supreme Court approved of the dichotomy that had developed in cases under the FOIA between "materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other." 410 U.S. at 89. Under *Mink*, the former may be withheld, while the latter, the "purely factual," is not within the purview of (b)(5) and hence is not exempt from disclosure. Furthermore, if matters reflecting the deliberative processes and those of a factual nature both appear in a memorandum, the factual information must be disclosed if it is severable from the deliberative items. *Ibid.*, 91; *Vaughn* v. *Rosen*, *supra*, 825.

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[2] *See, e.g.*, S. Rep. No. 813, *supra*, p. 9; H.R. Rep. No. 1497, *supra*, p. 10; Note, 86 Harv. L. Rev. 1047, *supra*, 1048–1049.

[3] *See, e.g.*, *Stokes* v. *Brennan*, *supra*, 703; *International Paper Company* v. *Federal Power Commission*, 438 F. 2d 1349, 1358–1359 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971); *Ackerly* v. *Ley*, 420 F. 2d 1336, 1341 (D.C. Cir. 1969); S. Rep. No. 813, *supra*, p. 3; H.R. Rep. No. 1427, *supra*, p. 10; Note, 86 Harv. L. Rev. 1047, *supra*, 1049.

[4] While principles of discovery are to govern disclosure under the FOIA, there are several significant differences between the two. A person need not be engaged in litigation in order to seek disclosure under the FOIA. The FOIA explicitly compels disclosure to "any person." § 552(a)(3). *See Bannercraft Clothing Company* v. *Renegotiation Board*, 466 F. 2d 345, 351–352 (D.C. Cir. 1972), *rev'd on other grounds*, 42 L.W. 4203 (No. 72–822, Feb. 19, 1974).

Unlike discovery, a claimant's need for access to the material he seeks is not a factor in disclosure under the FOIA. *Sterling Drug, Inc.* v. *F.T.C.*, 450 F. 2d 698, 704–705, (D.C. Cir. 1971) (apparently rejecting dictum in *American Mail Line, Ltd.* v. *Gulick*, 411 F. 2d 696, 703 (D.C. Cir. 1969); *see also Environmental Protection Agency* v. *Mink*, *supra*, 86; H.R. Rep. No. 1427, *supra*, p. 10; Note, 86 Harv. L. Rev. 1047, *supra*, 1051, n. 22. *But see International Paper Company* v. *Federal Power Commission*, n. 3, *supra*, 1359. Thus, if access is granted here, the documents at issue would be available to all members of the public, without any restriction or limitation on usage or dissemination. *City of Concord* v. *Ambrose*, *supra*, 959.

The Rosch memorandum as a whole is not readily susceptible to classification along the lines of the *Mink* dichotomy. The bulk of the document contains reasons and strategies underlying standards and procedures to be followed by the FTC staff. These segments, "work product" in the parlance of civil discovery, clearly do reflect Rosch's mental processes and would not be discoverable. Thus, these portions are within the (b)(5) exemption.

But the guidelines themselves, both as to the standard of preparation and investigative procedures (except for the first step in the investigative process) are neither reflective of "deliberative . . . processes" or "purely factual" in the sense that these terms are used in *Mink* and other (b)(5) cases. *E.g.*, *Vaughn* v. *Rosen*, *supra* (evaluations of certain agencies' personnel management programs; *held*, remanded with directions to determine if exemption applies); *Ethyl Corporation* v. *Environmental Protection Agency*, *supra* (medical and scientific data considered in connection with issuance of proposed lead regulations under the Clean Air Act; *held*, "purely factual," and thus not exempt).

Because the *Mink* dichotomy is inapplicable to these portions of the Rosch memorandum, the question is whether (b)(5) was aimed at shielding *only* matters relating to deliberative processes, or whether it was intended to compel disclosure of *only* the "purely factual." If the former, the segments here in question would have to be disclosed because they are not reflective of deliberative processes; if the latter, they would not have to be divulged because they are not "purely factual."

The legislative history surrounding (b)(5) and the cases construing the exemption suggest the appropriateness of the former approach. Congress sought to shield from disclosure *only* those matters reflective of the deliberative processes; all else was intended to be outside the ambit of (b)(5). *See Environmental Protection Agency* v. *Mink*, *supra*, 89–91; *Ethyl Corporation* v. *Environmental Protection Agency*, *supra*, 49; *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 425 F. 2d 578, 570 (D.C. Cir. 1970); S. Rep. No. 813, p. 9; H.R. Rep. No. 1497, p. 10.

These portions of the Rosch memorandum set forth objective criteria pertaining to the conduct of the Commission's work. They do not contain any advice, recommendations, opinions, or other subjective ideas that reflect policy-making processes within the scope of (b)(5). *See Bristol-Myers Company* v. *F.T.C.*, 424 F. 2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 284 (1970); *Ackerly* v. *Ley*, n.3, *supra*, 1341; *Souci* v. *David*, *supra*, 1077–1078; *see also Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.C. Cir. 1966), *aff'd* 384 F. 2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967); H.R. Rep. No. 1427, 89th Cong., 2d Sess., *supra*, p. 10; Note, 86 Harv. L. Rev. 1047, *supra*, 1049–1050.

Rather than being intertwined with the decision-making processes, these few segments contain the ultimate decisions themselves. Disclosing them would not violate the "bar against probing the mental processes of an executive branch decision-maker." *Montrose Chemical Corporation of California* v. *Train*, *supra*, 12. Since they set forth guidelines that presumably are being followed by the staff, access to them would not offend the policies against premature disclosure and freedom from inhibition underlying (b)(5).[5] The portions reflecting the reasoning processes by which these guidelines were reached may be severed from the rest of the document in order to preserve the privilege of confidentiality that attaches only to the advisory and consultative facets of administrative decision-making. *See Environmental Protection Agency* v. *Mink*, *supra*, 86.

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[5] The disclosable portions of the Rosch memorandum comprise less than one-third of the overall length of the document; about two-thirds is exempt as reflective of his mental or deliberative processes. Disclosure of the entire memorandum, including the "deliberative" portions, would be compelled if the Court were to consider it within the "adopted as policy" doctrine.

Under this standard, documents containing statements of policy actually adopted or followed by an agency are not exempt, even if they contain segments that reflect deliberative processes that would otherwise fall within (b)(5). *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board, supra,* 482 F. 2d at 718–720; *Sterling Drug, Inc.* v. *F.T.C.,* n. 4, *supra,* 706–708; 713, n. 8 (Bazelon, C.J., concurring in part and dissenting in part); *American Mail Lines, Ltd.* v. *Gulick,* n. 4, *supra;* Note, 86 Harv. L. Rev. 1047, *supra,* 1057–1058.

Although not expressly dealing with this issue, the Commission maintains that the Rosch memorandum merely sets forth his own personal views and does not purport to establish the policy of the Commission proper. *Defendants' Supplemental Memorandum in Support of Their Motion for Summary Judgment,* 8.

But a policy need not be formally or officially adopted by the agency in order to come within this doctrine. As long as it is adhered to in a de facto fashion by the agency, it is not exempt, regardless of how it came to be followed. *See, Sterling Drug, Inc.* v. *F.T.C.,* n. 4, *supra,* 713, n. 8 (Bazelon, C.J., concurring in part and dissenting in part); *see also General Services Administration* v. *Benson,* 415 F. 2d 878 (9th Cir. 1969), *aff'g* 289 F. Supp. 590 (W.D. Wash. 1968); Note, 86 Harv. L. Rev. 1047, *supra,* 1062–1063.

From all appearances, the guidelines set forth in the Rosch memorandum were intended to be, and presumably have been, adhered to by the staff. In that sense, they have been "adopted" for functional purposes by the Commission.

But these guidelines do not contain the "policy" of the Commission in the sense that that phrase is used in the cases that have followed this doctrine. The standard has been employed in cases involving substantive policies of an administrative agency. In contrast, the Rosch memorandum pertains to internal operations of the Commission's staff. The "adopted as policy" doctrine, therefore, is inapplicable.

Apart from the unwieldy treatment of the Rosch memorandum under the *Mink* dichotomy, what really is at issue here is whether an agency can avoid disclosure of its operating procedures under the guise of the exemption of (b) (5). Merely because the information has been put in the form of an intra-agency memorandum does not necessarily shield it from public disclosure under (b) (5). *See Bristol-Myers Company* v. *F.T.C.*, *supra*, 939; *cf. Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 482 F. 2d 710, 717 (9th Cir. 1973).

In *Long* v. *U.S. Internal Revenue Service*, *supra*, (b) (5) was ruled inapplicable to two documents used by Internal Revenue agents in entering closing agreements with taxpayers. One of the documents was a purely factual statistical study, the other was an instructional handbook. 349 F. Supp. at 874. The nearest analogue of the handbook in *Long* is the Chapter of the Operating Manual that has already been disclosed here by the Commission. The information in the Rosch memorandum elaborates, in part, on portions of the guidelines in the Operating Manual. Although the Rosch memorandum differs somewhat from the handbook in *Long*, there is one critical similarity: both documents set forth fundamental operating procedures for the conduct of the official functions of an administrative agency.

In setting the standards by which the FTC carries out its investigations and initiates administrative proceedings, the Rosch memorandum contains the kind of information that the public has a right to know under the FOIA.[6] This material should be made available even though it is put in the form of an intra-agency memorandum specifically addressed to agency personnel. *See Hawkes* v. *Internal Revenue Service*, *supra*, 795; K. Davis, *Administrative Law Treatise*, *supra*, 137.

It is difficult to envision how disclosure of the limited segments setting forth the guidelines for the staff can seriously harm the Commission. Compare *City of Concord* v. *Ambrose*, *supra*, 959. They merely lay out a timetable for the conduct of administrative investigations and proceedings.

By excising those portions reflecting Rosch's reasoning processes, disclosure will not be "injurious to the consultative functions of government" that (b) (5) was intended to protect. *Environmental Protection Agency* v. *Mink*, *supra*, 87, quoting *Kaiser Aluminum & Chem-*

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[6] The Commission has not argued that the Rosch memorandum is law enforcement in character, rather than administrative in nature, and hence not subject to disclosure under § 552(a) (2) (C). This provision mandates making available for public inspection and copying "administrative staff manuals and instructions to staff that affect a member of the public." *See Stokes* v. *Brennan*, *supra*, 701–702; *Hawkes* v. *Internal Revenue Service*, *supra*, 795. Even if it were not characterized as administrative in nature, a question the Court does not pass upon, it would still be subject to disclosure under §552(a) (3) unless it satisfied one of the specific exemptions of § (b). *See Long* v. *U.S. Internal Revenue Service*, *supra*.

ical Corp. v. *United States*, 141 Ct. Cl. 38, 49, 157 F. Supp. 939, 946 (1958).

The Commission, therefore, will be required to provide plaintiffs with a copy of the Rosch memorandum, subject to the deletion of certain portions indicated by the Court thereon that are exempt because they reflect the deliberative processes of the declarant Rosch.[7]

II. *The Foster Memorandum*

According to the affidavit of the Commission's secretary, the single paragraph submitted from the 18-page Foster memorandum is the only portion of the document pertinent to the 13-month time lapse concerning which plaintiffs have requested disclosure. *Affidavit of Charles A. Tobin*, p. 2, n. 1. In this seven sentence paragraph Foster mentions the form of the complaint that he recommends and alludes to some of the means by which the complaint was compiled.

The secretary's averment and the information contained in the paragraph itself establish that *in camera* inspection of the document as a whole is not needed here. *See Environmental Protection Agency* v. *Mink*, *supra*, 93.

Unlike the portions required to be disclosed in the Rosch memorandum, this paragraph exclusively reflects Foster's deliberative processes. His recommendations and advice are interspersed with other comments bearing upon the internal policy-making processes of the Commission. In sum, the whole paragraph contains the kind of consultative materials that (b)(5) was intended to protect.

The Foster memorandum also is exempt under (b)(7), which provides for nondisclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." The test for determining the applicability of this provision is whether the materials sought "relate to anything that can fairly be characterized as an enforcement proceeding." *Aspin* v. *Department of Defense*, No. 72–2147, at 6 (D.C. Cir. Nov. 26, 1973), quoting *Bristol-Myers Company* v. *F.T.C.*, *supra*, 939.

The Foster memorandum apparently summarizes the Commission's files pertaining to the plaintiffs herein. It is dated August 30, 1973, nearly a year after submission of the proposed consent decree and about seven weeks prior to the FTC's rejection of the proposal and commencement of the administrative proceedings. It appears to have been used in connection with the FTC's preparations for those proceedings.

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[7] The Court has prepared an edited version of the Rosch memorandum, deleting all of the exempt portions of the document. In order to preserve the confidentiality of the entire memorandum should an appeal be taken of this decision, the edited copy is being submitted to the Commission, which in turn will then be required to transmit it to the plaintiffs. Additionally, the memorandum in its full original form will be marked and sealed as Court Exhibit No. 1. The Foster memorandum will be marked and sealed as Court Exhibit No. 2.

Being properly classifiable as part of the FTC's "investigatory files compiled for law enforcement purposes," the exemption automatically attaches. This is so regardless of the needs of the claimants, *Weisberg* v. *U.S. Department of Justice*, No. 71–1026, at 9 (D.C. Cir. Oct. 24, 1973); *see also Environmental Protection Agency* v. *Mink*, *supra*, 86; and also regardless of whether the Government would in fact be harmed by disclosure. *Ditlow* v. *Brinegar*, No. 73–1984, at 3 (D.C. Cir. Feb. 27, 1974).

The exemption retains its applicability even though the FTC has already brought proceedings against the plaintiffs herein. *Aspin* v. *Department of Defense*, *supra*, 11; *see also Frankel* v. *S.E.C.*, 460 F. 2d 813, 817 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972).

The exception contained in the last phrase of (b)(7) is inapplicable here. Under that provision, disclosure must be made "to the extent available by law to party other than an agency." But this phrase is not intended to change procedures otherwise established or give earlier or additional access to investigatory files than a party could obtain while directly involved in litigation with the agency. H.R. Rep. No. 1427, p. 11. *See also Frankel* v. *S.E.C.*, *supra*, 818; *Evans* v. *Department of Transportation of United States*, 446 F. 2d 821 (5th Cir. 1971); *Benson* v. *United States*, 309 F. Supp. 1144, 1146 (D. Neb. 1970); *Cooney* v. *Sun Shipbuilding Co.*, 288 F. Supp. 708 (E.D. Pa. 1968). The Foster memorandum would not be available at this stage of the administrative proceedings and hence does not fall within the exception to (b)(7).

Accordingly, IT IS ORDERED:

That the Commission promptly provide the plaintiffs with a copy of the Rosch memorandum, subject to certain deletions, attached herein as Appendix A.*

IT IS FURTHER ORDERED:

That the Rosch memorandum in its entirety be marked and sealed as Court Exhibit No. 1 and that the Foster memorandum be marked and sealed as Court Exhibit No. 2.

IT IS FURTHER ORDERED:

That plaintiffs' other requests for disclosure be, and they hereby are, denied.

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* Appendix A is not reproduced herein for reasons of economy. It is available, however, at the Division of Legal & Public Records, Federal Trade Commission, Washington, D.C. 20580, for inspection and copying.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, ET AL. v. F.T.C.*

Civ. A. No. 74 Civ. 1751. F.T.C. Docket No. 8916.

(United States District Court, Southern District of New York, May 16, 1974)

On a motion to enjoin the Commission from proceeding in Docket 8916, court held that the alleged injuries were premature because plaintiffs failed to exhaust their administrative remedies and would not cause them irreparable harm. Motion to enjoin denied and Commission motion to dismiss granted.

Before FRANKEL, *District Judge.*

In this action plaintiffs seek (1) to halt an adjudicatory proceeding of the Federal Trade Commission (FTC) that has been under way for well over a year (in fact, practically speaking, for nearly two years), (2) to bar enforcement of an FTC rule promulgated three years ago, (3) to force the FTC to hold new rule-making proceedings, and to block or limit the agency's action in other, related aspects. The suit seems on its fact to collide with fundamental obstacles barring judicial interference with the administrative process at intermediate stages. Further study confirms this initial apprehension. For reasons outlined below, plaintiffs' motion for a preliminary injunction will be denied and defendant's motion to dismiss the complaint will be granted.

Late in 1969 the Commission initiated a rule-making proceeding by publishing a proposed rule designed to regulate retail food store advertising. With evidently particular concern about alleged practices of retail food chains, and spurred by evidence reflected in a staff report on the subject, the agency proposed to provide in its rule that it would be "an unfair method of competition and/or an unfair or deceptive act or practice" for a chain to (1) advertise a product at a stated price "in an area served by any of its stores which do not have such products in stock, and readily available to customers in self-service areas of such stores" or (2) "[f]ail to make the advertised items conspicuously and readily available for sale at or below the advertised prices. . . ." During proceedings in which both plaintiffs herein took part, along with other industry members and trade associations, the plaintiff National Association of Food Chains (NAFC) proposed its different version of the rule, including phrases now said to be unconstitutionally vague. Plaintiff Great Atlantic & Pacific Tea Company, Inc. (A & P), likewise failed to perceive the vagueness problem of which a great deal is made now. In any event, in May of 1971, the FTC promulgated the rule in its final form, effective July 12, 1971, adhering to the original in part and adopting in part some of the key language the NAFC had proposed. 16 C.F.R. § 424.1 (1973) (referred to hereinafter as Rule 424).*

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*Reported in Trade Reg. Rep. ¶75,080 at 96,814 (1974-1 Trade Cases). For case before the Commission, see 85 F.T.C. 622.

Surveys and tests in late 1971 and 1972 produced evidence of compliance and noncompliance which is discussed some in the papers before us, but is a more appropriate subject for debate before the defendant agency in the hearing plaintiffs desire to prevent. Acknowledging the agency's primacy at least to this extent, an affidavit for the movants says "That A&P's scores were middling—better than those of many chains, worse than those of others." An affidavit in opposition characterizes A&P's showing less agreeably—as "not the worst of all . . . chains" surveyed in November 1971, but "clearly the worst of all surveyed chains for which a reasonably large number of advertised items (*i.e.*, over 300) were surveyed." Similarly, from a later survey by law students in February and March, 1972, the Commission's affiant reports that "A&P's combined availability and overpricing average . . . was . . . the poorest performance of all chains surveyed."

At any rate, the Commission determined in 1972 that it should proceed against A&P to extirpate what it charged as unfair advertising and pricing practices. On July 26, 1972, A&P was sent a proposed complaint with an opportunity under the agency's procedures to enter into efforts toward a consent order. Such efforts were taken, but proved unsuccessful. A formal complaint, commencing the proceeding now in progress, was served on February 16, 1973. The pleading steps, various motions before the administrative judge, allied moves against Rule 424, and sundry other steps in the agency litigation are recounted in the papers, but need not be detailed here. Suffice it to say that a schedule prescribed by the administrative judge by order of January 17, 1974, set May 21, 1974, as the day to start trial hearings.

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*The Rule reads in part as follows:

"In connection with the sale or offering for sale by retail food stores of food and grocery products or other merchandise, subject to the jurisdictional requirements of Sections 5 and 12 of the Federal Trade Commission Act, it is an unfair method of competition and an unfair or deceptive act or practice to:

(1) Offer any such products for sale at a stated price, by means of any advertisement disseminated in an area served by any of its stores which are covered by the advertisement which do not have such products in stock, and readily available to customers during the effective period of the advertisement. (If not readily available, clear and adequate notice shall be provided that the items are in stock and may be obtained upon request.)

Provided, however, that it shall constitute a defense to a charge under Part (1) of the rule, supra, if the retailer maintains records sufficient to show that the advertised products were ordered in adequate time for delivery and delivered to the stores in quantities sufficient to meet reasonably anticipated demands.

(2) Fail to make the advertised items conspicuously and readily available for sale at or below the advertised prices.

Unless, in each of the above cases, there is clear and conspicuous disclosure in all such advertisements as to all exceptions and/or limitations or restrictions with respect to stores, products or prices otherwise included within the advertisements." [Notes omitted.]

The instant suit was filed April 19, 1974, and plaintiffs' motion for a preliminary injunction was filed April 23, noticed for May 1, 1974. Answering papers and a cross-motion were served May 1, and plaintiffs served additional papers on May 9, 1974. The matter comes on, then, on the brink of the administrative trial and amidst the usual press of other things in this forum. Fortunately, the papers are learned and the ultimate questions, despite the heft of the materials, seem few and uncomplicated. Referring mostly to the briefs for the pertinent authorities, this court sketches briefly the grounds of its decision.

1. The case is within the still clear reach of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 36 (1938). The limited grounds on which the exhaustion requirement may be overleaped are not present here. Valiant, imaginative, sometimes tortured attempts to portray such grounds have proved totally unconvincing.

2. Plaintiffs argue at length that the Commission is using an adjudicatory proceeding as a mistaken and unlawful device to amend Rule 424. Though it is said a good deal, the point is not made and cannot now be made. The A&P is evidently charged with violating Rule 424. (As plaintiffs, in the complaint filed here, put it, the FTC proceeding against A&P "is implicitly based on Rule 424.") As is not unheard of, the determination of the charge will or may require construction and application of the rule. As is also familiar, the rule may in the process become clearer, more precise, more specifically defined—as has been true, say, of endless statutes, the Constitution, and other administrative rules in many settings. To predict the rule will inevitably be "amended" is at this point an empty form of words. There is thus no foundation for the conclusion that the agency cannot adjudicate the case before it but must, as the A&P steadily repeats, hold "an amendatory rule-making proceeding."

3. It is said Rule 424 is so vague as to violate due process, and that things must get worse rather than better if the agency is allowed to proceed with such a poisonous uncertainty in the atmosphere. The argument itself waxes vague sometimes, but it is not weighty in any event. To begin with, as has been noted, the claim of vagueness is remarkably tardy and unimpressive on its face. It is, moreover, an unattractive novelty to insist that the agency may not consider in an adjudication the precise and detailed meaning of its own regulation. Plaintiffs stress that agency counsel have predicted that there may be issues in the adjudication proceeding as to the meaning and application of Rule 424. This, it is argued, amounts to a "concession" that the rule is so vague as to be unconstitutional. Leaving out other things that could be said about this, it is a patent fallacy to say that a statute or

rule is demonsrated to be unintelligible because lawyers and litigants find themselves in disputes over its meaning.

4. The A&P worries variously that (a) it is being singled out from among all its competitors to be put at arbitrary disadvantage and (b) other chains, not in the pending proceeding, will be bound by determinations the FTC makes in deciding this case. Both spectres are discoverable in almost any administrative proceeding. Neither is more than a figment in the circumstances disclosed here. The A&P fastens upon complaint counsel's proposed order, says it is broader than the rule (presumably in the rule's intelligible parts), and predicts that this complaining "guinea pig" of a chain is thus threatened with severe disadvantage *vis-à-vis* competitors bound only by the rule. But all this predicting of what the agency *may* do that is wrong, and how this will or will not affect other companies before neither agency nor court, could serve as an object lesson vindicating the still live and salutary essence of the exhaustion doctrine.

5. It is argued that the FTC's complaint "fails to state a cause of action" under § 12 of the Federal Trade Commission Act, and that at best the agency "is attempting a novel application of Section 12 . . . ." It follows for plaintiffs that the agency is exceeding its jurisdiction. As a supposed basis for circumventing the exhaustion requirement, the argument is frivolous.

6. Plaintiffs invoke ideas of "equity" long ago exploded in cases of this kind, and they present a "balance of hardships" said to favor their suit. They argue such things as the anticipated expense of the agency hearing, the probability of their own success in this case, and the threat of adverse publicity. As has appeared, this court finds the prediction of success much too sanguine. For the rest, it is unnecessary to recite the familiar precedents nullifying such arguments in a case of this nature.

The motion for a preliminary injunction is denied. The cross-motion to dismiss is granted. The complaint is dismissed.

It is so ordered.

WINN-DIXIE STORES, INC. v. F.T.C.*

Civ. A. No. 73–863–Civ.–J–S. F.T.C. Docket No. C–1110

(United States District Court, Middle District of Florida, May 17, 1974)

1. UNDER COURT'S EQUITY POWERS, F.T.C.'S FAILURE TO REOPEN AND MODIFY ORDER TO CONFORM TO LESS RESTRICTIVE ORDER OF COMPETITOR WAS REVIEWABLE IN DISTRICT COURT

Where FTC consent decree contained most favored nation clause, Com-

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*Reported in 377 F. Supp. 773 (1974). For case before the Commission, see 70 F.T.C. 611, *modified* 73 F.T.C. 1056, *modified* 86 F.T.C. 613.

mission's failure to reopen and modify order to conform it to allegedly less restrictive order of competitor was reviewable in district court under the Administrative Procedure Act, under court's general equity powers, and under standards established by case law.

2. GRANTING ACCESS TO JUDICIAL REVIEW OF ADMINISTRATIVE ORDER MUST BE LIBERAL

[774] Access to judicial review of administrative orders must be liberally granted.

3. WAIVER OF JUDICIAL REVIEW PROVISION OF ORDER APPLIED ONLY TO REVIEW OF SUBSTANTIVE TERMS OF ORDER

Provision of FTC consent order whereby grocery store operator waived judicial review applied only to review of substantive terms of that order and not to subsequent causes of action arising out of Commission's breach of agreement contained in that order.

4. ADMINISTRATOR'S DENIAL OF MOTION TO REOPEN PROCEEDING FOR PURPOSE OF MODIFICATION IS GENERALLY NOT SUBJECT TO JUDICIAL REVIEW

Generally, administrator's denial of motion to reopen proceeding for purpose of modifying FTC order is not subject to judicial review, but, where order contained most fávored nation clause, order contemplated reopening if and when competitor received more favorable treatment from FTC.

5. SECOND ORDER, CONTAINING NO REQUIREMENT FOR PRIOR APPROVAL OF ACQUISITIONS AND SHORTER TIME PERIODS FOR GIVING NOTICE, WAS LESS RESTRICTIVE ON ITS FACE THAN THE FIRST ORDER

Where order issued pursuant to consent decree in FTC proceeding involving grocery chain provided that FTC had veto as to acquisitions or mergers and that grocery chain had to give 60 days' advance notice before any merger or acquisition, and subsequent order against another grocery chain did not require prior approval of merger or acquisition except in states where chain was doing business and contained shorter time periods for giving notice, for purposes of application of most favored nation clause contained in first order, second order was less restrictive on its fact.

6. SECOND ORDER, REQUIRING DIVESTITURE OF CERTAIN ACQUISITIONS, WAS NOT NECESSARILY MORE RESTRICTIVE THAN EARLIER ORDER ISSUED AGAINST COMPETITOR WHICH DID NOT REQUIRE ANY DIVESTITURE

Where order issued by FTC against second grocery chain was less restrictive on its face, for purpose of application of most favored nation clause in earlier order which was issued against another grocery chain and which did not require any divestiture, fact that second order required divestiture of certain acquisitions did not cause second order to become more restrictive than earlier order.

7. F.T.C. ORDERS AGAINST COMPETING FIRMS DOES NOT GENERALLY ENTITLE FIRMS TO COMPETITIVELY EQUAL TREATMENT

Firms subject to FTC order are generally not entitled to competitively equal treatment.

8. FACT THAT FIRMS DID NOT HAVE STORES IN A GIVEN AREA DID NOT MEAN THEY WERE NOT IN COMPETITION WITH ONE ANOTHER TO ACQUIRE STORES IN SUCH AREA FOR PURPOSE OF APPLICATION OF MOST FAVORED NATION CLAUSE

For purpose of application of most favored nation clause contained in FTC order issued against grocery chain, fact that such chain and another chain against which second order was issued did not have stores in given area did

not mean that they were not in competition with each other to acquire stores in such area.

9. **COURTS WILL, WHEN F.T.C. CONSENT DECREE CONTAINS MOST FAVORED NATION CLAUSE, ENFORCE IT SO THAT NO PARTY IS PLACED AT A COMPETITIVE DISADVANTAGE**

   When FTC consent decree contains most favored nation clause, courts will enforce it so that one party to it will not be placed at disadvantage to competitors.

10. **RECORD ESTABLISHED ARBITRARY AND CAPRICIOUS ACTION BY COMMISSION IN REFUSING TO REOPEN AND MODIFY ORDER**

    Record established that FTC's refusal to reopen and modify order issued against grocery chain pursuant to consent decree which contained most favored nation clause was arbitrary and capricious in view of order issued against another grocery chain.

11. **COURT MUST GO BEHIND COMMISSION ACTION IN DETERMINING IF SAID ACTION IS ARBITRARY AND CAPRICIOUS**

    Fact that FTC held hearings and wrote opinion with care did not mean its action was not arbitrary and capricious, and court must go behind Commission action to determine if it is arbitrary and capricious.

(Syllabus, with substituted captions, taken from 377 F. Supp. 733)

On action to enjoin F.T.C. from enforcing certain parts of cease and desist order and to reopen proceeding for modification of the order, court held that it had jurisdiction to entertain proceeding; the Commission's refusal to reopen and modify the order was arbitrary and capricious; and that the order issued against a second grocery chain was less restrictive.

Judgment accordingly.

J. Shepard Bryan, Jr., Winn-Dixie Stores, Inc., Jacksonville, Fla., and *James F. Rill*, *John Hardin Young*, Washington, D.C., for plaintiff.

Calvin J. Collier, Gen. Counsel, *Gerald Harwood*, Acting Asst. Gen. Counsel, *Karl H. Buschmann*, Atty., Federal Trade Commission, Washington, D.C., *John L. Briggs*, U.S. Atty., *John J. Daley, Jr.*, Asst. U.S. Atty., Jacksonville, Fla., *John R. Fleder*, Atty., U.S. Dept. of Justice, Washington, D.C., for defendants.

Before SCOTT, *District Judge*.

ORDER AND INJUNCTION

CHARLES R. SCOTT, *District Judge*.

[775] This case involves a consent order entered by the defendant Federal Trade Commission (sometimes hereinafter Commission and sometimes FTC), against plaintiff Winn-Dixie Stores, Inc. (W-D), in 1966, and the effect to be accorded the terms of the order and the agreement upon which it was based.

Plaintiff has asked this Court (a) preliminarily and permanently to enjoin defendants from enforcing certain portions of the modified cease and desist order entered against Winn-Dixie, 73 F.T.C. 1056 (1968); (b) to order defendants to reopen the proceeding which led to the order and modify the order so as to make it conform to the order entered against one of Winn-Dixie's competitors, The Kroger Company, 79 F.T.C. 636 (1971); and (c) to declare certain of defendants' actions to be arbitrary, capricious and unlawful.

Pursuant to the provisions of Rule 65(a)(2) plaintiff moved that the hearing on the application for preliminary injunction be consolidated with trial on the merits and that the trial be advanced. Defendants consented to this procedure, and all parties presented their cases on the merits at the time of the hearing on the application for preliminary injunction. Therefore, the Court finds it appropriate to consider the case on its merits at this time.

I. FACTS

Following an investigation by the FTC of several acquisitions made by Winn-Dixie which the Commission had reason to believe violated Section 7 of the Clayton Act, as amended, the Commission, pursuant to its consent order procedure (16 C.F.R. § 2.31 et seq.) accepted an agreement, dated July 26, 1966, between W–D and counsel for the Federal Trade Commission. Pursuant to the agreement, the Commission, on September 14, 1966, simultaneously issued its complaint and final order to cease and desist, whereby W–D agreed, *inter alia*, not to make any acquisition, directly or indirectly, of any retail food or grocery stores in the United States without prior approval of the Commission. 70 F.T.C. 611–19 (1966). Among other things, that order provides,

> It is ordered, That for ten (10) years from the effective date of this Order, respondent shall not, without prior approval of the Federal Trade Commission, make any acquisitions, directly or indirectly, of any retail food or grocery stores in the United States.

The agreement further contains two provisions relevant to the instant controversy.

First, it contains a "most favored nation" clause which in substance provides that the Commission, upon application by Winn-Dixie, shall reopen the proceeding to modify the order if it is found to be more restrictive than an order or Rule subsequently issued involving mergers or acquisitions by a grocery chain.

Second, the agreement also states that Winn-Dixie "waives: . . . (c) All rights to seek judicial review or otherwise to challenge or contest the validity of the Order entered into pursuant to this Agreement".

Since the entry of the original order, Winn-Dixie has filed with the Commission three separate requests for reopening of the proceeding to modify the order. On February 17, 1967, it sought a modification on the basis of the FTC's "Enforcement Policy With Respect to Mergers in the Food Distribution Industries", which the Commission by order and opinion of April 17, 1967, denied.

On February 21, 1968, Winn-Dixie again requested a reopening of the proceeding to modify the order. The Commission by order of June 24, 1968, reopened the proceeding and modified the above order because it found its order entered against the Grand Union Company (hereinafter called Grand Union) to be less restrictive. 73 F.T.C. 1050 (June 21, 1968). This modified order is now in force against W-D.

[**776**] On May 3, 1972, Winn-Dixie petitioned the Commission to reopen the proceeding and further modify the cease and desist order outstanding against Winn-Dixie to conform to an order entered by the FTC against The Kroger Company, which order Winn-Dixie alleged to be less restrictive than the modified order against Winn-Dixie. The request was opposed by the Federal Trade Commission.

By Order of November 6, 1972, the Commission, in response to Winn-Dixie's request of June 20, 1972, agreed to hear oral argument concerning Winn-Dixie's request for further modification. On March 28, 1973, oral argument was heard before the Commission, and on May 30, 1973, an order was issued, accompanied by an opinion, denying reopening and modification. This lawsuit then was commenced.

II. JURISDICTION

At the outset the Court is faced with the perennial threshold question of whether or not it has jurisdiction to hear and determine the controversy. Defendants have moved to dismiss the complaint for lack of jurisdiction in this Court on the theory that there can be no judicial review of the FTC's denial of Winn-Dixie's motion to reopen and modify the existing consent order. In the alternative, the FTC argues that, even if there is judicial review of the Commission action, the proper forum for such review is the court of appeals rather than the district court.

[1] This Court finds that the Commission's failure to reopen and modify the Winn-Dixie order to conform it to an allegedly less restrictive order of a competitor is reviewable in the district court under the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq., under the Court's general equity powers, and under the standards established in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), and *Air Line Pilots Assoc. Int'l.* v. *Federal Aviation Administration*, 446 F. 2d 236 (5th Cir. 1971).

[2] The APA expressly provides for judicial review of administrative action which is arbitrary, capricious or an abuse of discretion. 5 U.S.C. §§ 701–706. Section 703 of the APA provides for review of

agency action (a) in a court specified by statute, or (b) in any court of competent jurisdiction. Furthermore, access to judicial review must be liberally granted. *Chicago* v. *United States*, 396 U.S. 162, 90 S. Ct. 309, 24 L. Ed. 2d 340 (1969); *Brownell* v. *WeShung*, 352 U.S. 180, 77 S. Ct. 252, 1 L. Ed. 2d 225 (1956); *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 75 S. Ct. 591, 99 L. Ed. 868 (1955); *Heikkila* v. *Barber*, 345 U.S. 229, 73 S. Ct. 603, 97 L. Ed. 972 (1953); *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451 (1949).

In *Abbott Laboratories*, *supra*, the government argued, as it does here, that since the statute (in that case the Federal Food, Drug and Cosmetic Act; in this case the Federal Trade Commission Act) includes a specific procedure for review, other types of review are excluded. The court rejected that assertion, holding that the district court had jurisdiction to review the agency action and grant injunctive relief where it is appropriate. The court further held that, "... only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review". 387 U.S. 136 at 141.

In *Air Line Pilots Assoc. Int'l.* v. *FAA*, supra, the Court of Appeals for the Fifth Circuit concluded that reviewability was determined by meeting the two-prong test developed in *Abbott Laboratories*, *supra*, of " 'whether the issues tendered are appropriate for judicial resolution' " and " 'whether hardship [would result] to the parties if judicial relief [were] denied' ". 466 F. 2d 236, 241. In the instant case Winn-Dixie meets the reviewability test developed in *Abbott Laboratories* and *Air Line Pilots Association*. Plaintiff's challenge to the Commission's failure to reopen and modify the order against W–D is ready and [777] appropriate for judicial resolution, and no alternative means of resolving the dispute is available. Therefore, for the reasons outlined herein, the Court holds that the Commission's order of denial is subject to and appropriate for judicial review.

The second prong of the *Abbott Laboratories* test is also met because Winn-Dixie will suffer hardship and be irreparably injured if judicial review is denied, since the Commission's denial of reopening and modifying the order places W–D at a distinct disadvantage to competitors.

[3] It is apparent to the Court that the provision of the original consent order whereby Winn-Dixie waives judicial review applies only to review of the substantive terms of that original order and not to subsequent causes of action arising out of the Commission's breach of the agreement contained in that order. Winn-Dixie seeks review of the breach of the agreement to modify and does not seek

review of the substantive terms of the consent order as originally entered.

[4] While it is a general rule of administrative law that an administrator's denial of a motion to reopen a proceeding for the purpose of modifying a Commission order is not subject to judicial review, *Securities and Exchange Commission* v. *Louisiana Public Service Commission*, 353 U.S. 368, 77 S. Ct. 855, 1 L. Ed. 2d 897 (1957); *Martin Marietta Corp.* v. *FTC*, 376 F. 2d 430 (7th Cir. 1967), in this case the order itself contemplates reopening if and when another grocery chain receives more favorable treatment from the FTC. *See, e.g.*, *Ford Motor Co.* v. *United States*, 335 U.S. 303, 69 S. Ct. 93, 93 L. Ed. 24 (1948); *Chrysler Corp.* v. *United States*, 316 U.S. 556, 62 S. Ct. 1146, 86 L. Ed. 1668 (1942).

Winn-Dixie might never have agreed to the original consent order if the "most favored nation" clause had not been included in it. Such a clause necessarily implies the right to reopen and modify the consent order, and the Commission cannot have the discretion to arbitrarily and capriciously refuse to reopen. If such discretion were vested in the Commission and there were no judicial review of the exercise thereof, the presence of the "most favored nation" clause in the order would be meaningless.

Defendants rely heavily on the case of *Martin Marietta*, *supra*, which the Court finds to be clearly distinguishable from the case at bar. That case involved a request for modification of the terms of the consent order itself and did not contain a "most favored nation" clause agreement for reopening and modification. There the court properly refused to reopen and modify the original consent order. Here Winn-Dixie seeks only to enforce the agreement to reopen and modify which is contained in the original order. The absence of a most favored nation clause in that case gave an aura of greater finality to those orders than exists in this case. There it was likely that no need to modify the consent orders would ever exist. In this case it was contemplated and anticipated by the parties from the outset that modification of the order might become necessary.

Defendants next contend that even if the Commission's action is reviewable, the plaintiff should have sought review in the court of appeals rather than in the district court, because the Federal Trade Commission Act provides for review in the courts of appeal.

In support of this contention defendants rely on the case of *Floersheim* v. *Engman*, 494 F. 2d 949 (D.C. Cir. 1973), where the court held that neither the court of appeals nor the district court had subject matter jurisdiction under the Federal Trade Commission Act or the APA to review the FTC's determination that action proposed by

Floersheim would violate the outstanding cease and desist order. The court reasoned that where a cease and desist order of the FTC has been affirmed in an action before the court of appeals any question of the order's meaning should be heard by **[778]** the court of appeals that enforced it, rather than by the district court. *See also*, *Regal Knitwear Co.* v. *N.L.R.B.*, 324 U.S. 9, 65 S. Ct. 478, 89 L. Ed. 661 (1945); 15 U.S.C. § 21 (c), (d) and § 45(c).

In contrast to the *Floersheim* case, the consent order in this case has never been before the court of appeals nor does plaintiff seek review of Commission denial of plaintiff's proposed actions. What plaintiff seeks is an order compelling the Commission to perform what it agreed to do in the consent order; *i.e.*, to reopen the proceeding and modify the order.

The *Floersheim* case stands for the general proposition that where a court of appeals affirms an agency order, any review of that order is in the court of appeals. It does not support the defendant's contention that, in any case, review of the FTC's denial of a motion to reopen an order is in the court of appeals.

So far as the question of district court jurisdiction is concerned, the *Floersheim* case holds that the district court has no jurisdiction to review the Commission determination that Floersheim's proposed course of action would violate the cease and desist order already enforced by the court of appeals.

All parties agree that, assuming the Court has jurisdiction to review the agency action, the scope of review is to determine whether or not the FTC has acted in a manner which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". 5 U.S.C. § 706.

This Court finds that it has jurisdiction to review the allegedly arbitrary and capricous agency action which, plaintiff contends, constitutes an abuse of discretion. *Elmo Division of Drive-X Co.* v. *Dixon*, 121 U.S. App. D.C. 113, 348 F. 2d 342 (1965); *Elmo Co.* v. *Federal Trade Commission*, 128 U. S. App. D.C. 380, 389, F. 2d 550 (1967). Therefore, defendants' motion to dismiss the complaint for lack of jurisdiction over the subject matter should properly be denied.

III. MERITS OF THE CONTROVERSY

On October 16, 1971, the Federal Trade Commission entered a consent order against The Kroger Company (hereinafter called Kroger) involving a merger or acquisition by a grocery store chain. 79 F.T.C. 636 (1971). Winn-Dixie contends that the order issued by the FTC against Kroger is less restrictive with regard to mergers and acquisitions than is the order which is now in effect against W-D.

This condition, Winn-Dixie alleges, violates the letter and the spirit of the so-called "most favored nation" clause contained in the agreement entered into between W-D and the Commission in 1966, which provides,

> [I]n the event that the Federal Trade Commission issues any Order or Rule which is less restrictive than the provisions of this Order, in any proceeding involving mergers or acquisitions by a grocery store chain, then the Commission shall, upon the application of respondent, pursuant to rule 3.28 of the Commission's Rules of Practice, reopen this proceeding in order to make whatever revisions, if any, are necessary to bring the restrictions imposed upon respondent herein into conformity with those imposed upon its competitors.

On May 3, 1972, Winn-Dixie applied to the Commission requesting revision of the W-D order to conform it to the allegedly less restrictive terms of the Kroger order. This request was based on the revision agreement of 1966, with its most favored nation clause. On May 30, 1973, after hearing, the Commission, Commissioner Dennison dissenting, issued an order and opinion denying W-D's application.

Winn-Dixie then brought this action alleging that the Commission's failure to reopen and modify the 1968 W-D order is arbitrary, capricious and an abuse of discretion and fails to comply with the agreement entered into between Winn-Dixie and the Commission in 1966. **[779]** Therefore, W-D claims, the Commission's order denying reopening and modification should be set aside, and the Commission should be enjoined from enforcing against Winn-Dixie so much of the 1968 order as is more restrictive than the Kroger order.

Before the Court can properly grant the relief sought by Winn-Dixie, the following three questions must be answered in the affirmative: (1) Does the Kroger order involve a "merger or acquisition by a grocery store chain" as that phrase is used in the 1966 agreement? (2) Is the Kroger order less restrictive than the Winn-Dixie order as modified after Grand Union? (3) Is modification necessary to bring the Winn-Dixie order into conformity with the Kroger order?

(A) *Does the Kroger Order Involve an Acquisition?*

It is not disputed that the Kroger order involves an acquisition by a grocery store chain. The order against Kroger was in response to Kroger's acquisition of leased food departments in three Gold Circle stores in Dayton, Ohio.

(B) *Is the Kroger Order Less Restrictive?*

The question of whether or not the Kroger order is less restrictive than the Winn-Dixie order is the most hotly contested issue of this case. The thrust of the Federal Trade Commission's argument, and the theory on which it based its order denying reopening and modification, is that, although *part* of the Winn-Dixie order may be more restrictive than part of the Kroger order, taken as a whole, the Kroger order is more restrictive than the W–D order. This conclusion is reached by the Commission by comparing the factual situations which gave rise to the Commission's orders in these two cases. *Vicksburg* v. *Henson*, 231 U.S. 259, 34 S. Ct. 95, 58 L. Ed. 209 (1913); *Virginia Excelsior Mills* v. *Federal Trade Commission*, 256 F. 2d 538 (4th Cir. 1958); *Ostler Candy Co.* v. *Federal Trade Commission*, 106 F. 2d 962 (10th Cir. 1939).

The Commission entered its order against Kroger in response to Kroger's acquisition of the leased food departments in the aforesaid three Gold Circle stores. Kroger was already the leading food marketer in the Dayton area, so these three acquisitions involved a comparatively small, strictly horizontal,[1] acquisition in a single market. The order required total divestiture of the leased food departments.

The activities giving rise to the original complaint against Winn-Dixie were W–D's acquisition of the 35-store Hill Grocery chain in 1962, which was operating in northern central Alabama, and Winn-Dixie's subsequent acquisition in 1963 of nine grocery stores operated by Colonial Stores, Inc., in Birmingham, Alabama. These acquisitions were charged in the Commission's complaint as essentially geographic market extensions,[2] although they did have horizontal aspects. The consent order did not require Winn-Dixie to divest itself of any stores but provided that, for a ten-year period, W–D was prohibited from making any acquisition of any retail food or grocery store without prior Commission approval. Subsequently the Grand Union order was entered and, in response thereto, the Commission modified the order in force against Winn-Dixie to impose the "5–5–5"[3] criteria.

The Kroger and Winn-Dixie orders differ in three major respects. First, the Kroger order does not require prior Commission approval of a food store **[780]** merger or acquisition, however large, except in approximately 20 states where that company presently does business. Winn-Dixie, on the other hand, is subject to an absolute Commission veto as to such acquisitions throughout the entire United States. Second, the Kroger order establishes shorter time periods than the Winn-Dixie order for giving notice of proposed mergers or acquisitions. In the "5–5–5" or larger category, Kroger must give the Commission

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[1] A horizontal acquisition is an acquisition by a company in an area where it is already engaged in that business. In contrast, a geographic acquisition is an acquisition by a company in an area where it does not already engage in business.

[2] *Id.*

[3] The "5–5–5" category refers to mergers or acquisitions involving five or more states, or more than five million dollars of annual sales involving more than five percent of food store sales in any city or county.

60 days prior notification except that, when Kroger's time schedule does not permit such notice, Kroger is required to give 30 days notice following consummation of a merger or acquisition, whereas the Winn-Dixie order requires 60 days advance notice without exception. 73 F.T.C. 1056 (1968). The orders in *Winn-Dixie*, *Grand Union* and *Kroger* may be summarized as follows:

	Duration of order	Area	60-d notice 5–5–5		
			Mergers or acquisitions [1]	10-d [2] notice	30-d [3] notice
Original order against Winn-Dixie.	10 yr	Entire United States.	No [4]	No [4]	No.[4]
Grand Union order.	do	do	Yes	No	No.
Modified Winn-Dixie order after Grand Union (now in force).	do	do	Yes	No	No.
Kroger order	do	Limited to 20 States.	Yes	Yes	Yes.

[1] 60-d notice is required for mergers or acquisitions involving the "5-5-5" category.

[2] This requirement is defined in the Kroger order and provides for 10-d notice after a merger or acquisition if Kroger's time schedule does not permit a longer notice period.

[3] This requirement is defined in the Kroger order and provides for 30-d notice of mergers or acquisitions involving 4 or less stores or less than $5,000,000 in annual sales.

[4] The original Winn-Dixie order prohibits any mergers or acquisitions without prior approval.

There are certain other differences between the Winn-Dixie order and the Kroger order, but no one contends that the agreement upon which this case is based requires exact identity of restrictions. Thus, Winn-Dixie does not seek **[781]** complete conformity of its order to the Kroger order, but only seeks substantive compliance with the agreement of 1966.

The Commission recognizes that the most favored nation clause must be honored. In granting Winn-Dixie's application for modification after Grand Union, the Federal Trade Commission both adhered to its commitment in the agreement underlying the Winn-Dixie order and carefully tailored the 1968 modification to the terms of a less restrictive order entered against a competitor.

The Commission claims the fact that the Kroger order only requires approval of horizontal mergers is an appropriate outcome of the Kroger case, and the fact that the Winn-Dixie case included market extension mergers made the provision for prior approval of such extensions appropriate. The 1966 agreement, however, makes no distinction between the types of mergers or acquisitions involved but apparently covers any mergers or acquisitions. This issue was clearly analyzed and properly resolved by Commissioner Dennison in his dissenting opinion in this case.

> In the opinion denying modification, great significance is given to the fact that the respective orders were designed in response to entirely different circumstances. *Winn-Dixie* involved a geographic market extension-type merger, while *Kroger* was a straight horizontal acquisition. While this is certainly true, I question the relevancy of this fact and how it would change the outcome dictated by the original consent order.[1] A most favored nation provision requires the Commission to modify the Winn-Dixie order where there is a less restrictive order issued in any proceeding involving mergers or acquisitions by a grocery store chain. The provision is not limited to geographic market extension-type mergers nor did the Commission in any way reserve discretion in the matter.
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> [fn. Apparently this distinction failed to impress the Commission at the time of the first modification of the *Winn-Dixie* order to conform to the *Grand Union* order. Docket C–1350, 73 F.T.C. 1050 (1968). The *Grand Union* case involved a *horizontal acquisition.*]

[5] The Commission argues that the Kroger order is not less restrictive than the Winn-Dixie order either on its face or in its operative effect. The question of whether or not it is less restrictive on its face is here resolved by the Court in favor of Winn-Dixie. On the basis of the comparison of the two orders previously made by the Court herein, there can be no doubt that the restrictions on Winn-Dixie which appear on the face of its modified consent order are substantially more burdensome than are the restrictions imposed upon Kroger. The question of whether or not Winn-Dixie's order is less restrictive in its operative effect is the vital argument of this lawsuit, and the Court will now consider that issue.

In its opinion in this case the Commission held that the Kroger order was not less restrictive than the Winn-Dixie order because (1) the Kroger order not only bans future acquisitions, as does the Winn-Dixie order, but also requires divestiture of three food departments leased by Kroger, and (2) Winn-Dixie was charged in the Commission's complaint with essentially geographic market extensions having some horizontal aspects, whereas the complaint charged Kroger with a horizontal merger.

Winn-Dixie concedes that it is not required by the consent order to divest itself of any stores, as was Kroger by the consent order in its case. The Kroger most favored nation clause, unlike the Winn-Dixie agreement, represents the sort of limitation to industrywide principles which the Commission contends should apply here. In Kroger, modification is to occur only in the event a less restrictive *trade regulation rule* is promulgated, whereas in Winn-Dixie modification is to occur whenever a less restrictive *order or rule* is entered. Thus, **[782]** the Commission has demonstrated a capacity to negotiate for and write a narrower modification clause if it so desires.

[6] The Commission urges the Court to weigh the added burden on Winn-Dixie of seeking prior approval of its initial entry by acquisition into a new geographic market against the onus on Kroger of divestiture of acquired properties in 1971. This method of balancing would require the Court to give the term "restrictive" in the most favored nation clause a retrospective meaning. The fact that Kroger in 1971 was required, as part of a consent order, to take the single action of divesting itself of three leased food departments should not thereafter act to bar Winn-Dixie from enforcing the terms of its agreement. If this interpretation were to be placed on the agreement, Winn-Dixie would be at a competitive disadvantage to Kroger; the very position it sought to prevent by negotiating the most favored nation clause into the agreement in 1966.[4] Therefore, the Court concludes that the divestiture requirement did not cause the Kroger order to become more restrictive than the Winn-Dixie order, and any other conclusion would place Winn-Dixie at a competitive disadvantage to Kroger.

[7] Although firms subject to Commission order are generally not entitled to competitively equal treatment, *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, 87 S. Ct. 1622, 18 L. Ed. 2d 749 (1967); *Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411, 78 S. Ct. 377, 2 L. Ed. 2d 370 (1958), the parties in this case provided for a means of assuring equal treatment with regard to mergers and acquisitions of food stores by including the most favored nation clause in their agreement. Winn-Dixie sought to prevent itself from being at a disadvantage when attempting to merge with or acquire another food store or chain. Nevertheless, the flexible notification provisions available to Kroger, and the fact that Kroger's order only applies in states where it presently does business places Winn-Dixie at a disadvantage.

For example, if Winn-Dixie and Kroger each seek to acquire a food store outside either of their present geographic areas, Kroger may offer to purchase the store immediately, whereas before Winn-Dixie can make an offer to purchase, the Commission must give its approval. Thus, Winn-Dixie cannot bargain with the same swiftness nor certainty as Kroger, and it is not unlikely that a food store or chain owner might be willing to accept a lower price from Kroger for a quickly effected sale rather than wait for Commission approval of an offer from Winn-Dixie. The Commission could later decide to bring an action to set aside the Kroger acquisition of such a store, but merger challenges are based upon a full blown adjudication of issues and the consideration of the record as a whole. Prior approval of acquisitions, in contrast, is based on standards of evidence far less stringent than those applied to adjudication.

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[4] Without the agreement with its most favored nation clause, Winn-Dixie argues, it would never have consented to entry of the cease and desist order in 1966.

[8] The Commission contends Winn-Dixie is at no "competitive" disadvantage to Kroger in the states where neither company presently operates food stores, because Kroger by definition is not competing in those areas. Thus, the Commission argues, the prior approval requirement is not a more restrictive provision imposed upon Winn-Dixie than "those imposed upon its competitors", as contemplated by the most favored nation clause. This argument is not persuasive. The fact that neither Winn-Dixie nor Kroger has any stores in a given area at present does not necessarily mean they are not in competition with each other to acquire stores in that area. They may compete, not only in food sales, but also in attempting to acquire food stores.

[**783**] [9] The law is clear that when a consent decree contains a most favored nation clause the courts will enforce it so that one party to it will not be placed at a disadvantage to competitors. *Ford Motor Co.* v. *United States*, 335 U.S. 303, 69 S. Ct. 93, 93 L. Ed. 24 (1948); *Chrysler Corp.* v. *United States*, 316 U.S. 556, 62 S. Ct. 1146, 86 L. Ed. 1668 (1942). In both *Chrysler* and *Ford* the Supreme Court held that the crucial fact was not the degree of disadvantage, but the persistence of an inequity against which protection has been secured in a well understood and carefully drawn decree. In this case we have such a decree which the Court must enforce.

(C) *Is Modification Necessary?*

Winn-Dixie does not contend that the order issued against Kroger was inappropriate to deal with Kroger's alleged violation, or that the order issued against Winn-Dixie was inappropriate to deal with its alleged violations. Winn-Dixie only claims that it is entitled to every competitive advantage available to Kroger because it bargained for and won that right when the most favored nation clause was included in the original consent decree.

The plain meaning of this clause must be observed and enforced. The Supreme Court in *United States* v. *Armour & Co.*, 402 U.S. 673, 91 S. Ct. 1752, 29 L. Ed. 2d 256 (1971), in holding a consent decree did not prohibit Armour from being acquired by the Greyhound Bus Line, declared,

> [T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written. . . .

402 U.S. 673 at 682, 91 S. Ct. 1752 at 1757, 29 L. Ed. 2d 256.

The essence of Winn-Dixie's argument in support of its position is that the plain language of its consent agreement mandates the requested modifications, and that no other reasonable position can be taken if the Commission stays within the "four corners" of the consent agreement.

In this regard the Court fully agrees with the statement of Commissioner Dennison, in his opinion dissenting from the Commission's order denying Winn-Dixie's petition for reopening and modification.

> The respondent has persuasively argued that the order against the Kroger Company (Docket No. C-2067) is less restrictive than the order against it. This point notwithstanding, the majority would have us look behind the plain reading of the order to determine whether the *Winn-Dixie* and *Kroger* factual situations were substantially similar before invoking the most favored nation provision. Why it is necessary to create a "principle of conformity" and to look at the competitive circumstances giving rise to the respective orders, is unclear. The words employed in the provision are neither unclear nor ambiguous. The clause itself, taken as a whole, is clear in its meaning and its import is patent. Most favored nation provisions have always been strictly construed. *Koloprct* [*Kolovrat*] v. *Oregon*, 266 [366] U.S. 187 [81 S. Ct. 922, 6 L. Ed. 2d 218] (1961); *Lukrich* [*Lukich*] v. *Department of Labor and Industry*, 176 Wash. 221, 29 P. 2d [388] 288 (1934). However, such provisions have always been construed from the four corners of the agreement. See *Sanprovincenzo* [*Santovincenzo*] v. *Eggan* [*Egan*] 284 U.S. 30 [57 S. Ct. 81, 76 L. Ed. 151] (1931); *Mentula* v. *State Land Board*, 244 Or. [229] 299, 419 [417] P. 2d 581.

Winn-Dixie is presently at a disadvantage to its competitors because an inequality in treatment exists between W-D and Kroger. Not only is this discrimination in treatment of competitors sub[**784**]ject to careful scrutiny, *Morey* v. *Doud*, 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957); *Hartford Steam Boiler Inspection Ins. Co.* v. *Harrison*, 301 U.S. 459, 57 S. Ct. 838, 81 L. Ed. 1223 (1937); *Mayflower Farms* v. *Ten Eyck*, 297 U.S. 266, 56 S. Ct. 457, 80 L. Ed. 675 (1936), but the disadvantage in this case is caused by the failure of one party to adhere to its judicially enforceable agreement.

> Consent orders, agreed to by both the respondent and the Commission, are binding decrees. If the respondent is to be bound, usually at its detriment, then the Commission must likewise be bound; sometimes to its detriment. If the Com-

> **mission wanted to limit the most favored nation treatment to only geographic market extension cases, it should have insisted upon this narrower language in the consent negotiations. It did not and must now live with the broader language.**

In re Winn-Dixie Stores, Inc., F.T.C. Docket No. C-1110 (May 30, 1973), Dissenting Opinion of Commissioner Dennison.

Since the Kroger order is framed to require prior Commission approval of food store acquisitions by Kroger only in those states or subdivisions where Kroger presently operates such stores or departments, the Winn-Dixie order should be conformed so as to adopt the same approach.

[10, 11] Therefore, the Court finds that the action of the Commission in denying Winn-Dixie's petition for reopening and modification is arbitrary, capricious and an abuse of discretion. The fact that the Federal Trade Commission held hearings and wrote an opinion with care does not mean its action was not arbitrary and capricious. Just saying a decision is careful does not make it so. *Federal Trade Commission* v. *Crowther*, 139 U.S. App. D.C. 137, 430 F. 2d 510 (1970). The Court must go behind the Commission action to determine if it is arbitrary and capricious. *Greater Boston Television Corp.* v. *Federal Trade Commission;* 143 U.S. App. D.C. 383, 444 F. 2d 841 (1970).

The Court further finds that Winn-Dixie is irreparably injured, aggrieved and adversely affected by defendants' action in denying its petition. Unless immediate relief is obtained, plaintiff will be at a severe competitive disadvantage, in direct contravention of the terms of the agreement between it and the Federal Trade Commission.

In summary, the consent order requiring modification is clear on its face. By its actions after Grand Union the Commission has established the proper procedure for complying with the modification provision of the most favored nation clause. The harm to public confidence in consent orders and decrees, which make up the vast majority of settlements in the anti-trust field, will be substantial if the requested modification is denied in contravention of an expressed provision of the order. Furthermore, Winn-Dixie will be at a distinct competitive disadvantage unless and until the arbitrary and capricious action of the Commission in failing to reopen and modify the Winn-Dixie order is remedied.

Therefore, it is

Ordered:

1. Defendant's motion, filed herein January 15, 1974, to dismiss the complaint of Winn-Dixie Stores, Inc., is hereby denied.

2. Stipulation regarding discovery and witnesses, filed herein March 28, 1974, is hereby adopted and confirmed by the Court.

3. By consent of all parties, plaintiff's motion, filed herein January 30, 1974, for advancement of the cause and consolidation of trial on the merits with hearing on application for preliminary injunction, is hereby granted.

4. This memorandum opinion constitutes the Court's findings of fact and conclusions of law; and, it is further

Ordered and adjudged:

That the Federal Trade Commission and its members, Lewis A. Engman, [**785**] Paul Rand Dixon, Mary Gardiner Jones, David S. Dennison, Jr., and Mayo J. Thompson, be and hereby are permanently enjoined and restrained from enforcing the order against Winn-Dixie Stores, Inc., in F.T.C. Docket No. C–1110, insofar as that order requires that approval of the Federal Trade Commission be obtained prior to the consummation of any food or grocery store acquisition or merger by plaintiff Winn-Dixie Stores, Inc., in any city or county in which Winn-Dixie is not doing business at the time of such merger or acquisition; and, it is further

Ordered and adjudged:

That the Federal Trade Commission and its aforesaid members be and hereby are permanently enjoined and restrained from enforcing the order against Winn-Dixie in F.T.C. Docket No. C–1110, insofar as that order requires Winn-Dixie Stores, Inc., to notify the defendant Commission of food store mergers or acquisitions on any different schedule than The Kroger Company is required to notify the Federal Trade Commission of mergers or acquisitions under the terms of the order entered in F.T.C. Docket No. C–2067 (October 26, 1971); and, it is further

Ordered and adjudged:

That the Federal Trade Commission and its aforesaid members be and hereby are permanently enjoined and restrained from failing to reopen the proceeding involving Winn-Dixie Stores, Inc., in F.T.C. Docket No. C–1110, and upon such reopening to effect such modifications of the order entered therein as will conform such order to that order entered by the Federal Trade Commission against The Kroger Company in F.T.C. Docket No. C–2067 (October 26, 1971); and, it is further

Ordered and adjudged:

That the action of the Federal Trade Commission and its aforesaid members in denying Winn-Dixie Stores' request for reopening of the proceeding and modification of the order in F.T.C. Docket No. C–1110 was arbitrary, capricious and an abuse of discretion and that plaintiff is entitled to such requested reopening and modification.

ADOLPH COORS COMPANY v. F.T.C.*

No. 73-1567. F.T.C. Docket No. 8845.

(United States Court of Appeals, Tenth Circuit, June 4, 1974)

1. UNDER BOTH THE SHERMAN ANTITRUST ACT AND THE F.T.C. ACT, PRICE FIXING IS ILLEGAL PER SE

   Price fixing is illegal per se under both the Sherman Antitrust Act and the Federal Trade Commission Act.

2. PRICE FIXING AGREEMENT RENDERS A CONSPIRACY ILLEGAL

   Agreement to fix prices renders a conspiracy illegal.

3. SURROUNDING CIRCUMSTANCES AS WELL AS ACTS AND CONDUCT OF PARTIES CAN INFER OR IMPLY AGREEMENT TO FIX PRICES

   Agreement to fix prices may be inferred or implied from the acts and conduct of the parties, as well as from the surrounding circumstances.

4. IF RECORD AS A WHOLE SUPPORTS FINDINGS OF F.T.C., COURT OF APPEALS MUST ACCEPT THEM

   Findings of the Federal Trade Commission must be accepted by Court of Appeals if there is substantial evidence on the record as a whole to support them.

5. OVERRULING OF ADMINISTRATIVE LAW JUDGE'S RULING BY F.T.C. DOES NOT REQUIRE A VERY SUBSTANTIAL PREPONDERANCE OF EVIDENCE

   Federal Trade Commission's overruling of law judge's findings on the credibility of two witnesses was not required to be supported by a very substantial preponderance of the evidence.

6. F.T.C. IS NOT PREVENTED FROM DRAWING ONE CONCLUSION WHERE THERE IS A POSSIBILITY OF DRAWING TWO INCONSISTENT INFERENCES FROM EVIDENCE

   Where there is a possibility of drawing two inconsistent inferences from the evidence, the Federal Trade Commission is not prevented from drawing one.

7. WELL SUPPORTED INFERENCE DRAWN BY F.T.C. CANNOT BE SET ASIDE EVEN THOUGH COURT CAN DRAW A DIFFERENT INFERENCE

   If the inference drawn by the Federal Trade Commission from the evidence is supported by substantial evidence, it cannot be set aside even though the court could draw a different inference.

8. FINDINGS AND CONCLUSIONS OF ADMINISTRATIVE LAW JUDGE ARE NOT SACROSANCT NOR NECESSARILY BINDING ON F.T.C. OR COURT

   Federal Trade Commission must consider the initial decision of the law judge and the evidence in the record on which it was based, but the findings and conclusions of the law judge are not sacrosanct and are not necessarily binding on the Commission or the court; they are part of the record to be considered on appeal.

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*Reported in 497 F. 2d 1178 (1974). *Cert. denied;* January 13, 1975, 419 U.S. 1105, 95 S. Ct. 775. For case before the Commission, *see* 83 F.T.C. 32; *modified,* 85 F.T.C. 185.

9. Even Though Law Judge's Findings Should Be Given Reasonable Weight if They Differ With the Conclusions of the Commission, It Does Not Modify the Substantial Evidence Rule

[**1179**] When the law judge and the Federal Trade Commission reach opposite results, the law judge's findings should be considered on review and given such weight as they merit within reason and the light of judicial experience, but this does not modify the substantial evidence rule in any way.

10. Findings of Price-Fixing Agreements and a Resale Price Maintenance Program Were Supported by Substantial Evidence on the Record as a Whole

Substantial evidence on the record as a whole supported the Federal Trade Commission's findings of price-fixing agreements between beer brewer and its distributors; likewise, there was substantial evidence to support the finding that the brewer had a resale price maintenance program and that it had in some cases secured adherence to its suggested retail prices by unlawful means.

11. A Violation of the F.T.C. Act and Sherman Antitrust Act Occurs if Manufacturer Takes Affirmative Action To Secure Compliance With Its Prices

If a manufacturer advances beyond a simple refusal to deal and takes affirmative action to secure compliance with its prices, a combination in violation of the Sherman Antitrust Act and the Federal Trade Commission Act occurs.

12. Trespassing on Wholesaler or Resaler Independence To Set Own Prices Is a Violation of the Sherman Antitrust Act

Any trespass on the independence of a reseller or wholesaler to set his own prices is a violation of the Sherman Act.

13. Use of Concerted Effort To Interfere With Distributors' Pricing Independence and Compel Adherence to Suggested Prices Violates Sherman Antitrust Act

A seller may refuse to deal with one failing to adhere to its specified prices, but where a concerted effort is used to interfere with distributors' pricing independence and to compel them to adhere to suggested prices, there is a violation of the Sherman Antitrust Act.

14. Barring Conduct With Monopolistic Purposes, a Manufacturer May Choose Those to Whom It Will Sell

A manufacturer may choose those to whom it will sell as long as its conduct has no monopolistic purposes.

15. Where Manufacturer Parted With Dominion Over Its Product, Further Effort To Restrict Those to Which It Could Be Transferred Would Be Illegal per se Under the Sherman Act and F.T.C. Act

Where beer brewer parted with title and risk to its product when it sold and delivered the beer to distributors, and thus parted with dominion over the product, its further effort to restrict the territories or persons to whom the product could be transferred was a per se violation of the Sherman Act and the Federal Trade Commission Act.

16. SUBSTANTIAL EVIDENCE ON THE RECORD SUPPORTED F.T.C.'S FINDING OF COMBINATIONS IN VIOLATION OF THE F.T.C. ACT

Substantial evidence on the record as a whole supported Federal Trade Commission's finding that beer brewer combined with its distributors in the practice of encouraging and coercing retailers to sell the brewer's draught beer to the exclusion of light draught beer competitors in violation of the Federal Trade Commission Act.

17. FORECLOSURE AGREEMENTS ARE UNLAWFUL

Agreements foreclosing a competitor's products are unlawful.

18. FINDING THAT ACTIONS OF MANUFACTURER IN PROHIBITING CENTRAL WAREHOUSE SALES OR REQUIRING WHOLESALE PRICES TO EQUAL THOSE OF OTHER ACCOUNTS WAS SUPPORTED BY EVIDENCE TO BE AN UNFAIR METHOD OF COMPETITION

Substantial evidence on the record as a whole supported Federal Trade Commission's findings that beer brewer's prohibition of central warehouse sales, or a requirement that wholesale prices to those accounts equal those to other retailers, was a substantial restraint on the capacity of the distributor to resell to whomever he chose and threatened the same anticompetitive results as other illegal restraints on alienation; thus, the practices were unfair methods of competition in violation of the Federal Trade Commission Act.

19. FINDING OF COMMISSION THAT MANUFACTURER USED THREAT OF SPEEDY CONTRACT TERMINATION TO FORCE ANTICOMPETITIVE BEHAVIOR WAS SUPPORTED BY EVIDENCE

Substantial evidence on the record as a whole supported Federal Trade [1180] Commission's findings that beer brewer used the threat of speedy contract termination to force its distributors into anticompetitive behavior.

20. MANUFACTURER COULD NOT USE CONTRACT TERMINATION PROVISIONS TO FORCE DISTRIBUTORS INTO ANTICOMPETITIVE BEHAVIOR

Beer brewer had the right to terminate distributors according to the contract provisions which the distributors agreed to, but it could not use contract termination provisions to force its distributors into anticompetitive behavior.

21. CONTRACT TERMINATION PROVISIONS OF MANUFACTURER AND ITS DISTRIBUTORS WAS A MATTER OF PRIVATE CONTRACT AND NOT SUBJECT TO THIRD-PARTY INTERFERENCE

Contract termination provisions of beer brewer and its distributors, based upon their contractual obligations, were a matter of private contract and not subject to interference by third parties.

22. CONTENTION RAISED IN COURT BUT NOT IN ADMINISTRATIVE PROCEEDING BEFORE COMMISSION IS NOT PROPERLY BEFORE COURT OF APPEALS

Contention not raised in administrative proceeding before the Federal Trade Commission was not properly before the Court of Appeals.

23. AFFIDAVIT REFUTED CLAIM THAT F.T.C. STAFF ATTORNEY PERFORMED INVESTIGATIVE AND PROSECUTING FUNCTIONS IN PREPARING CASE, AND THAT HE PARTICIPATED IN REVIEW OF CASE AS ATTORNEY-ADVISOR TO NAMED COMMISSIONER

Beer brewer's claim that a staff attorney of the Federal Trade Commission performed investigative and prosecuting functions in preparing

the case against the brewer, and that he also participated in the review of the case as attorney-advisor to named commissioner in violation of statute, was refuted by an affidavit of the attorney stating that, upon leaving the staff of the Commission, he did not discuss the merits of the brewery case with any of the commissioners or the Commission's trial staff.

24. **Unless Choice of Remedy Has No Reasonable Relation To Unlawful Practices Found, Choice of F.T.C. Will Not Be Disturbed Because F.T.C. Is Vested With Wide Discretion in Coping With Unlawful Practices**

    Federal Trade Commission is vested with wide discretion in its choice of remedies to cope with unlawful practices, and its choice will not be disturbed unless it has no reasonable relation to the unlawful practices found.

25. **All Doubts About Commission Remedies Are To Be Resolved in Its Favor Once the Government Has Borne Its Burden of Establishing Violations of Law**

    Once the government, in an anticompetitive practices case brought before the Federal Trade Commission, has borne its burden of establishing violations of the law, all doubts about the Commission's remedy are to be resolved in its favor.

(Syllabus, with substituted captions, taken from 497 F. 2d 1178)

On petition to review cease and desist order issued by the F.T.C., court held that (1) substantial evidence supported F.T.C.'s findings of illegal price-fixing agreements, (2) once manufacturer parted with dominion over its products, further efforts to restrict to whom the product could be transferred were a per se violation of the Sherman Antitrust Act and the F.T.C. Act, and (3) substantial evidence on the record supported finding of combination and coercion to sell brewer's draught beer to the exclusion of light draught beer competitors, and (4) findings that manufacturer used threats of speedy contract termination to force its distributors into anticompetitive behavior was supported by substantial evidence on record as a whole.

Order enforced in part and set aside in part.

Holloway, Circuit Judge, concurred in part and disssented in part, with opinion.

Leo N. Bradley, Golden, Colo. (*Earl K. Madsen*, Golden, Colo., on the brief), for petitioner-appellant.

Robert E. Duncan, Washington, D.C. (*Calvin J. Collier*, Gen. Counsel, *Gerald Harwood*, Acting Asst. Gen. Counsel, *W. Baldwin Ogden*, Washington, D.C., on the brief), for respondent-appellee.

Before HOLLOWAY and BARRETT, *Circuit Judges*, and DURFEE,[*] *Judge Court of Claims*.

BARRETT, *Circuit Judge*.

Adolph Coors Company appeals an Order to Cease and Desist issued by the Federal Trade Commission. The FTC filed a complaint alleging that Coors was engaged in anticompetitive practices in violation of Section 5 of the Federal Trade Commission Act.[1] An Initial Decision was issued by the Administrative Law Judge after hearings were conducted in Denver extending over a period of thirty days. The Law Judge found that Coors had not violated the Act. He recommended that the complaint be dismissed. The FTC appealed the Initial Decision to the five-member Federal Trade Commission. The Commission substituted its findings for those of the Law Judge and found, as a matter of law, that Coors had violated Section 5 of the Act.[2]

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[*] Honorable James R. Durfee, sitting by designation.

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[1] Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. § 45, provides in part:

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * * * * * *

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, ... from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

[2] The Commissioners ordered that Coors cease and desist from:

1. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct which has as its purpose or effect the fixing, maintaining, establishing or setting of the prices at which distributors sell Coors beer to retailers or the prices at which retailers sell Coors beer to consumers.

2. Publishing, disseminating or providing any price list or other document indicating suggested or mandatory prices for the sale of Coors beer by any distributor to any retailer or any price list or other document indicating suggested or mandatory prices for the sale of Coors beer by any retailer to any consumer. * * *

3. Publishing, disseminating or providing to any distributor or any retailer any information or suggestions concerning what Coors may believe to be an appropriate or proper mark-up or profit for Coors beer when the distributor sells to the retailer or when the retailer sells to the consumer or a mark-up or profit below which the distibutor or retailer is advised not to sell Coors beer. * * *

4. Refusing to sell beer to any Coors distributor or terminating or threatening to terminate any Coors distributor because:

A. the distributor has in the past or might in the future sell Coors beer at prices, mark-ups, or profits different from those approved or recommended by respondent;

B. one or more of the distributor's customers sold Coors beer or advertised Coors beer for sale at prices, mark-ups or profits different from those approved or recommended by respondent;

C. the Coors distributor sold Coors beer to another distributor or to a retailer whose business is located outside of the territory granted to the distributor; or

D. the Coors distributor distributes, has distributed, or proposes to distribute in the future the product of another brewer.

5. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct to fix, establish, limit or restrict the territory in which or the persons to whom a distributor may sell Coors beer. * * *

6. Allocating Coors beer among its distributors in times of beer shortage at the Coors brewery, by any means other than by allocating shares to distributors equal to their proportionate purchases of Coors beer from the brewery during the last three months before the allocation or when the distributor has not been in business for more than a year as a Coors distributor, on some other equitable basis.

7. Refusing to deliver all of a distributor's order because the distributor has made sales to customers outside of the territory granted the distributor or because the distributor or the distributor's customer is selling Coors beer at prices, mark-ups or profits lower than those approved by respondent.

8. Prohibiting its distributors from selling for central warehouse delivery; provided, however, that respondent can establish refrigeration standards for the central warehouse which are substantially similar to those established for distributors and can require its distributors to be responsible, directly or indirectly, for maintenance of such refrigeration standards and for rotation of Coors beer in the central warehouse and at the

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Adolph Coors Company, a Colorado corporation, is engaged in brewing, dis[**1182**]tribution and sale of beer, using the trade name of "Coors". Coors has one brewery in Golden, Colorado, and distributes its beer in an eleven-state area. The beer is sold to the distributors who in turn sell to retailers. While Coors is the fourth largest beer brewer in the United States, it alone among the nation's some 70 brewers is a "shipping" brewery, i.e., Coors ships all of the beer brewed at its single "regional" brewing plant at Golden, Colorado, F.O.B. to the various distributors in Arizona, California, Colorado, Idaho, Kansas, Nevada, New Mexico, Oklahoma, Texas (some counties only), Utah and Wyoming. In 1971 the average barrel of Coors beer traveled 961 miles to its market place.

The beer is made by the aseptic brewing process which requires refrigerated marketing. It is uncontroverted that Coors beer is substantially more expensive than any other beer consumed in the United States, and yet because of its popularity, Coors has climbed from the 49th largest brewery in 1948 to its number 4 position today. Coors maintains market leadership in total sales against all competitors except in its territory served in Texas. Because of the delicacy of the

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(Continued)
retail delivery locations where the beer is redelivered from the central warehouse. if respondent changes its container dating system so that the retailer and the consumer will recognize the date without reference to a code or measuring stick.

9. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct with its distributors which has as its purpose or effect requiring that retailers serve Coors draught beer as their only light-colored draught beer.

10. Entering into, maintaining, or enforcing any contract, agreement or understanding, or taking any action or course of conduct with any of its distributors which has as its purpose or effect the requirement that the distributor eliminate, or refrain from obtaining and handling rival brands of beer in order to become or remain a Coors distributor.

11. Hindering, suppressing or eliminating competition or attempting to hinder, suppress or eliminate competition between or among distributors or between or among retailers handling Coors beer.

12. Cancelling any distributor agreement unless and until the respondent has pursued the following procedure:

A. Cancellation With Cause

(a) Respondent has given the distributor sixty days' notice of respondent's intention to cancel its agreement with the distributor; ....

B. Cancellation Without Cause

(a) Respondent has given the distributor one hundred and eighty days' notice of respondent's intention to cancel its agreement with the distributor; ....

13. IT IS FURTHER ORDERED that respondent, within three (3) months from the date this Order becomes final, shall provide for arbitration, in the city in which a distributor resides, by an independent and neutral arbitrator, to determine in the case of any announced termination, and upon the request of a distributor, whether or not said termination is made in good faith (in the case of termination without cause) or whether or not said termination is made in good faith and for material violation of one or more contract provisions which are relevant to the effective operation of the franchise (in the case of termination with cause). * * * *

(S) CHARLES A. TOBIN,
Secretary.

ISSUED: July 24, 1973.

product, it is essential that the refrigeration controls and expeditious marketing techniques be strictly monitored. Once the beer is delivered to the distributors, this obligation is assumed by them under an agreement with Coors. It is the distributor who is required to protect the "integrity" of the Coors beer quality by guarding against a retailer's failure to rotate the beer, and failure to insure proper refrigerated storage. Coors beer retained over 90 days must be destroyed.

Coors has 35 area representatives to help market the product. Each representative is assigned certain distributors to work with and to see that Coors' Policy Manual is followed. The price Coors charges to its distributors is set by Coors. Coors suggests to its distributors and retailers the price at which to sell its beer.

Each distributor is assigned a territory in which to market Coors' products. Coors may reduce the territory or add distributors to a particular territory. There are 166 independent distributors and one wholly owned subsidiary company.

In 1964 Coors eliminated sales to central warehouse accounts. Central warehouse accounts are either retailers such as large chain supermarkets who buy for redelivery to their own outlets, or independents who purchase for redelivery to nonaffiliated retail outlets or retailer warehouses.

Coors favors draught accounts. It has a draught policy in which tavern owners are given 30 days to discontinue handling other brands of light draught beer. If the owner-retailer continues to sell another brand of light draught beer, Coors discontinues its supply of light draught beer to the tavern.

The contract between Coors and the distributors enables Coors to cancel its contract for any breach by the distributor, with a five-day notice. Either Coors or the distributor may cancel the contract without cause with a 30-day notice.

Coors contends that: (1) it did not engage in wholesale or retail price fixing; (2) its vertically imposed territories are reasonable and legal; (3) it has no policy of requiring exclusive draught accounts; (4) it has the right to protect its quality product and not distribute its beer through central warehousing; (5) **[1183]** its contract termination rights are reasonable and legal; (6) the provisions of the Commission's Order are not supported by substantial evidence, are not reasonable, and are in conflict with important public policies; (7) the FTC internal procedures have prejudiced its right to a fair hearing; and (8) this court must exercise its power and set aside the Commission's Order.

I.

Coors contends that it did not engage in price fixing agreements with its distributors. Its practices are set out in the Coors Policy Manual which states as follows:

> In order to maintain a successful wholesale or retail business, pricing integrity is essential. Pricing integrity will result in an adequate and equitable profit to both Distributor and retailer and is fair to the ultimate consumer.
>
> It is the policy of the Adolph Coors Company to suggest, if it so chooses, to either the wholesaler or retailer level, suggested minimum pricing. We reserve the right to further that policy by simply refusing to deal with anyone who doesn't adhere to said policy.
>
> The Adolph Coors Company and its agents must only state the policy. They cannot make agreements, threaten, coerce, or intimidate wholesalers or retailers in any manner. They can enforce the policy only by reserving the right to refuse to deal with those who don't adhere to the suggested prices.

Coors' sales manager, Harvey Gorman, testified that the product is controlled by agreeing individually with each distributor. This policy is enforced by a provision in the contract between Coors and the distributor enabling Coors to terminate a distributorship in 30 days without cause. Since there are about 7,000 applicants for distributorships, any distributor who does not conform to Coors' pricing policies could readily be replaced. Coors' area representatives constantly obtain wholesale price information and send the information to the home office in Golden. The area representatives also resolve any conflicts between the prices proposed by a distributor and those suggested by Coors.

John Hemphill, a former Coors distributor, testified that he would only go so far in making a request to use his own prices, knowing that Coors could terminate him in 30 days. He also testified that a Coors' area representative told him that the best thing for him to do is not to be a distributor if he could not agree to Coors' policies on pricing and territories. The Law Judge had questioned Hemphill's credibility because of a suit he has pending against Coors, but the Commissioners rejected this fact as bearing on the issue of credibility.

Jay Wagnon, a Coors' distributor, testified that Coors insisted on controlling distributor price increases and that when he refused to adopt wholesale prices suggested by the Coors' area representative he was summoned to Golden and requested to change his prices. He stated that Coors' personnel told him to bring his prices in line with Coors' recommendations or they could put another distributor in his area. He testified that he was afraid; that he had been threatened; and that he therefore conformed to the suggested prices. The Law Judge did not find Wagnon's testimony credible. The Commissioners, on the other hand, found that his testimony was credible.

Jay Thurman, a former distributor, testified that he was given pricing sheets by the area representative which were to be followed. He was told that if the prices were changed, it would go through Mr. Straight, a Coors official, who, in turn, would determine if the changes were justified.

Peter Tinetti, a former distributor, testified that Coors sent him the prices at which to sell Coors beer.

The area representatives submitted reports to the Golden headquarters [**1184**] about agreements or understandings they had made with distributors on wholesale prices.

[1–3] Price fixing is illegal *per se* under the Sherman Antitrust Act. 15 U.S.C.A. § 1; *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4–5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958); *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 218, 60 S. Ct. 811, 84 L. Ed. 1129 (1940). Price fixing is also illegal *per se* under Section 5 of the Federal Trade Commission Act. 15 U.S.C.A. § 45. Prices are fixed when they are agreed upon. *United States* v. *Masonite Corporation*, 316 U.S. 265, 276, 62 S. Ct. 1070, 86 L. Ed. 1461 (1942). The agreement to fix prices renders the conspiracy illegal. The agreement may be inferred or implied from the acts and conduct of the parties, as well as from surrounding circumstances. *Pearl Brewing Co.* v. *Anheuser-Busch, Inc.*, 339 F. Supp. 945 (S.D. Tex. 1972); *National Macaroni Manufacturers Association* v. *Federal Trade Commission*, 345 F. 2d 421 (7th Cir. 1965).

> . . . the test . . . is whether the agreement, or conduct, interferes with the freedom of sellers or traders in such a manner as to prohibit or restrain their ability to sell in accordance with their own judgment, and not what particular effect the agreement or conduct, has on the actual prices.

339 F. Supp. 945 at 952.

[4–7] The findings of the Commission must be accepted by this court if there is substantial evidence on the record considered as a whole to support them. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1951). The Commission's overruling of the Law Judge's findings on the credibility of two witnesses is not required to be supported by a very substantial preponderance of the evidence. *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 75 S. Ct. 855, 99 L. Ed. 1147 (1955). And where there is a possibility of drawing two inconsistent inferences from the evidence, the Commission is not prevented from drawing one. *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, 62 S. Ct. 960, 86 L. Ed. 1305 (1942); *National Macaroni, supra.* If the inference is supported by substantial evidence, it cannot be set aside even though the court could draw a different inference. *National Macaroni, supra.*

[8, 9] The Commission must consider the initial decision of the Law Judge and the evidence in the record on which it was based. *Cinderella Career and Finishing Schools, Inc.* v. *Federal Trade Commission*, 138 U.S. App. D.C. 152, 425 F. 2d 583 (1970). But the findings and conclusions of the Law Judge are not sacrosanct and are not necessarily binding on the Commission or the court; they are part of the record to be considered on appeal. *OKC Corp.* v. *Federal Trade Commission*, 455 F. 2d 1159 (10th Cir. 1972). When the Law Judge and the Commission reach opposite results, the Law Judge's findings should be considered on review and given such weight as they merit within reason and the light of judicial experience. But this does not modify the substantial evidence rule in any way. *OKC Corp., supra.*

[10] There is substantial evidence from the record as a whole to support the Commission's findings of price fixing agreements between Coors and its distributors.

Coors also challenges the Commission's finding that Coors has a resale price maintenance program and that it has in some cases secured adherence to its suggested retail prices by unlawful means. There is substantial evidence to support the Commission's finding.

Coors' policy is to establish pricing integrity which means that a certain profit is allowed on each level of resale. Pricing integrity is not possible with price discounting. Coors implements pricing integrity by refusing to deal with anyone not adhering to its price [**1185**] suggestions. A Coors' area representative threatened to refuse further sales to an offending retailer unless he would adhere to the prices suggested by Coors. Coors used its distributors to secure retailers' adherence to suggested minimum prices. One area representative reported that a retailer was cut off by a distributor because the retailer was advertising Coors beer at cut prices. Another area representative reported that a distributor planned to take appropriate action against a retailer who refused to sell at suggested prices. A distributor reported that Coors beer was not delivered to a retailer who cut prices. An area representative reported that action would be taken against a retailer who refused to raise his prices to a profit level.

Mr. Letcher, a retailer, testified that he was selling Coors at special weekend prices and that he was warned by the Coors distributor to discontinue the practice. Letcher refused to cooperate and the distributor terminated deliveries to his store. The distributor told Letcher that deliveries would be received if he would agree not to discount the beer, and that Letcher might lose the retail account if he continued to discount the beer. Letcher was also told by the distributor that Coors does not tolerate price cutting. Letcher sold his business. The distributor resumed deliveries to the new owners who agreed not to discount the beer. The distributor did not act independently in cutting off Letcher as Coors suggests, but cut him off in accordance with Coors' pricing policies.

[11–14] United States Supreme Court decisions hold that if a manufacturer advances beyond a simple refusal to deal and takes affirmative action to secure compliance with its prices, a combination in violation of Section 1 of the Sherman Antitrust Act and Section 5 of the Federal Trade Commission Act occurs. *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960); *Federal Trade Commission* v. *Beech-Nut Packing Company*, 257 U.S. 441, 42 S. Ct. 150, 66 L. Ed. 307 (1922). Any trespass on the independence of a reseller or wholesaler to set his own prices is a violation of the Sherman Act. *Pearl Brewing Co., supra.* A seller may refuse to deal with one failing to adhere to its specified prices, *United States* v. *Colgate & Company*, 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992 (1919), but where a concerted effort is used to interfere with the distributors' pricing independence and to compel them to adhere to suggested prices, there is a violation of the Sherman Antitrust Act. A manufacturer may choose those to whom it will sell to as long as its conduct has no monopolistic purposes. *Colorado Pump & Supply Company* v. *Febco, Incorporated*, 472 F. 2d 637 (10th Cir. 1973), *cert. denied* 411 U.S. 987, 93 S. Ct. 2274, 36 L. Ed. 2d 965 (1973).

The Commission found that:

> . . . [Coors] has pursued a policy of fixing, controlling and maintaining prices at which Coors beer is sold at both the wholesale and retail level, that in furtherance of this policy it has engaged in various acts and practices such as: suggested resale prices to both distributors and retailers, checking prices at which distributors and retailers sell Coors beer, advising distributors and retailers that it is contrary to Coors pricing policy for them to deviate from prices approved by respondent, threatening to terminate distributorships and threatening to force distributors to sell their businesses for refusing to adhere to suggested retail prices, entering into agreements and understandings with distributors as to the wholesale prices which the distributors will charge for Coors beer, joining with distributors in attempting to coerce retailers to refrain from selling Coors beer at prices below those approved by respondent, encouraging distributors to prevent retail price cutting by refusing to deliver Coors beer to price cutters, or to reduce the amount of beer delivered, and entering into agreements and understandings with retailers as to the retail prices or **[1186]** range of prices at which such retailers will sell Coors beer.

There is substantial evidence in the record to support the Commission's findings.

II.

Coors alleges that its vertically imposed territories are reasonable and legal. The Commission held that Coors vigorously enforces its territorial restrictions and that it has engaged in unlawful price fixing which is:

> . . . [s]trong grounds for presuming that the most injurious effects of vertical territorial divisions may be operative, and, therefore, for holding the entire arrangement of territories with price fixing illegal per se.

The Coors' distributor contract provides, in part, as follows:

> While this agreement is in effect the Distributor will conduct the business of wholesale distribution of Coors Beer in the above territory only . . . .

In *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967), the United States brought an antitrust action against Arnold, Schwinn & Co., an association of Schwinn distributors and a Schwinn distributor, seeking a declaratory judgment to invalidate the distribution franchising system of its products. Schwinn bicycles are shipped directly to franchised retailers who agree to sell only to ultimate consumers. Schwinn also distributed its bicycles to franchised distributors who agreed not to resell to anyone outside their assigned territories. The Court held that:

> Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. *White Motor*, [*Co.* v. *United States*, 372 U.S. 253, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963)]; *Dr. Miles* [*Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)]. Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale.
> 388 U.S. at 379.

The rule of law in *Schwinn* is clear and unequivocal.

> Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of § 1 of the Sherman Act. 388 U.S. at 382.

See Federal Trade Commission v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 247, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972); *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972); *Williams* v. *Independent News Co., Inc.*, 485 F. 2d 1099 (3rd Cir. 1973); *Warriner Hermetics, Inc.* v. *Copeland Refrigeration Corporation*, 463 F. 2d 1002 (5th Cir. 1972), *cert. denied* 409 U.S. 1086, 93 S. Ct. 688, 34 L. Ed. 2d 673 (1972); *Beverage Distributors, Inc.* v. *Olympia Brewing Co.*, 440 F. 2d 21 (9th Cir. 1971), *cert. denied* 403 U.S. 906, 91 S. Ct. 2209, 29 L. Ed. 2d 682 (1971); *Fontana Aviation, Inc.* v. *Beech Aircraft Corporation*, 432 F. 2d 1080 (7th Cir. 1970), *cert. denied* 401 U.S. 923, 91 S. Ct. 872, 27 L. Ed. 2d 826 (1971). *Cf. Carter-Wallace*

Inc. v. *United States*, 449 F. 2d 1374, 196 Ct. Cl. 35 (1971); *Tripoli Company* v. *Wella Corporation*, 425 F. 2d 932 (3rd Cir. 1970), *cert. denied* 400 U.S. 831, 91 S. Ct. 62, 27 L. Ed. 2d 62 (1970); *LaFortune* v. *Ebie*, 26 Cal. App. 3d 72, 102 Cal. Rptr. 588 (Cal. Ct. App. 1972).

[15] Coors, a manufacturer, enters into an agreement with its distributors **[1187]** to distribute Coors beer in the assigned territory only. Coors maintains that the territorial restrictions are necessary to retain the quality and proper refrigerated handling of its beer, and that the territorial restrictions are legal. However, since Coors parts with title and risk to the product when it sells and delivers the beer to distributors, and thus has parted with dominion over the product, its further effort to restrict the territories or persons to whom the product can be transferred is a *per se* violation of Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Coors may still condition its sales to distributors and others upon maintenance of procedures necessary to control the quality of the product.

Although we are compelled to follow the *Schwinn per se* rule rendering Coors' territorial restrictions on resale illegal *per se*, we believe that the *per se* rule should yield to situations where a unique product requires territorial restrictions to remain in business. For example, speed of delivery, quality control of the product, refrigerated delivery, and condition of the Coors product at the time of delivery may justify restraints on trade that would be unreasonable when applied to marketing standardized products. *La Fortune* v. *Ebie*, *supra*. Perhaps the Supreme Court may see the wisdom of grafting an exception to the *per se* rule when a product is unique and where the manufacturer can justify its territorial restraints under the rule of reason. *White Motor Co.* v. *United States*, 372 U.S. 253, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963).

The dissenters in *Schwinn* contended that the new *per se* rule cannot be justified, automatically invalidating vertical restraints in a distribution system based on sales to wholesalers and retailers.

> . . . the Court has, *sua sponte* created a bluntly indiscriminate and destructive weapon which can be used to dismantle a vast variety of distributional systems—competitive and anticompetitive, reasonable and unreasonable.

388 U.S. at 394.

Thus we are foreclosed from considering the reasonableness of the restriction or its business justification. We are cognizant of the unpredictability which is created in relationship to the Coors operation.

III.

[16] Coors contends that it has no policy of requiring exclusive draught accounts. The Commission found that Coors combined with its distributors in the practice of encouraging and coercing retailers

to sell Coors draught beer to the exclusion of light draught beer competitors in violation of Section 5 of the Federal Trade Commission Act.

Mr. Coors testified that exclusive draught accounts were desirable. Several distributors testified that the purpose of obtaining exclusive draught accounts is to encourage draught customers to buy beer to take home. To implement the policy, Coors threatened to terminate a retailer's supply of Coors draught beer unless he eliminated competitive draught beers within 30 days. Coors' distributors did, in fact, take out their Coors draught beer if the retailer did not comply with the policy.

[17] Agreements foreclosing a competitor's products are unlawful. *Federal Trade Commission* v. *Brown Shoe Co., Inc.*, 384 U.S. 316, 86 S. Ct. 1501, 16 L. Ed. 2d 587 (1966); *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457, 668, 61 S. Ct. 703, 85 L. Ed. 949 (1941); *Standard Fashion Company* v. *Magrane-Houston Company*, 258 U.S. 346, 42 S. Ct. 360, 66 L. Ed. 653 (1922). The policy of pursuing an exclusive draught policy violates Section 5 of the Federal Trade Commission Act. There is substantial evidence in the record to support the Commission's finding.

IV.

[1188] [18] Coors asserts that it has the right to protect its quality product and not distribute its beer through central warehousing. The Commission held that Coors' prohibition of central warehouse sales, or a requirement that wholesale prices to those accounts equal those to other retailers is a substantial restraint on the capacity of the distributor to resell to whomever he chooses and threatens the same anticompetitive results as other illegal restraints on alienation. Therefore, the Commission found that the practices are unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

The central warehouse method of distribution involves purchase by the warehouser of beer from the brewer or the distributor. The beer is delivered by the retailer to its outlets. This method of distribution could cut the price of the beer to the retailer and consumer. Coors eliminated sales to central warehouse accounts in 1964. The distributors viewed central warehousing as a threat to the integrity of their territorial restrictions. Coors alleges that sales to central warehousers affects the quality of its beer because of poor procedures used by the warehousers.

The Order imposed by the FTC does not prevent Coors' distributors from conditioning its sales to central warehouse accounts on the maintenance of procedures necessary to the quality control of its products. The Order only enjoins Coors from requiring its distributors from refusing to sell to central warehouse accounts. The restriction by Coors, limiting those with whom the distributors may deal, amounts to a restriction on resale and violates the mandates of *Schwinn* and the Federal Trade Commission Act. There is substantial evidence in the record to support the FTC's finding.

V.

Coors alleges that its contract termination rights are reasonable and legal and that its conduct in the rare instances of its use has been proper and legal in every respect. The Commission held that:

> Whether or not any actual terminations of Coors distributors, or sales forced by threat of termination can be ascribed entirely, solely and unambiguously to the failure of the terminated or coerced distributor to participate in an antitrust violation, it is abundantly clear from the record in this case that Coors representatives have used the explicit or implicit threat or speedy termination is often successful in efforts to force the acquiescence of its distributors in anticompetitive behavior.

The Coors distributor contract provides in part as follows:

> This agreement and any supplements now or hereafter effective (whether fixing prices and terms to the Distributor, or otherwise) may be cancelled in entirety at any time by the Company for any breach by the Distributor on five (5) days' written notice to the Distributor. This agreement and such supplements may be cancelled in entirety by either party without cause upon the giving of notice to that effect to the other party, in which event termination shall become effective thirty (30) days after delivery or the mailing of the written notice of cancellation, whichever first occurs. * * *

[19] The Commission held that Coors used the threat of speedy termination to force its distributors into anticompetitive behavior. There is substantial evidence in the record to support the Commission's holding.

[20] Coors has the right to terminate distributors according to the contract provisions which the distributors have agreed to. *Bushie* v. *Stenocord Corporation*, 460 F. 2d 116 (9th Cir. 1972). However, it may not use the contract termination provisions to force its distributors into anticompetitive behavior.

[1189] [21] The Law Judge was correct in stating that the termination provisions of Coors and its distributors, based upon their contractual obligations, are a matter of private contract and are not subject to interference by third parties. The termination provisions are reasonable but may not be used by Coors to force any unlawful conduct. Therefore the Commission's attempt to rewrite Coors' contract termination provisions in paragraphs 12 and 13 of its Order must be set aside. The contract termination provisions do not violate Section 5 of the Federal Trade Commission Act.

VI.

Coors alleges that FTC internal procedures have prejudiced its right to a fair and impartial hearing. Coors asserts that Mr. Steinitz, a staff attorney of the FTC, performed investigative and prosecuting functions in preparing the case against Coors, and that he also participated in the review of the case as attorney-advisor to Commissioner Paul Rand Dixon in violation of 5 U.S.C.A. § 554(d) and 16 CFR 4.7(a).

[22, 23] Coors' contention was not raised in the administrative proceeding and therefore is not properly before this court. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 78 S. Ct. 377, 2 L. Ed. 2d 370 (1958). In any event, Coors' contention has no merit because Mr. Steinitz, in an affidavit in the record, states that upon leaving FTC's staff he did not discuss the merits of the Coors case with any of the Commissioners or the Commission's trial staff. There was no error.

VII.

Coors alleges that the provisions of the Commission's Order are not supported by substantial evidence, are not reasonable, are in conflict with important public policies, and must be rejected. It alleges that Paragraphs 4C, 5 and 7, if adopted, would force it to abandon its right to choose those it will authorize to serve as its distributors in its marketing area, eliminating its ability to obtain required market penetration for its survival. Coors states that Paragraph 6, a formula devised by the FTC for beer rationing, is too simplistic to work effectively for Coors.

[24, 25] The Order by the Commission is reasonably related to the violations by Coors. The Commission is vested with wide discretion in its choice of remedy to cope with unlawful practices, and its choice will not be disturbed unless it has no reasonable relation to the unlawful practices found. *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 79 S. Ct. 818, 3 L. Ed. 2d 893 (1959); *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 66 S. Ct. 758, 90 L. Ed. 888 (1946). Once the Government has borne its burden of establishing violations of the law, all doubts about the remedy are resolved in its favor. *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 81 S. Ct. 1243, 6 L. Ed. 2d 318 (1961).

We hold that paragraphs 1 through 11 of the FTC's Order are enforced; paragraphs 12 and 13 of the FTC's Order are set aside.

HOLLOWAY, *Circuit Judge* (concurring in part and dissenting in part):

I fully concur in the well-reasoned opinion of the court in upholding paragraphs 1 through 11 of the Commission's order and disagree only as to the setting aside of paragraphs 12 and 13.

It is true that paragraphs 12 and 13 require a substantial change in the contract provisions on termination of distributorships. However, the Commission has found that it is abundantly clear that Coors representatives have used the explicit or implicit threat of speedy termination in efforts to force acquiescence of its distributors in anticompetitive behavior. We are agreed that there is substantial evidence in the record to support the finding.

The Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices in [**1190**] this area of trade and commerce. See *Siegel Co.* v. *FTC*, 327 U.S. 608, 611, 66 S. Ct. 758, 90 L. Ed. 888. The courts interfere only where there is no reasonable relation between the remedy and the violation. *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 377, 85 S. Ct. 1498, 14 L. Ed. 2d 443. And orders affecting contractual relationships have been upheld where unlawful practices involved similar subtle pressures and threats of termination of dealers' leases. Id. at 374–375.

On this record and the findings made I would uphold as reasonable the Commission's choice of a remedy to cope with the unlawful practices.

NATIONAL PETROLEUM REFINERS ASSOCIATION ET AL. v. F.T.C., ET AL.*

Civ. A. No. 1180–71. F.T.C. File No. 215–21.

(United States District Court, District of Columbia, June 17, 1974)

1. **SCOPE OF COURT'S REVIEW IS NARROW IN CASES OF TRADE REGULATIONS AND MUST BE BASED ON ADMINISTRATIVE RECORD**

   Scope of federal court's review of a trade regulation promulgated by the Federal Trade Commission is a narrow one and must be based on administrative record compiled by the commission.

2. **WHETHER RULE IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR NOT IN ACCORDANCE WITH LAW ARE STANDARDS OF REVIEW FOR FEDERAL COURT TO USE IN REVIEW**

   Standard of review for federal court is whether Federal Trade Commission's rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

3. **ACTION FOR REVIEW OF F.T.C. RULE NEITHER REQUIRED NOR NECESSITATED DISCOVERY**

   Discovery was neither required nor necessary in action for review of a trade regulation rule promulgated by the Federal Trade Commission.

(Syllabus, with substituted captions, taken from 392 F. Supp. 1052)

On review of trade regulation rule promulgated by F.T.C., court held that extensive discovery requested by plaintiff was neither required nor necessary, and that scope of court's review of trade regulation rule is narrow, based only on administrative record compiled by Commission.

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*Reported in 392 F. Supp. 1052 (1974).

Protective order granted.

William Simon, Howrey, Simon, Baker & Murchison, Berlin, Roisman & Kessler, Washington, D.C., for plaintiffs.

Stuart E. Schiffer, Dept. of Justice, *Michael J. Ryan*, Asst. U.S. Atty., U.S. District Court, *Calvin J. Collier*, Gen. Counsel, Federal Trade Comm., Washington, D.C., for defendants.

Before ROBINSON, *District Judge.*

MEMORANDUM

AUBREY E. ROBINSON, JR., *District Judge.*

This is an action for review of a trade regulation rule promulgated by the Federal Trade Commission. See 340 F. Supp. 1343 (D.D.C. 1972), *reversed*, 157 U.S. App. D.C. 83, 482 F. 2d 672 (1973). *cert. denied* 415 U.S. 951, 94 S. Ct. 1475, 39 L. Ed. 2d 567 (1974). The matter is now before the Court on Plaintiffs' request for extensive discovery of the "whole record" which they claim underlies the administrative proceedings herein. Plaintiffs seek to depose the former Chairman of the Commission and at least one former staff member who participated in the internal processes leading [**1053**] to promulgation of the rule under review here. In addition, Plaintiffs seek production of every document generated within the Commission in connection with the promulgation of the rule here challenged. Defendants vigorously oppose this discovery, contending that it is inappropriate under Rule 26, Federal Rules of Civil Procedure, as irrelevant and not calculated to lead to the discovery of admissible evidence herein.

[1] Essential to resolution of the present dispute is definition of the scope and basis of this Court's review herein. If wide-ranging de novo review were appropriate, discovery might well be allowed. Defendants contend, however, that the scope of review is a narrow one and that the Court must base its review on the administrative record compiled by the Commission. The Court finds defendants' position well taken.

The informal rule-making proceedings here under review were initiated pursuant to Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553. The section requires only that the agency publish notice of proposed rule-making, provide opportunity for the presentation of views and comments by interested parties, and, after "consideration of the relevant matter presented," incorporate in the rules adopted a statement of their basis and purpose. There is no statutory provision requiring that F.T.C. rules be made on the record after hearing such that the more stringent, formal rule-making procedures of Sections 7 and 8 of the APA, 5 U.S.C. §§ 556 and 557, would apply.[1]

[2] In this context, it is clear that the standard of review for the Court is whether the Commission's rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), *Camp* v. *Pitts*, 411 U.S. 138, 140–142, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973), *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971).

> To make this finding the court must consider whether the decision was based on a consideration of the relevant facts and whether there has been a clear error of judgment. . . . Although inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. *Citizens to Preserve Overton Park* v. *Volpe, supra,* at 416, 91 S. Ct. at 823 (citations omitted).

It is equally evident that the basis for review in the present case is limited to the administrative record compiled by the Commission[2] *Camp* v. *Pitts*, *su*[**1054**]*pra*, 411 U.S. at 142, 93 S. Ct. 1241, *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 420, 91 S. Ct. 812.

Plaintiffs have briefed extensively several major cases which deal generally with the adequacy of an administrative record. The short answer to this presentation is simply that each of these cases is distinguishable on its face as involving a specialized agency proceeding where important requirements were found to be imposed by statutes other than the APA.[3] Both *Camp* and *Overton Park*, on the other hand, involved informal proceedings solely under the APA, as does the present case. The Court finds, therefore, that the limited scope and basis of review set forth in *Camp* and *Overton Park* is applicable herein.

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[1] *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 93 S. Ct. 810, 35 L. Ed. 2d 223 (1973). There is indication in the Complaint herein and the Court of Appeals, decision, 482 F. 2d at 674, n. 2, that Plaintiffs claim entitlement to a full administrative hearing on statutory (Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45) and Constitutional due process grounds. If Plaintiffs intend to pursue this point, it is a purely legal issue going to the merits of the case rather than to the present discovery issues.

[2] Plaintiffs repeatedly emphasize the necessity of bringing the "whole record" before the Court, expressly suggesting that the Commission may have considered as material various undisclosed information developed through staff investigations or ex parte contacts. Plaintiffs seek to explore this possibility in order to bring the "whole record" before the Court. The term "whole record" apparently derives from 5 U.S.C. § 706, which sets forth the standard of review herein. Yet Plaintiffs have offered no authorities for the proposition that the term "whole record" means anything other than the administrative record as compiled by the agency. It is apparent, for example, that the Supreme Court in *Citizens to Preserve Overton Park* v. *Volpe,* equated the "whole record" requirement with "the full administrative record" on which the challenged decision is based. 401 U.S. at 420, 91 S. Ct. 814.

In *Appalachian Power Co.* v. *E.P.A.*, 477 F. 2d 495, at 507 (4th Cir. 1973), the Court stated that it "must have before it the record of expert views and opinions, the technological data and other relevant material, including the state hearings, on which the Administrator himself acted" yet the context reveals that the Court was simply requiring that the entire administrative record developed before the agency be submitted for review, and the Court so indicated in requiring (at 507) that "the full administrative record" be certified to the Court. The agency had sought to confine the Court to the "four corners" of an administrative order, and the Court quite properly refused to be so confined.

Further, in those cases[4] where the administrative record was found inadequate, the remedy was not discovery, but remand to the agency for supplementation of the record. The discovery requested here would take place prior to review of the administrative record on the merits, while the remands in said cases took place only after the Court had determined on such review that the administrative record was inadequate. In only one case, *Overton Park*, has discovery at the judicial level been considered as an alternative, and there was allowed only as an expedient,[5] in sharply limited situations.[6] Even there, moreover, the Court expressly indicated that the District Court was not "required" to resort to testimonial procedures.[7]

The Commission's rule will stand or fall on the basis of the administrative record herein, which, it should be noted, is 2100 pages in length, including a statement of basis and purpose. If on reviewing the merits of this action the Court should find the record inadequate the possibilities include invalidation of the rule or remand for supplementation of the administrative record. In no event, however, does the Court foresee the type of *de novo* trial rejected in *Camp*, nor the probing of the mental processes of decisionmakers abjured in *Overton Park*.

[3] Plaintiffs will have ample opportunity to demonstrate the weaknesses [**1055**] of the present record. The absence of discovery need not limit judicial review. Discovery here is neither required nor necessary.

Defendants will be granted a protective order from discovery herein.

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[3] *City of Chicago, Illinois* v. *F.P.C.*, 147 U.S. App. D.C. 312, 458 F. 2d 731 (1971), *Mobil Oil Corporation* v. *F.P.C.*, 157 U.S. App. D.C. 235, 483 F. 2d 1238 (1973) and *Public Service Commission, State of New York* v. *F.P.C.*, 159 U.S. App. D.C. 172, 487 F. 2d 1043 (1973) all involved review under a "substantial evidence" test imposed by the Natural Gas Act and at least one of these cases, Public Service Commission, indicated that such review is based "on the record" as in a "formal" APA rule-making. 487 F. 2d at 1069. *International Harvester Company* v. *Ruckelshaus*, 155 U.S. App. D.C. 411, 478 F. 2d 615 (1973) involved a hearing and decision pursuant to Section 202(b)(5)(D) of the Clean Air Act, 42 U.S.C. § 1857f–1(b)(5)(B). *Montrose Chemical Corporation* v. *Train*, 160 U.S. App. D.C. 270, 491 F. 2d 63 (1974) was a Freedom of Information Act case, yet its discussion of administrative decision-making related only to decision required by statute to be made "only on substantial evidence of record." 491 F. 2d at 68.

[4] Note 3, supra.

[5] See 401 U.S. 420, n. 34, 91 S. Ct. 814, and Separate Opinion of Mr. Justice Black, 401 U.S. 421–22, 91 S. Ct. 814.

[6] ". . . (W)here there are administrative findings that were made at the same time as the decision . . . there must be a strong showing of bad faith or improper behavior before such inquiry may be made." 401 U.S. at 420, 91 S. Ct. at 825. There has been no such showing of bad faith or impropriety on the part of the Commission herein.

[7] 401 U.S. at 420, 91 S. Ct. 814.

F.T.C. v. RICHARD M. PAGE, PRESIDENT, AND ARROW FOOD DISTRIBUTORS, INC., A CORPORATION, ET AL.*

Civ. A. No. 19051. F.T.C. Docket No. 8890.

(United States District Court, Northern District of Georgia, Atlanta Div., June 26, 1974)

1. IN PROCEEDINGS BY F.T.C. TO SEEK ENFORCEMENT OF SUBPOENAS "DUCES TECUM," FOURTH AMENDMENT OBJECTIONS COULD BE RAISED

[1053] Fourth Amendment objections of defendants, in petition brought by Federal Trade Commission seeking an order requiring defendants to appear and produce documentary evidence in a Commission adjudicative hearing pursuant to certain subpoenas issued by the Commission, could be raised in the proceedings.

2. F.T.C. BEHAVIOR INFERRING INTENTIONAL PERVERSION OF LEGAL DISCOVERY PROCESS ENTITLED DEFENDANTS DISCOVERY AGAINST VARIOUS COMMISSION OFFICIALS ON QUESTION OF COMMISSION BEHAVIOR

Where combination of failure of Federal Trade Commission to rule on defendants' motions to quash July, 1968 subpoenas before their date of return, along with subsequent issuance of a possible invalid order denying motions to quash, raised inference that the Commission might have intentionally perverted the legal discovery processes available to it in order to obtain and examine corporate records of defendants pending defendants' attempt to secure their return, defendants were entitled to conduct discovery against various Commission officials on the question of whether the Commission's behavior in 1968 was so egregious as to taint the present subpoenas.

(Syllabus, with substituted captions, taken from 378 F.Supp. 1052)

On petition of F.T.C. seeking enforcement of subpoenas *duces tecum* issued against defendants, and on counter-motion of defendants seeking dismissal of petition or in the alternative, discovery against the Commission, court held that because Commission behavior in issuing subpoenas against defendants in 1968 was possibly so egregious as to taint the present subpoenas, defendants were entitled to conduct discovery against various Commission officials on the question of previous Commission behavior.

Ruling deferred until discovery completed, motion of Commission for a protective order denied.

Julian M. Longley, Jr., Asst. U.S. Atty., Atlanta, Ga., *Robert E. Duncan*, Federal Trade Commission, Washington, D.C., for plaintiff.

Ellis Arnall and *Allen I. Hirsch Arnall, Golden & Gregory*, Atlanta, Ga., for defendants.

Before FREEMAN, *District Judge.*

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*Reported in 378 F. Supp. 1052 (1974). On December 19, 1974, this case was dismissed with prejudice in accordance with a motion filed by the Commission, pursuant to Federal Rule of Civil Procedure 41(a)(2).

ORDER

RICHARD C. FREEMAN, *District Judge.*

This is a petition brought by the Federal Trade Commission (hereinafter, the "FTC", or the "Commission"), for an order requiring respondents to appear and produce documentary evidence in an FTC adjudicative hearing pursuant to certain subpoenas *duces tecum* issued by the FTC. The subject matter jurisdiction of this court is grounded upon Section 9 of the Federal Trade Commission Act (hereinafter, the "FTCA"), 15 U.S.C. § 49, which authorizes the FTC to issue subpoenas *ad testificandum* and *duces tecum* in connection with any matter under investigation by the FTC, and provides that a federal district court may, in the event of default, compel compliance therewith. Respondents have moved to dismiss the petition, or alternatively, for an order compelling discovery as against the FTC. Petitioner has responded by moving for a protective order against such discovery.

On February 27, 1974, this court denied two of respondent's objections to the instant subpoenas but requested additional briefs regarding the applicability of the Fourth Amendment's prohibition against unreasonable searches and seizures to the present proceedings. Specifically, the court wanted to consider (1) the traditional use of federal courts as forums in which to raise Fourth Amendment objections to administrative subpoenas and (2) the impact of the recent case of *United States* v. *Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974) upon that use. After careful consideration of these issues, the court has concluded that the petition should not be granted at this time and that respondents are entitled to discovery from the FTC.

Before proceeding to the merits of the present dispute, it may be helpful to recapitulate the procedural setting from which it has arisen. Section 5 of the FTCA, 15 U.S.C. § 45, declares unlawful unfair methods of competition and unfair or deceptive acts or practices in commerce, and provides that whenever the FTC suspects that a party may be engaged in such behavior, it shall issue a complaint stating the charges and requiring the party to appear at an adjudicative hearing. The purpose of such a hearing is to determine whether or not the FTC shall issue a cease and desist order restraining the party from committing such unlawful acts in the future. Pursuant to § 3.34 of the FTC Rules of Practice, 16 CFR 3.34, both sides are en[**1054**]titled to apply for subpoenas *ad testificandum* and *duces tecum* to the Administrative Law Judge. In June of 1972, the FTC initiated, pursuant to § 5 of the FTCA, 15 U.S.C. § 45, an administrative proceeding entitled In the Matter of Frozen Food Forum, Inc., et al., Docket No. 8890, by filing a complaint against various distributors of grocery products. The complaint alleged that the corporate respondents herein, and others, had engaged and were engaging in the illegal pricing, price discrimination, and payment or receipt of unlawful brokerage fees, in violation of § 2 of the Clayton Act, 15 U.S.C. § 13, and § 5 of the FTCA. Specifically, it alleged that corporate respondent Frozen Food Forum, Inc. (hereinafter, "FFF") a grocery products distributor to institutions owned by 72 stockholder-members, contracted with suppliers to package grocery products under its own labels for sale by the suppliers to FFF's stockholder-members. It further alleged that corporate respondents Winton Sales Company, Carper Sales Company, and at one time Stewart-Tucker, Inc. (not a respondent herein), acted as brokers for FFF by purchasing grocery products on FFF's behalf and received brokerage fees from suppliers in excess of actual services rendered, in violation of § 2(c) of the Clayton Act. The complaint also alleged that FFF and its stockholder-members violated § 2(c) by receiving valuable brokerage services from its brokers without paying for such services, despite the fact that the brokers received compensation as such from suppliers.

On February 6, 1973, the FTC caused subpoenas *duces tecum* to be issued to Julius Levitt, individually and in his capacity as a corporate officer of FFF; to the corporate officers of FFF's alleged brokers, Carper Sales Company and Winton Sales Company; and to the corporate officers of four of FFF's stockholder-members, Arrow Food Distributors, Inc., Hardin's, Inc., Capitol Fish Company, and Bob Blanke Sales Company, Inc. The subpoena issued to FFF requests the production of material relating to acquisition and distribution of grocery products. The subpoenas issued to the four stockholder-members of FFF requests material relating to the relationships between the stockholder-member, FFF, and the three named brokers. The subpoenas issued to the brokers request material relating to their orders of grocery products for FFF from certain suppliers.

On February 20, 1973, respondents moved to quash the subpoenas. The motions were subsequently denied by the Administrative Law Judge one month later. In dismissing the motions to quash, the Administrative Law Judge ordered respondents to appear before him in Atlanta, Georgia, on April 3, 1973. Each respondent thereupon filed an affidavit stating his intention not to appear on April 3 in compliance with the subpoena. No proceedings were convened on April 3, and on April 16, government counsel filed a request for enforcement of the subpoenas with the Administrative Law Judge. Respondents were found in default for failure to comply with the subpoenas, and the matter was certified to the FTC for enforcement. The present proceedings were brought pursuant to this alleged default and certification.

Respondents have refused to comply with the present subpoenas on the grounds that they are the product of a prior illegal seizure of FFF's corporate records in August of 1968. Respondents contend that enforcement of the subpoenas would give judicial sanction to the FTC's prior unlawful actions, and request the invocation of the "exclusionary rule" to deny the present petition.

The history of the FTC's allegedly unlawful acquisition of FFF's corporate records commenced in July of 1968, when the FTC caused investigatory subpoenas *duces tecum* to be issued to Julius Levitt (individually and as an officer of FFF), to Ms. Joyce Alexander (individually and as an employee of FFF), and to George T. Stewart (of Stewart-Tucker, Inc., FFF's alleged bro[**1055**]ker). As in the present case, the government suspected FFF of violating Section 2 of the Clayton Act and Section 5 of the FTCA, but unlike the present case, it had yet to issue a formal complaint. Respondents made timely motions to quash the subpoenas.

Ms. Alexander's subpoena required her appearance before an FTC hearing examiner in Atlanta, Georgia, on August 14, 1968. The motion to quash had not been decided by that date, however. Ms. Alexander was unable to appear because of an illness in her family, but her counsel nevertheless requested a ruling on the pending motion to quash. The hearing examiner ruled that in the absence of a definitive FTC ruling on the motion, the subpoena was still in force. Corporate records of FFF requested by Ms. Alexander's subpoena were then tendered, under protest of counsel, by a Mr. Herbert Oliver. Mr. Oliver, an employee of FFF, testified in Ms. Alexander's stead regarding the tendered records, subject to her later confirmation.

On the following day, August 15, counsel for respondents received word by telephone that the FTC had denied their motions to quash, and several days later received in the mail what purported to be an order denying the motions. Counsel for respondents contended then, as they do today, that the order was invalid because it was not properly signed by the Secretary of the Federal Trade Commission. Further attempts by the FTC to secure compliance on the subpoenas were not successful, and proceedings to compel enforcement were brought in federal court.

During the course of proceedings before the Hon. Sidney O. Smith, U.S. District Court for the Northern District of Georgia, the FTC was ordered to return the papers and allow the respondents a limited opportunity to depose FTC officials regarding the allegedly invalid order denying the motion to quash. See, *FTC* v. *Kujawaski et al.*, 298 F. Supp. 1288 (N.D. Ga. 1969). Upon the FTC's subsequent motion to dismiss and over the objections of respondents' counsel, the court dismissed the enforcement proceedings on August 6, 1969. Identical subpoenas *duces tecum* were issued to Julius Levitt and Joyce Alexander the following day, on August 7. Again, the respondents moved to quash.

This time, the motion was denied before respondents were required to testify, but respondents still refused to do so and were held in default. No further action was taken by the FTC to enforce this second set of subpoenas.

If the purpose of today's proceedings were to enforce the identical subpoenas served upon respondents in July of 1968 (and again in August of 1969), then the court would not hesitate in granting the present petitions, regardless of whether the Commission had previously obtained FFF's corporate records in an illegal fashion. This conclusion would necessarily follow from the lack of any connection between the FTC's alleged prior unlawful behavior and the present subpoenas. But respondents assert the existence of such a connection in the present case. Although Judge Smith eventually ordered the Commission to return FFF's records, respondents contend that while the records were in the Commission's possession, they were closely studied and analyzed, and that the information gleaned therefrom was used to draft the present subpoenas. For its part, the Commission has not denied the existence of a link between the drafting of present subpoenas and its analysis of the previously obtained corporate records. Respondents infer unlawfulness from the FTC's failure to rule on the motions to quash the July, 1968, subpoenas before the date of their return, and from the FTC's subsequent issuance of an allegedly invalid order denying the motions to quash. It is therefore urged that if the records had been obtained unlawfully, then any information produced by the present subpoenas would necessarily be tainted as the fruit of a poisonous tree.

Respondents base their Fourth Amendment argument upon *Silverthorne* **[1056]** *Lumber Co.* v. *United States*, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920), in which the Supreme Court reversed a district court's judgment of contempt which had imposed a fine on a corporation and had imprisoned one of its officers. In that case, federal officers, after arresting Silverthorne and his father pursuant to an indictment, had unlawfully searched the offices of the Silverthorne Lumber Co. and seized certain documents. A new indictment was then handed down. The district court held the search unconstitutional and ordered the papers returned, but subpoenas were served on Silverthorne and the corporation requiring the production of the originals. The respondents refused to comply and were held in contempt. The Supreme Court reversed on the grounds that the subpoenas were drafted with the assistance of information gleaned from evidence seized in violation of the Fourth Amendment. As stated by the Court:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all.

251 U.S. at 392, 40 S. Ct. at 183. Although *Silverthorne* clearly stands for the proposition that Fourth Amendment objections may be raised in proceedings other than criminal trails (such as proceedings to enforce subpoenas *duces tecum*), it did not address the issue of whether such objections may be raised where the evidence is destined for ultimate use in an administrative, rather than a criminal proceeding.

This question was considered in *Knoll Associates, Inc.* v. *F.T.C.*, 397 F. 2d 530 (7th Cir. 1968), wherein the Seventh Circuit set aside a cease and desist order issued by the FTC which was in part based upon evidence stolen by a former employee of Knoll Associates, Inc., for the purpose of assisting the FTC in its administrative prosecution of that company. The Commission unsuccessfuuly urged affirmance of its order on the grounds that Fourth Amendment objections could not be asserted by a corporation in its appeal of an administrative adjudication. The Court of Appeals rejected both the proposition that Fourth Amendment rights did not obtain in an administrative adjudicatory proceeding, as well as the proposition that a corporation had no standing to assert such rights therein. The Court reasoned that the purpose of the Fourth Amendment—that is, deterrence of governmental lawlessness—would be served by application of the exclusionary rule regardless of the criminal or administrative nature of the proceedings involved, and regardless of the personal or corporate nature of the party agrieved by the unlawful seizure.

Knoll may be distinguished from the present case because it arose from a direct appeal of the Commission's final cease and desist order, rather than from an interlocutory attack upon the evidence's admissibility. Petitioner therefore suggests that respondents' Fourth Amendment objections are premature, in that they could raise such objections before the Court of Appeals in their appeal of any cease and desist order issued by the Commission. Such an argument appears to be in direct opposition to *Silverthorne*, wherein the Supreme Court, by overturning a contempt citation for refusal to comply with subpoenas issued in a criminal action, thereby refused to validate even a preliminary judicial validation of subpoenas tainted by an unlawful search and seizure. Further, the respondent in *Knoll* had been prevented from making an interlocutory attack upon the tainted evidence in federal district court because it had not been obtained through normal discovery procedures, but through theft. Therefore, the respondent therein could raise its Fourth Amendment objections only by attacking the cease and desist order. Such is not the case here, as the respondents have at their disposal a federal district court forum in which to raise objections to subpoenas, by virtue of Section 9 of the FTCA.

[1057] [1] As it is clear that Fourth Amendment objections may be raised in these proceedings, the court now turns to a consideration of the recent Supreme Court decision of *United States* v. *Calandra*, *supra*. In that case, Calandra, who had previously been granted transactional immunity, had been called as a witness before a grand jury investigating loan-sharking activities. While testifying before the grand jury, Calandra objected to answering certain questions propounded to him on the grounds that they related to his involvement with evidence illegally seized from him by federal agents, and moved the district court to suppress and return such evidence. The district court thereupon determined that the evidence had been illegally seized and granted Calandra's motion. The Supreme Court reversed on the grounds that application of the exclusionary rule to the facts of that case would seriously interrupt and interfere with the grand jury's historically sanctioned investigatory and accusatory functions. As stated by the Court:

> Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues * * * only tangentially related to the grand jury's primary objective. [footnote omitted]. The probable result would be "protracted interruption of grand jury proceedings," *Gelbard* v. *United States*, 408 U.S. 41, 70, 92 S. Ct. 2357, 2372, 33 L. Ed. 2d 179 (1972) (White, J., concurring), effectively transforming them into preliminary trials on the merits.

414 U.S. at 349, 94 S. Ct. at 620–21, 38 L. Ed. 2d at 572. The Court distinguished *Silverthorne* on the grounds that an indictment had already been handed down by a grand jury. Thus, the purpose of the subpoenas in that action was to gather evidence to be introduced at a trial designed to determine the defendants' guilt or innocence, and not at a grand jury to determine whether an indictment should be handed down. As stated by the *Calandra* Court, ". . . the primary consequence of the Court's decision [in *Silverthorne*] was to exclude the evidence from the subsequent criminal trial." 414 U.S. at 352, 94 S. Ct. at 622, 38 L. Ed. 2d at 574, fn. 8. Therefore, *Calandra* may be interpreted as recognizing an investigative exception to the exclusionary rule: that is, the Fourth Amendment may not be used to prevent investigative institutions from determining whether there is cause to believe that violations of the law have occurred.[1]

In light of the above, it is clear to this court that *Calandra's* exception to *Silverthorne* does not apply to the present action. It is undisputed that the present subpoenas *duces tecum* were issued in the course of an adjudicative proceeding, in that a formal complaint (comparable to an indictment drawn by a grand jury) has already been issued. The primary consequence of a denial of the present petition will be to exclude the evidence sought thereby from consideration in an adjudicative proceeding designed to determine whether respondents' behavior warrants issuance of a cease and desist order. No investigative proceedings will be interrupted by consideration of respondents' Fourth Amendment arguments at this point.

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[1] The distinction between adjudicative and investigative proceedings was clearly recognized in *F.T.C.* v. *Kujawski*, *supra*, wherein Judge Smith implicitly acknowledged that an investigative subpoena may be entitled to some judicial deference. The Court found ". . . a definite tension between the need to allow administrative agencies to investigate matters fully without undue hinderance in the federal courts and a need to allow the investigated party some recourse at this early stage [that is, a Section 9 federal district court hearing] to check any abuses by that agency." 298 F. Supp. at 1290. The Court therefore allowed the respondents a limited opportunity to undertake discovery to determine if the subpoenas were procedurally valid.

[2] Although respondents have not alleged an illegal search and seizure in the sense of an actual physical entry onto respondents' property, we feel that the combination of the Commission's [**1058**] failure to rule on respondents' motions to quash the July, 1968, subpoenas before their date of return, with the subsequent issuance of a possibly invalid order denying motions to quash, raises the inference that the Commission may have intentionally perverted the legal discovery processes available to it in order to obtain and examine FFF's corporate records pending respondents' attempts to secure their return. Although it is unclear at this point whether or not the Commission's behavior in 1968 was so egregious as to taint the present subpoenas, we feel that respondents are entitled to conduct discovery against various FTC officials on this question, and hereby allow respondents ninety days from the date of this order in which to do so.

Accordingly, the court hereby defers any ruling on the instant petition until such time as discovery has been completed. The Commission's motion for a protective order is denied.

It is so ordered.

AMERICAN GENERAL INSURANCE COMPANY, ET AL. v. F.T.C.*

No. 73–2905. F.T.C. Docket No. 8847.

(United States Court of Appeals, Fifth Circuit, June 27, 1974)

1. CORPORATIONS SEEKING TO MERGE ARE REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES EVEN THOUGH FURTHER FACT FINDING WAS NOT NECESSARY, WHERE ADMINISTRATIVE RULING DECLARED THAT MCCARRAN-FERGUSON ACT DID NOT IMMUNIZE MERGER FROM CLAYTON ACT.

[197] Where administrative ruling that McCarran-Ferguson Act did not immunize merger from Clayton Act section concerning acquisition by one company of stock of another would have no international repercussion, did not place in [198] issue any constitutional rights and did not amount to blatant or obvious error, even if jurisdictional error, corporations seeking

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*** Reported in 496 F. 2d 197 (1974). For case before the District Court, S.D. Texas, *see* p. 673 herein. For case before the Commission, see —— F.T.C. ——.**

to merge would be required to exhaust administrative remedies, even though any necessity for further fact-finding did not play a crucial role in the case.

2. MERELY BECAUSE ONLY QUESTIONS OF LAW ARE INVOLVED DOES NOT MAKE REQUIREMENT OF EXHAUSTION OF ADMINISTRATIVE REMEDIES INAPPLICABLE; AGENCY'S INTERPRETATION OF STATUTE IS ENTITLED TO "GREAT DEFERENCE"

Requirement of exhaustion of administrative remedies is not inapplicable merely because only questions of law are involved; agency's interpretation of statute is entitled to "great deference."

(Syllabus, with substituted captions, taken from 496 F. 2d 197)

On appeal from decision of the U.S. District Court, S.D. Texas, dismissing the complaint, court held that where an administrative ruling that the McCarran-Ferguson Act did not immunize merger from Clayton Act section, did not have international repercussions, did not place in issue any constitutional rights and did not amount to blatant, even if jurisdictional, error corporations would have to exhaust administrative remedies. Affirmed.

Leroy Jeffers, *John L. Murchison, Jr.*, *David T. Harvin*, *George F. Reed*, Houston, Tex., for American General Insurance Company.

Richard F. Ober, Gen. Counsel, *Decatur H. Miller*, Baltimore, Md., for Fidelity & Deposit Co. of Maryland.

Charles A. Tobin, Secretary, *Ernest G. Barnes*, Asst. Director, *Nicholas S. Reynolds*, *Louis R. Sernoff*, Attys., Federal Trade Commission, Washington, D.C., *Robert E. Kopp*, Dept. of Justice, *Neil H. Koslowe*, Washington, D.C., *Gerald Harwood*, Actg. Asst. Gen. Counsel, *John T. Fischbach*, Atty., Federal Trade Commission, Washington, D.C., for defendants-appellees.

Before DYER and MORGAN, *Circuit Judges*, and KRAFT, *District Judge*.

LEWIS R. MORGAN, *Circuit Judge:*

In this case, plaintiffs-appellants seek to enjoin the Federal Trade Commission from preceeding against them under § 7 of the Clayton Act, 15 U.S.C. § 18, on the ground that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015, deprives the Commission of jurisdiction over the case. Finding that any such injunction would be premature at this time, we affirm the district court's dismissal of the complaint.

On June 17, 1971, the Commission issued a complaint, Commission Docket No. 8847, against the Texas-based American General Insurance Co., charging that American General had violated § 7 of the Clayton Act by reason of its merger with Fidelity and Deposit Co. of Maryland. See 15 U.S.C. § 21. The complaint charged that the effect of the merger "may be substantially to lessen competition or to tend to create a monopoly in the business of underwriting fidelity and surety bonds in the United States . . . ."

American General responded that the complaint failed to state a claim, denied the principal allegations of the complaint, and argued that the Commission was without jurisdiction to issue the complaint because the

> . . . transaction which is the subject matter of the Commission's Complaint involves the business of insurance, which is regulated by State law. Accordingly, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15 (1945), renders inapplicable section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, to the merger of respondent American General Insurance Company with Fidelity & Deposit Company of Maryland.

Subsequently, Fidelity & Deposit was permitted to intervene in the administrative proceedings.

On December 27, 1971, American General moved for summary judgment on the issue of jurisdiction under Section 3.24 of the Commission's rules, 16 C.F.R. § 3.24. On March 7, 1972, an administrative law judge ruled that the Commission lacked jurisdiction to issue the complaint because the "States of Maryland and Texas, and many of the other states, have laws, capable of being enforced, which regulate the business of insurance, within the contemplation and meaning of the McCarran-Ferguson Act."

Commission counsel appealed the decision of the administrative law judge to the Commission. A three-member ma[**199**]jority held that jurisdiction was not barred by the McCarran-Ferguson Act because the states could not regulate the merger activity of national insurance companies. In addition, the Commission held that "the business of insurance for which regulation by a state may preempt Federal jurisdiction does not include mergers or other combinations of enterprises engaged in the activity of selling insurance." In its opinion, the Commission vacated the initial decision and remanded the case to the administrative law judge for further proceedings.

On March 5, 1973, American General and Fidelity & Deposit filed a complaint in the United States District Court for the Southern District of Texas seeking a declaratory judgment that the McCarran-Ferguson Act immunized the merger from § 7, and injunctive relief "prohibiting Defendants from conducting any further proceedings in FTC Docket No. 8847."

[1, 2] On June 5, 1973, 359 F. Supp. 887, the court denied plaintiffs' motion for a preliminary injunction and granted defendants' motion to dismiss "for failure to exhaust administrative remedies." The court concluded

> . . . that there has not yet been any final agency action, that the Federal Trade Commission has not clearly exceeded the bounds of its jurisdiction, and that the Plaintiffs have an adequate remedy at law through review of the final Commission order as provided by the Clayton Act. . . .

The court opined that were it to reach the merits, it would uphold the Commission's position: "because a state cannot regulate extraterritorially, the potential regulation of the instant merger by Texas and Maryland, the domiciliary states of the Plaintiffs, does not by way of the McCarran-Ferguson Act deprive the Commission of jurisdiction to challenge the merger under Section 7 of the Clayton Act when the impact of the merger obviously will be felt in all fifty states." The plaintiffs have appealed.

The rule that a plaintiff must exhaust all available administrative remedies before coming to a federal court for relief is old and well-established. In *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 51, 58 S. Ct. 459, 463, 82 L. Ed. 638 (1938) the Supreme Court referred to

> . . . the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter. [footnote omitted.]

It is true that certain distinguished commentators have questioned whether the rule is as firm as the Myers Court would imply. K. Davis, Administrative Law Treatise, § 20.02 (1958). Nevertheless, it remains true that the doctrine of exhaustion "is well established in the jurisprudence of administrative law." *McKart* v. *United States*, 395 U.S. 185, 193, 89 S. Ct. 1657, 1662, 23 L. Ed. 2d 194 (1969). Of course, the doctrine has numerous exceptions. *Id.*

In a comprehensive and learned review of this area of the law, this court in *United States* v. *Feaster*, 410 F. 2d 1354 (5th Cir. 1969), *cert. den.*, 396 U.S. 962, 90 S. Ct. 427, 24 L. Ed. 2d 426 (1969), described the relevant exceptions to the rule that administrative remedies must be exhausted prior to review by the courts. The first factor which would permit premature resort to judicial remedies is an international repercussion resulting from the administrative proceedings. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 83 S. Ct. 671, 9 L. Ed. 2d 547 (1963). There is not even the merest allegation that this factor is present here.

This second exception was fashioned by the Second Circuit in *Fay* v. *Douds*, 172 F. 2d 720 (2nd Cir. 1949). A litigant may rely on this exception only if [**200**] there is a substantial showing that his constitutional rights have been violated. 410 F. 2d at 1366. The question in this case is purely one of statutory intrepretation and application. No constitutional provision is at issue.

The final exception is based on *Leedom* v. *Kyne*, 358 U.S. 184, 79 S. Ct. 10, 3 L. Ed. 2d 210 (1958).

> In that case the Supreme Court permitted review of the NLRB's certification of a bargaining unit which included both professional and nonprofessional employees even though the professional employees had not consented to inclusion in the otherwise nonprofessional unit. This action was a brazen defiance of the express provisions of 29 U.S.C.A. § 159(b)(1). [footnote omited.] 410 F. 2d at 1366.

In this case, appellants seek to bring themselves within the *Leedom* v. *Kyne* exception by emphasizing that their challenge to the Commission's action is jurisdictional. However, it has never been the law that any jurisdictional error, no matter how slight, throws open the gates to premature court action. The jurisdictional area must be gross or egregious to provide an exception to the rule of exhaustion.

> The extraordinary remedy of judicial intervention in agency proceedings still in progress is unavailable unless necessary to vindicate an unambiguous statutory or constitutional right, and only when this condition is satisfied will a court look to the general body of equitable jurisprudence and other appropriate sources for the purpose of fashionable relief. *Coca-Cola Company* v. *F.T.C.*, 475 F. 2d 299, 304, (5th Cir. 1973).

It has also been stated that the *Leedom* v. *Kyne* exception is "narrow" and "rare-successfully invoked" and that the error must be "of a *summa* or *magna* quality as contraposed to decisions which are simply *cum* error." 410 F. 2d at 1368. We are unwilling at this stage of the proceedings to make a determination of the merits of the jurisdictional question. It is nevertheless obvious from the record in the district court and the briefs and arguments on appeal that the question is a close one. If the Commission is committing error by proceeding against the appellants, its error is not blatant or obvious. The McCarran-Ferguson Act is not without ambiguity, and we feel that the question of its applicability is better left to a review of any final order which may be entered in this case.

Many policy considerations support this holding. A crucial one is "the avoidance of premature interruption of the administrative process." *McKart* v. *United States*, *supra*, at 193. In addition, the efficiency of the agency is an important consideration, and courts ought not to encourage flouting of the administrative process. Considerations of judicial economy also enter into the equation, since, if no cease-and-desist order is ever entered, the courts need not deal with the jurisdictional question at all. Finally, there are systemic factors to be considered. Professor Jaffe has called the exhaustion doctrine "an expression of executive and administrative autonomy." L. Jaffe, Judicial Control of Administrative Action, 425 (1965).

It is true, as appellants argue, that the necessity for further fact-finding, which would be a strong argument for requiring exhaustion, does not play a crucial role in this case. However, it has never been the law that exhaustion is not required as to questions of law. In fact, an agency's interpretation of a statute is entitled to "great deference." *Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965). It must be emphasized that

> . . . Congress did not contemplate a grant of jurisdiction to the courts to prevent abuse or misuse of administrative power by prior restraint of the exercise of such powers. *Lone Star Cement Corp.* v. *F.T.C.*, 339 F. 2d 505, 510 (9th Cir. 1964).

In summary, we are not convinced that the extraordinary showing of necessity which is needed to justify prema[**201**]ture judicial interference, is present in this case. We therefore uphold the district court's refusal to derail the pending Commission procedings in this matter.

Affirmed.

ALTERMAN FOODS, INC. v. F.T.C.*

No. 73–1960. F.T.C. Docket No. 8844

(United States Court of Appeals, Fifth Circuit, July 22, 1974)

1. IF SUPPORTED BY SUBSTANTIAL EVIDENCE, FINDINGS OF F.T.C. ARE CONCLUSIVE

   Findings of Federal Trade Commission that party has engaged in an unfair method of competition are conclusive if supported by substantial evidence.

2. BARRING UNREASONABLE RELATIONSHIP TO UNLAWFUL PRACTICES FOUND, F.T.C. HAS WIDE DISCRETION IN CHOICE OF REMEDIES FOR UNLAWFUL PRACTICES

   Federal Trade Commission has wide discretion in its choice of remedies for unlawful practices and its determination with respect thereto is not to be disturbed unless remedy selected has no reasonable relation to the unlawful practices found to exist.

3. REMEDIES FOR UNLAWFUL PRACTICES ARE NOT LIMITED ONLY TO THE PRECISE FORM OF ILLEGAL PRACTICES FOUND

   Federal Trade Commission is not limited in choosing remedy for unlawful practices to prohibiting only the precise form of illegal practices found by it.

4. F.T.C. MAY REACH RESULTS CONTRARY TO ITS HEARING OFFICER, FOR THE COMMISSION, NOT THE LAW JUDGE, BEARS ULTIMATE RESPONSIBILITY OF DETERMINING WHETHER THERE HAS BEEN A VIOLATION OF LAW

   Federal Trade Commission, rather than Administrative Law Judge, bears ultimate responsibility of determining whether party has engaged in an unfair method of competition and may, therefore, reach results contrary to those of its hearing officer.

5. COMMISSION'S FINDINGS, NOT LAW JUDGE'S IF SUPPORTED BY SUBSTANTIAL EVIDENCE ARE CONTROLLING

   Findings substituted by Federal Trade Commission for those of Administrative Law Judge in proceedings to remedy unfair methods of competition are controlling if supported by substantial evidence.

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*Reported in 497 F. 2d 993 (1974). For case before the Commission, see 82 F.T.C. 298.

6. PETITIONER'S CONDUCT IN INDUCING PARTICIPATION OF ITS SUPPLIERS IN FOOD SHOWS FOR ITS BUYERS AND CUSTOMERS VIOLATED F.T.C. ACT

Conduct of wholesaler and retailer of groceries and household products in inducing its suppliers to participate in food shows for its buyers and customers was violative of Federal Trade Commission Act at the retail level of distribution, despite contention that the food shows were solely wholesale promotions and that promotional allowances and services provided by the suppliers were not connected with resale of suppliers' products to retail customers, where, inter alia, suppliers were invited by buyers who purchased for retail division and profits realized by wholesaler and retailer from suppliers' rentals of booths at the food shows were, in effect, price reductions on suppliers' products.

7. LACKING FORMAL PROOF, F.T.C. COULD STILL INFER VIOLATIONS OF STATUTORY REGULATIONS

Federal Trade Commission could properly infer that profits realized by wholesaler and retailer from rentals paid by its suppliers for booths at food shows organized for buyers and customers of the wholesaler and retailer were put to use at retail level, in support of determination that inducing suppliers to participate in the food shows constituted violation of Federal Trade Commission Act at retail level of distribution, even [994] though there was no formal proof that profits on the food shows were put to use at the retail level.

8. DETERMINATION OF FUNCTION OF COOPERATIVE WAS WITHIN PROVINCE OF TRIER OF FACT

Determination of whether retailer-owned buying cooperative functioned as a wholesaler in competition with retailer and wholesaler, whose wholesale division sold exclusively to independent grocery stores organized as a voluntary cooperative, was within province of trier of fact in proceeding to determine whether wholesaler and retailer violated Federal Trade Commission Act.

9. EVIDENCE SUPPORTED FINDING THAT COOPERATIVE KNOWINGLY INDUCED AND RECEIVED DISCRIMINATORY ALLOWANCES AND SERVICES IN VIOLATION OF F.T.C. ACT

Evidence that retailer-owned buying cooperative performed functions similar to petitioner's wholesale division which sold exclusively to independent grocery stores organized as a voluntary cooperative sustained determination that petitioner's wholesale division and the retailer-owned buying cooperative were in basic competition for wholesale business and that petitioner's conduct in knowingly inducing and receiving dscriminatory allowances and services constituted violation of Federal Trade Commission Act at the wholesale level.

10. FACTS WERE ENOUGH TO SUSTAIN DETERMINATION OF VIOLATION OF F.T.C. ACT

Demonstration that wholesaler and retailer of groceries and household products knowingly solicited and obtained from supplier promotional considerations which were not available to competitor on the wholesale level was sufficient to sustain determination that wholesaler and retailer had violated Federal Trade Commission Act on the wholesale level, despite contention that the wholesale competitor competed in the distribution of the products of only one small supplier and that the violation was, therefore, de minimis.

11. TO SHOW PRIMA FACIE VIOLATION, IT IS NOT NECESSARY TO PROVE INJURY TO COMPETITION

Proof of injury to competition is not required to show prima facie violations of prohibition against supplier's allowances for advertising or other sales promotion services or facilities unless allowances are available on proportionally equal terms to all customers competing in distribution of such products and of prohibition against a seller favoring any purchaser with promotional services and facilities not accorded to all purchasers on proportionally equal terms.

12. TO SOLICIT DISCRIMINATORY PROMOTIONAL CONSIDERATIONS IS ILLEGAL PER SE

Solicitation of discriminatory promotional consideration is per se illegal.

13. AFFIRMATIVE ACTION, NOT SIMPLY WILLINGNESS, TO MAKE AVAILABLE EQUAL PROMOTIONAL CONSIDERATIONS IS REQUIRED TO AVOID BEING DISCRIMINATORY

To avoid being discriminatory, supplier's promotional payments and services must be made available or accorded to competing customers, and to meet this requirement, supplier must not merely be willing, if asked, to make an equivalent deal with other customers but must take affirmative action to inform all customers of availablility of the promotion programs.

14. BURDEN OF PROOF WAS ON PETITIONER TO SHOW AVAILABILITY OF SIMILAR PAYMENTS ONCE F.T.C. SHOWED THAT ONLY WHOLESALER AND RETAILER RECEIVED SPECIAL PAYMENTS

[995] Once Federal Trade Commission showed that only wholesaler and retailer received special payments and services from suppliers, burden of proving availability of similar payments to competitors was on the wholesaler and retailer in proceedings before the Commission for alleged violation of Federal Trade Commission Act.

15. WHERE SUPPLIERS WERE EITHER UNABLE OR UNWILLING TO EXTEND SIMILAR PROMOTIONAL CONSIDERATION TO OTHER CUSTOMERS, PARTICIPATION IN FOOD SHOWS ORGANIZED BY THE WHOLESALER AND RETAILER OF THE SUPPLIERS WAS DISCRIMINATORY AND CONDUCT OF WHOLESALER AND RETAILER IN INDUCING SUPPLIERS TO PARTICIPATE IN THE SHOWS WAS VIOLATIVE OF F.T.C. ACT

Participation in food shows, which were organized by wholesaler and retailer of groceries and household products for its buyers and customers, by suppliers of the wholesaler and retailer was discriminatory and conduct of wholesaler and retailer in inducing its suppliers to participate in the shows was violative of Federal Trade Commission Act where suppliers were either unwilling or unable to extend similar promotional consideration to their other customers.

16. IN FORMULATION OF ITS DECREES, F.T.C. HAS BROAD DISCRETION

Federal Trade Commission has broad discretion in formulation of its decrees.

17. F.T.C. HAS BROAD DISCRETION IN FORMULATING ITS ORDERS UPON FINDING VIOLATIONS OF LAW

Order of Federal Trade Commission prohibiting retailer and wholesaler from inducing and receiving promotional considerations which it knows or should know are not offered to others was not overly broad where Commission determined that the wholesaler and retailer had violated the Federal Trade Commission Act by inducing its suppliers, at their own expense, to participate in food shows which were organized for its buyers and customers and which resulted in receipt by wholesaler and retailer of promotional allowances and

services which were not accorded on proportionally equal terms to other customers of the suppliers.

(Syllabus, with substituted captions, taken from 497 F. 2d 993)

On petition to set aside order of F.T.C., court held that conduct of wholesaler and retailer in inducing its suppliers to participate in food shows sponsored by the wholesaler and retailer for its buyers and sellers was violative of the F.T.C. Act.

Petition denied and order enforced.

Allen I. Hirsch, *Cleburn E. Gregory*, *Jr.*, Atlanta, Ga., for petitioner.

Robert E. Duncan, Atty., Office of General Counsel, *Calvin J. Collier*, General Counsel, *Harold D. Rhynedance*, *Jr.*, Asst. Gen. Counsel and *Gerald Harwood*, Asst. General Counsel, Federal Trade Commission, Washington, D.C., for respondent.

Before DYER, MORGAN, and RONEY, *Circuit Judges.*

RONEY, *Circuit Judge:*

The general question in this case is whether a wholesaler and retailer of groceries and household products violates the Federal Trade Commission Act by inducing its suppliers, at their own expense, to participate in a food show for its buyers and customers, knowing that the suppliers did not so cooperate with its competitors. The Federal Trade Commission found a violation, and we agree.

The case comes to us on a petition of Alterman Foods, Inc. to set aside a Federal Trade Commission cease and desist order. 82 F.T.C. 298, Trade Reg. Rep. ¶ 20,248 (Dkt. 8844, Feb. 12, 1973). Alterman is a combination wholesaler and retailer of groceries and household products serving primarily Georgia and Alabama with annual sales exceeding $130 million. It sells to the public at retail from approximately 70 food stores, Big Apple, Food Giant, and K-Mart, which it operates directly or through wholly-owned subsidiaries. Its wholesale division sells exclusively to the "A.B.C. Food Stores," approximately 375 independent grocery stores organized as a voluntary cooperative and under contract to pur[**996**]chase most of their stock from Alterman. The institutional division sells in bulk to restaurants, hotels, hospitals, and other institutions.

Since 1956 Alterman has held an annual "food show" conducted under the jurisdiction of its wholesale division, for the institutional, independent, and supermarket buyers. At the show, suppliers demonstrate their wares to an audience of up to 15,000 managers, comanagers, and employees of the Alterman owned retail outlets, together with their families and friends; independent A.B.C. Store owners, their employees, families, and friends; and customers of the institutional division. The general consuming public is not invited to attend.

The Commission found that the suppliers' involvement in the food show constituted, in connection with the resale of the suppliers' products, promotional allowances and services to Alterman which were not accorded on proportionally equal terms to the suppliers' other customers. The suppliers thus violated sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. 13 (d) and (e). The Commission concluded that Alterman, by knowingly inducing and receiving these discriminatory allowances and services, engaged in unfair competition at both wholesale and retail levels in violation of section 5 of the Federal Trade Commission Act, 15 U.S.C.A. § 45. It issued a cease and desist order.

Seeking to set aside or modify the order, Alterman asserts (1) no retail level violation was proved because the promotional allowances and services were not provided in connection with the retail sale of the suppliers' products; (2) there was no violation of the Act at the wholesale level because no other customers of the participating suppliers competed with Alterman at the wholesale level except one wholesaler as to which any violation was *de minimis*; (3) in any event, the allowances and services satisfied the tests for proportional equality among the suppliers' customers; and (4) the Commission's order was overbroad.

Applicable Legal Principles

The Commission determined that Alterman, in inducing suppliers to violate their obligations under the amended Clayton Act, had committed an unfair method of competition proscribed by section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C.A. § 45(a)(1).[1] The courts have uniformly accepted this use of section 5 to reach buyer conduct not directly proscribed by the prohibitions on sellers established by sections 2(d) and 2(e) of the amended Clayton Act. *Colonial Stores, Inc.* v. *FTC*, 450 F. 2d 733 (5th Cir. 1971); *FTC* v. *J. Weingarten, Inc.*, 336 F. 2d 687 (5th Cir. 1964), *cert. denied*, 380 U.S. 908, 85 S. Ct. 890, 13 L. Ed. 2d 796 (1965); *R. H. Macy & Co.* v. *FTC*, 326 F. 2d 445 (2d Cir. 1964); *Giant Food, Inc.* v. *FTC*, 113 U.S. App. D.C. 227, 307 F. 2d 184 (1962), *cert. denied*, 372 U.S. 910, 83 S. Ct. 723, 9 L. Ed. 2d 718 (1963); *see FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 88 S. Ct. 904, 19 L. Ed. 2d 1222 (1968).

Section 2(d) makes it unlawful for a supplier to pay allowances for advertising or other sales promotion services or facilities provided by one customer who resells the supplier's products unless the allowances are "available on proportionally equal terms to all other customers competing in the distribution of such products." [2]

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[1] 15 U.S.C.A. § 45(a)(1) reads:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

[**997**] Section 2(e) prohibits a seller from favoring any purchaser with promotional services and facilities "not accorded to all purchasers on proportionally equal terms." [3]

The basic factual elements of the unfair method of competition of inducing discriminatory payments or services violative of the Clayton Act are:

> 1. that a respondent in commerce knowingly solicited or ininduced and received from a supplier promotional allowances, services, or facilities;
> 2. that the solicited promotional considerations were received in connection with the resale of the supplier's product;
> 3. that the respondent had competitors at the same functional level; and
> 4. that the respondent knew or should have known that its competitors were not offered the promotional considerations in question on proportionally equal terms.

FTC v. *J. Weingarten, Inc.*, 336 F. 2d 687, 693 n. 16 (5th Cir. 1964), *cert. denied*, 380 U.S. 908, 85 S. Ct. 890, 13 L. Ed. 2d 796 (1965); *see FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 88 S. Ct. 904, 19 L. Ed. 2d 1222 (1968); Commission Guide 14, 16 C.F.R. § 240.14 (1974) (FTC Guides for Advertising Allowances and Other Merchandising Payments and Services).

[1–3] The Commission's findings are, of course, conclusive if supported by substantial evidence. *Colonial Stores, Inc.* v. *FTC*, 450 F. 2d 733 (5th Cir. 1971); *Foremost Dairies, Inc.* v. *FTC*, 348 F. 2d 674 (5th

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[2] Section 2(d), 15 U.S.C.A. § 13(d), provides in full:

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

[3] Section 2(e), 15 U.S.C.A. § 13(e), provides in full:

> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Although subsections (d) and (e) contain textual variations, they have generally been construed as co-extensive. *See, e.g., Exquisite Form Brassiere, Inc.* v. *FTC*, 112 U.S. App. D.C. 175, 301 F. 2d 499 (1961), *cert. denied*, 369 U.S. 888, 82 S. Ct. 1162, 8 L. Ed. 2d 289 (1962); *American News Co.* v. *FTC*, 300 F. 2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824, 83 S. Ct. 44, 9 L. Ed. 2d 64 (1962); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773, 66 S. Ct. 231, 90 L. Ed. 467 (1945). *See also* 1 R. Callman, The Law of Unfair Competition, Trademarks & Monopolies § 28.1 (e) (3d ed. 1967); 2 H. Toulmin, The Anti-Trust Laws of the United States § 13.2 (1949).

Cir.), *cert. denied*, 382 U.S. 959, 86 S. Ct. 435, 15 L. Ed 2d 362 (1965); *see* 15 U.S.C.A. § 45(c). The Commission has wide discretion in its choice of remedies for unlawful practices, and its determination is not to be disturbed unless the remedy selected "has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 613, 66 S. Ct. 758, 760, 90 L. Ed. 888 (1946); *accord, FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 85 S. Ct. 1035, 13 L. Ed. 2d 904 (1965). The Commission is not limited to prohibiting only the precise form of illegal practices found by it. *FTC* v. *Colgate-Palmolive Co., supra; FTC* v. *Mandel Brothers*, 359 U.S. 385, 79 S. Ct. 818, 3 L. Ed. 2d 893 (1959).

Commission's Findings and Order

All of Alterman's suppliers were encouraged to participate in the food show each year. In each year covered by the complaint (1966–1969), approximately 300 suppliers participated. In order to participate, a supplier was required to rent a booth in which to display his products, at a cost of $350 or $375 depending on the year, and to staff the booth in order to display its products. The section 2(d) charge is based on the **[998]** profit Alterman derived from the show, approximately $100 per supplier even after an admittedly generous allowance for indirect costs. The section 2(e) allegation stems from the promotional services—supplies and labor—furnished by the participating suppliers.

The Commission found that Alterman knowingly induced suppliers to participate in its food show and thereby received favored allowances and services.[4] The Commission determined that the food show benefited Alterman's retail and wholesale sales. Both Associated Grocers Co-op, Inc. and May & Company of Georgia were wholesale competitors discriminated against by suppliers' participation in the food show. The Promotional considerations accorded by the suppliers discriminated against Alterman's retail competitors both directly and indirectly.

Having found the elements necessary to adjudicate section 5 violations at both wholesale and retail levels, the Commission issued an order which prohibits Alterman from inducing and receiving from a supplier promotional services or facilities, or anything of value in exchange for promotional consideration provided by Alterman, when Alterman knows or should know that the promotional considerations it obtains are not made available by the supplier on proportionally equal terms to all other customers competing with Alterman in the distribution of the supplier's products. The term "customers" includes retail customers who do not purchase directly from the supplier. As to the operation of future food shows, the order requires Alterman to bear its proper share of the operating expenses and to repay any profit on a show to all participants pro rata. Alterman must deliver a copy of the Commission's order to everyone invited to participate in a food show.

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[4] The Administrative Law Judge's finding that Alterman had sufficient information and experience that it should have known that similar offers had not been made to the grocery trade establishes the requisite element of scienter. *See, e.g., Colonial Stores, Inc.* v. *FTC*, 450 F. 2d 733, 744–745 (5th Cir. 1971); *American News Co.* v. *FTC*, 300 F. 2d 104, 110 (2d Cir.), *cert. denied*, 371 U.S. 824, 83 S. Ct. 44, 9 L. Ed. 2d 64 (1962).

Retail Sales

Alterman argues that the Commission erred in finding a violation at the retail level of distribution on the ground that the food shows are solely wholesale promotions and the promotional allowances and services provided by the suppliers were not "in connection with" resale of the suppliers' products to retail customers. The Commission reasoned that the suppliers' booths, displays, and demonstrations aided Alterman's retail operation both indirectly and directly: indirectly, by giving special information to those involved in retail sales on how to display and market their products most effectively, thus giving them an advantage over their retail competitors; and directly, by the profit made by Alterman's wholesale division from the show, which could in turn reduce the profit margin it needed from the sale of products through its retail division in order to achieve an appropriate overall corporate profit.

Alterman cites the Administrative Law Judge's finding that the food shows were wholesale promotions and that the promotional services did not facilitate retail sales. In support of this position, Alterman notes that the consuming public was not invited to attend the food shows and that there was no general advertising of shows. In addition, it points out that, although personnel from Alterman's retail outlets were invited to the shows, they were not permitted to purchase from suppliers there and were not eligible for free orders and prizes offered by suppliers. Alterman also contends that the Commission did not prove that the profits on food shows were used by the retail division and thus did not prove discriminatory allowances in connection with resale at retail.

[4, 5] We should note that the Commission, rather than the Administrative **[999]** Law Judge, bears the ultimate responsibility of decision and may, therefore, reach results contrary to those of its hearing officer. Findings substituted by the Commission, if supported by substantial evidence, control. *Mississippi River Corp.* v. *FTC*, 454 F. 2d 1083, 1089 (8th Cir. 1972); *Art National Manufacturers Distributing Co.* v. *FTC*, 298 F. 2d 476, 477 (2d Cir.), *cert. denied*, 370 U.S. 939, 82

S. Ct. 1588, 8 L. Ed. 2d 808 (1962); *cf. NLRB* v. *Seafarers International Union*, 496 F. 2d 1363, 1364 (5th Cir. 1974).

[6] The record contains substantial evidence supporting the Commission's determination that the food shows were in connection with Alterman's retail resales of the participating suppliers' products. Suppliers were invited by Alterman's buyers who purchased for the Company's retail division as well as for its wholesale business. The Alterman vice-president in charge of retail operations testified that the Company's retail stores and their managers definitely benefit from the food shows. Company literature encouraging retailers to attend the shows stresses the benefits to them of participation. The store managers have general discretion in stocking their stores. By going to a food show, a manager can acquire information on new products. He can also observe methods of promoting sales and building up his store. According to another Alterman vice-president, the food shows "cement the relationship between a food supplier and the retailer." Thus, the suppliers' promotional services at food shows benefited Alterman at the retail level.

[7] The profits on booth rentals were, in effect, price reductions on suppliers' products. *See Grand Union Co.* v. *FTC*, 300 F. 2d 92, 99 (2d Cir. 1962). Although, as Alterman argues, there is no formal proof that its profits on the food shows were put to use at the retail level, the Commission could properly infer that this additional source of profit enabled the Company to maintain a given overall profit level while charging less in its other operations, an advantage denied to Alterman's competitors. This inference lies within the competence of the Commission and constitutes substantial evidence in the absence of contrary evidence produced by Alterman. *See Colonial Stores, Inc.* v. *FTC*, 450 F. 2d 733, 739 n. 13, 741 nn. 17 & 18 (5th Cir. 1971).

Wholesale Competition

[8] Alterman attacks the Commission's finding that Associated Grocers is "as a practical matter" based on "the market realities" in competition with Alterman at the wholesale level. In the broad range of possible functional organizations, a retailer-owned buying cooperative, such as Associated Grocers, may serve as the common agent of individual retailer-members, as their wholesaler, or as something in between. Classification as to function is the province of the trier of fact. *Fred Meyer, Inc.* v. *FTC*, 359 F. 2d 351, 361 (9th Cir. 1966), rev'd in part on other grounds, 390 U.S. 341, 88 S. Ct. 904, 19 L. Ed. 2d 1222 (1968).

[9] We find the Commission determination that Associated Grocers' 8headquarters was Alterman's functional competitor supported by sub-

stantial evidence. Associated Grocers' headquarters performs functions similar to Alterman's operation of its voluntary cooperative for A.B.C. Stores. Each maintains substantial inventories of suppliers' products, purchased directly in its own name, in a large warehouse. Each sells products at wholesale prices and delivers them to affiliated independent retail stores. There is some degree of competition between the two organizations for the business of existing and new independent retail outlets. Finally, there was testimony that, during the years covered by the complaint, Alterman and Associated Grocers were the only two major sources in the Atlanta trade area offering retailers a full line of grocery supplies. This is sufficient evidence to support the Commission's finding that Alterman's wholesale division and Asso[**1000**]ciated Grocers' headquarters are in basic competition for wholesale business. *See Tri-Valley Packing Association* v. *FTC*, 329 F. 2d 694, 706–709 (9th Cir. 1964); *Alhambra Motor Parts* v. *FTC*, 309 F. 2d 213 (9th Cir. 1962); *cf. Central Retailer-Owned Grocers, Inc.* v. *FTC*, 319 F. 2d 410 (7th Cir. 1963).

Alterman asserts a crucial distinction in that Associated Grocers is owned by the retailers which it serves. Any profits from the headquarters operation are returned to the members. In contrast, any profit from Alterman's wholesale division belongs to the Company, not to the A.B.C. Stores. The dispositive criterion, however, is the functional level at which the activities take place. Nothing in *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 88 S. Ct. 904, 19 L. Ed. 2d 1222 (1968), indicates that ownership of a functional wholesaler by its customers would prevent the Commission from reaching otherwise illegal conduct.

[10] Even assuming arguendo that Associated Grocers was not a wholesale competitor of Alterman, we reject Alterman's *de minimis* contention. The Company points out that May & Co. was shown to have competed with Alterman in the distribution of the products of only one small supplier of the 300 participating in the food shows, and that that supplier rented only half a booth in two shows for which it paid a total of $375. Alterman argues that any resultant disfavoring of May & Co. had relatively little effect on competition.

[11, 12] Proof of injury to competition, however, is not required to show prima facie violations of sections 2 (d) and (e). *See FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 79 S. Ct. 1005, 3 L. Ed. 2d 1079 (1959); *R. H. Macy & Co.* v. *FTC*, 326 F. 2d 445 (2d Cir. 1964); *Giant Food, Inc.* v. *FTC*, 113 U.S. App. D.C. 227, 307 F. 2d 184 (1962), *cert. denied*, 372 U.S. 910, 83 S. Ct. 723, 9 L. Ed. 2d 718 (1963). Solicitation of discriminatory promotional consideration is *per se* illegal. *R. H. Macy & Co.* v. *FTC*, *supra; American News Co.* v. *FTC*, 300 F. 2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824, 83 S. Ct. 44, 9 L. Ed. 2d 64 (1962). In any event, the supplier in question, which had a limited

product line and a low profit margin, did not usually participate in food shows. Commission counsel tried the case by using seven suppliers as examples to illustrate Alterman's violations. The Commission was not required to prove all possible violations by Alterman with the 300-odd participating suppliers to justify a cease and desist order. In this context it cannot be said that Alterman's use of its buying power to obtain discriminatory promotional allowances and services was "negligible or inconsequential in the sense of being de minimis." *Shreveport Macaroni Manufacturing Co.* v. *FTC*, 321 F. 2d 404, 409 (5th Cir. 1963), *cert. denied*, 375 U.S. 971, 84 S. Ct. 491, 11 L. Ed. 2d 418 (1964). This is particularly so because the Commission has the authority to nip potentially destructive practices in the bud. *See FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 68, 79 S. Ct. 1005, 3 L. Ed. 2d 1079 (1959). It was enough in this case that the Commission demonstrated that Alterman knowingly solicited and obtained promotional considerations not available to a competitor.

Proportional Equality

The Commission found that the food show participation and booth rental by suppliers was discriminatory. This finding rested on a determination that these promotional considerations were not available to competitors.

Alterman contends that the food show promotional considerations complied with the tests for proportional equality. It points out that the cost of booth rental was a very small percentage of the amount of suppliers' sales to Alterman and that the suppliers received fair value in terms of promotional exposure for the amounts they paid.[5]

[**1001**] [13–15] Alterman's arguments miss the point. To avoid being discriminatory, promotional payments and services must be made "available" or "accorded" to competing customers of the suppliers. To meet this requirement, a supplier must not merely be willing, if asked, to make an equivalent deal with other customers, but must take affirmative action to inform them of the availability of the promotion programs. *Fred Meyer, Inc.* v. *FTC*, 359 F. 2d 351, 360 n. 10 (9th Cir. 1966), *rev'd* in part on other grounds, 390 U.S. 341, 88 S. Ct. 904, 19 L. Ed. 2d 1222 (1968); Commission Guide 8, 16 C.F.R. § 240.8 (1974); *see Vanity Fair Paper Mills, Inc.* v. *FTC*, 311 F. 2d 480 (2d Cir. 1962); *Exquisite Form Brassiere, Inc.* v. *FTC*, 112 U.S. App. D.C. 175, 301 F. 2d 499 (1961), *cert. denied*, 369 U.S. 888, 82 S. Ct. 1162, 8 L. Ed. 2d 289 (1962). Thus, while promotional benefits received may

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[5] Among the seven illustrative suppliers, the highest percentage was just over 3%. There was testimony that it would have cost one supplier $1500 to reach independently the A.B.C. retailers present at the food shows.

be considered in determining proportional equality, the basic question is one of proportionality of offers. *Colonial Stores, Inc.* v. *FTC*, 450 F. 2d 733, 744 (5th Cir. 1971). Once the Commission had shown that only Alterman had received special payments and services, the burden of proving the availability of similar payments to its competitors was on Alterman. *R. H. Macy & Co.* v. *FTC*, 326 F. 2d 445, 450 (2d Cir. 1964); *see State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Co.*, 258 F. 2d 831, 838 (7th Cir. 1958), *cert. denied*, 358 U.S. 947, 79 S. Ct. 353, 3 L. Ed. 2d 352 (1959). The record makes plain, however, that suppliers were either unwilling or unable to extend similar promotional considerations to all other customers.[6]

Scope of the Order

Based on its finding of 2(d) and 2(e) violations in connection with Alterman's food shows, the Commission not only placed restrictive conditions on future food shows but also broadly prohibited Alterman from inducing and receiving promotional considerations which it knows or should know are not offered to others in violation of sections 2(d) and 2(e). Alterman argues that the Commission's order is overly broad and that we should modify it to enjoin only section 5 violations arising from food show activities.

[16, 17] The Commission has broad discretion in the formulation of its decrees. Here the Commission has limited its order to those types of section 5 violations in which it found Alterman to have engaged, *i.e.*, inducing from its suppliers payments and services violative of sections 2(d) and 2(e). The terms of the order closely parallel the provisions of 2(d) and 2(e) but do not extend beyond them. Such orders have often been upheld against contentions of overbreadth. *See, e.g.*, *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 72 S. Ct. 800, 96 L. Ed. 1081 (1952); *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 58 S. Ct. 678, 82 L. Ed. 936 (1938); *P. Lorillard Co.* v. *FTC*, 267 F. 2d 439 (3d Cir. 1959). The Commission has proscribed future conduct of the same general type as the illegal business practices it found. Thus, the proscriptions are reasonably related to the violations uncovered at the hearing.

Alterman makes general allegations of uncertainty in the meaning of the order. In *FTC* v. *National Lead Co.*, 352 U.S. 419, 77 S. Ct. 502,

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[6] This does not mean that offers to participate in non-existent food shows would have sufficed. For another aspect of "availability" is that the promotional payments or services in question must be useful and suitable to competing customers or useable and appropriate alternatives must be offered. *State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Co.*, 258 F. 2d 831, 838–839 (7th Cir. 1958), *cert. denied*, 358 U.S. 947, 79 S. Ct. 353, 3 L. Ed. 2d 352 (1959); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988, 994–995 (8th Cir.), *cert denied*, 326 U.S. 773, 66 S. Ct. 231, 90 L. Ed. 467 (1945) Commission Guide 9, 16 CFR § 240.9.

1 L. Ed. 2d 438 (1957), the subjects of a comprehensive cease and desist order posed hypothetical situations which they claimed might subsequently cause them considerable difficulties. The Supreme Court rejected their [**1002**] arguments, noting that the companies could apply to the Commission for advice, if such situations developed, and present the questions "in evidentiary form rather than as fantasies." *Id.* at 431. *Accord FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394, 85 S. Ct. 1035, 13 L. Ed. 2d 904 (1965); *see* 16 C.F.R. § 3.61(d) (1974).

Conclusion

The Commission's determinations being supported by substantial evidence and in accordance with law, and the scope of the order being reasonably related to the nature of the violations found, we deny the petition for review and order the Commission's cease and desist order enforced in its entirety. See 15 U.S.C.A. § 45(c).

Petition for review denied and cease and desist order enforced.

EXXON CORPORATION v. F.T.C., ET AL.[*]

Civ. A. No. 1928–73. F.T.C. Docket No. 8934.

(United States District Court, District of Columbia, August 13, 1974)

1. **Rules of Federal Civil Procedure Contemplate Assistance of Counsel in Relation to Answering Interrogatories**

   [775] Assistance of counsel in relation to answering interrogatories is clearly contemplated by rule which states, inter alia that answers are to be signed by the person making them, and that objections should be signed by the attorney making them.

2. **Evidence Was Sufficient To Show That F.T.C. Search for Documents Was Thorough and Complete**

   Evidence was sufficient, in action by corporation against Federal Trade Commission seeking production of certain documents under the Freedom of Information Act, to show that the Commission search for such documents was complete and thorough.

3. **Upon Conclusion That Information Provided by F.T.C. Was Adequate, Plaintiff's Alleged Inadequacy of F.T.C. Answers Did Not Keep Case From Being Ripe for Summary Judgment**

   Conclusion was required, in action by corporation against the Federal Trade Commission under the Freedom of Information Act seeking production of certain documents, that information provided by the Commission demonstrated the adequacy of its search for all "identifiable records" and that any further discovery by corporation would be unreasonable, so that any documents not found in search described in affidavit of the Commission or listed in Commission's indices were not "identifiable records" under statute, with the result that alleged inadequacy of Commissioner's answers did not keep the case from being ripe for summary judgment.

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[*] Reported in 384 F. Supp. 755 (1974). Appeal filed September 10, 1974, in U.S. Court of Appeals, D.C. Cir. For case before the Commission, see —— F.T.C. ——.

4. DETERMINATION OF WHETHER A PARTICULAR "*IN CAMERA*" SUBMISSION REQUIRES AN INDEX AND THE DEGREE OF SPECIFICITY REQUIRED LIES WITHIN THE COURT'S DISCRETION IN A FREEDOM OF INFORMATION ACT CASE

It is within the discretion of the court in a Freedom of Information Act case to determine whether a particular *in camera* submission requires an index, and, if so, the degree of specificity required.

5. WITH DETERMINATION THAT INDEX SUBMITTED BY F.T.C. WAS ADEQUATE, CONCLUSION THAT CASE WAS RIPE FOR SUMMARY JUDGMENT WAS REQUIRED

[756] Index of documents submitted by the Federal Trade Commission, in action against it by corporation under the Freedom of Information Act, was adequate for needs of the corporation, which required conclusion that the case was ripe for summary judgment.

6. F.T.C. STAFF REPORT WAS EXEMPT FROM DISCOVERY, IN FREEDOM OF INFORMATION ACT ACTION, EVEN THOUGH IT WAS RELEASED TO CONGRESS, BECAUSE IT FELL WITHIN INVESTIGATORY FILES SECTION OF THE ACT

In Freedom of Information Act action by oil company, under staff report of Federal Trade Commission was exempt from discovery, under section of statute providing exemption for "investigatory files compiled for law enforcement purposes," where record reflected that an antitrust complaint was currently pending before Commission against eight leading petroleum firms, including plaintiff, charging defendants with violating the Federal Trade Commission Act, and such exemption was not waived by Commission's release of the report to Congress, where the Act itself states that the statute does not authorize withholding of information from Congress.

7. UNDER THE FREEDOM OF INFORMATION ACT, WHEN EXEMPTION RELATING TO INVESTIGATORY FILES COMPILED FOR LAW ENFORCEMENT PURPOSES APPLIES, SUCH EXEMPTION APPLIES TO THE ENTIRE FILE

When exemption relating to investigatory files compiled for law enforcement purposes applies, under the Freedom of Information Act, such exemption applies to the entire file.

8. TO ALLOW LAW ENFORCEMENT AGENCIES TO FULFILL THEIR RESPONSIBILITIES WITHOUT DIVULGING THEIR MODUS OPERANDI OR IDENTITIES OF INFORMANTS IS AN IMPORTANT PURPOSE BEHIND THE INVESTIGATORY FILES EXEMPTION

An important purpose behind the investigatory files for law enforcement purposes exemption of the Freedom of Information Act is to allow law enforcement agencies to fulfill their responsibilities without divulging their modus operandi or the identities of their informants.

9. CONGRESSIONAL CORRESPONDENCE WITH F.T.C. FELL WITHIN SECTION OF FREEDOM OF INFORMATION ACT EXEMPTING FROM DISCOVERY, MATTERS INVOLVING INVESTIGATORY FILES COMPILED FOR LAW ENFORCEMENT PURPOSES

Congressional correspondence with Federal Trade Commission, which in the main involved letters complaining of various practices by oil companies, including plaintiff, which sought production of certain documents in possession of the Federal Trade Commission, were exempt under section of the Freedom of Information Act providing that the statute does not apply to matters that involve investigatory files compiled for law enforcement purposes.

10. COMMUNICATIONS BETWEEN F.T.C. AND DEPARTMENT OF JUSTICE WHICH REFERRED COMPLAINTS BETWEEN AGENCIES FOR POSSIBLE LAW ENFORCEMENT INVESTIGATIONS WERE EXEMPT UNDER FREEDOM OF INFORMATION ACT

Communications between the Department of Justice and the Federal Trade Commission referring complaints between the agencies for possible use in law enforcement investigations were exempt from discovery under the Freedom of Information Act by reason of section of the Act providing that the Act does not apply to matters that involve investigatory files compiled for law enforcement purposes.

11. INTERAGENCY MEMORANDUMS WERE EXEMPT FROM DISCOVERY WHERE NONE OF THE DOCUMENTS CONTAINED NONSEVERABLE MATERIAL WHICH COULD BE DISCLOSED WITHOUT JEOPARDIZING DISCLOSURE OF OPINIONS EXPRESSED IN SUCH DOCUMENTS

Interagency memorandums were exempt from discovery, in action by oil company against Federal Trade Commission seeking production of certain documents under the Freedom of Information Act, where none of the documents contained material that could be served from the remaining portions of the documents without jeopardizing disclosure of opinions expressed in such documents, so that such documents were exempt under section of the Act relating to interagency or intraagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

(Syllabus, with substituted captions, taken from 384 F. Supp. 755)

In action seeking production of certain documents under the Freedom of Information Act, court held that where record reflected an antitrust complaint involving, among others, plaintiff, a staff report dealing with the oil industry was exempt from discovery under the section of the Freedom of Information Act exempting "investigatory files compiled for law enforcement purposes" and exemption was not waived by F.T.C.'s release of the report to Congress because the statute does not authorize Commission to withhold information from Congress. Motions for plaintiff denied, motion for defendant granted.

William Simon, *John S. Kingdon*, *Gary G. Stevens*, *Howrey*, *Simon*, *Baker & Murchison*, Washington, D.C., for plaintiff.

Earl J. Silbert, U.S. Atty., *Arnold T. Aikens*, *Michael J. Ryan*, Asst. U.S. Attys., *Calvin J. Collier*, Gen. Counsel, F.T.C., *Gerald Harwood*, Asst. Gen. Counsel, F.T.C., *Robert E. Duncan*, *Mary L. Azcuenaga*, Attys., F.T.C., for defendants.

Before BRYANT, *District Judge*.

MEMORANDUM AND ORDER

BRYANT, *District Judge*.

[757] This action is brought under the Freedom of Information Act, 5 U.S.C. § 552. Plaintiff Exxon Corporation (hereinafter

"Exxon") seeks the production of certain documents in the possession of defendant Federal Trade Commission (hereinafter "Commission"). Jurisdiction is conferred by 5 U.S.C. § 552(a) (3). This court has heard argument on and taken under advisement defendants' motion to dismiss or in the alternative for summary judgment and motions of the plaintiffs relating to discovery from defendant Tobin, Secretary of the Commission.

This is one of the first attempts by a government agency to follow the guidelines set forth in *Vaughn and Cuneo.*[1] The court has given it close scrutiny in the light of these guidelines and, for reasons set forth below, concludes that the Commission's efforts pass muster.

On July 9, 1973, counsel for Exxon requested a copy of the Commission's staff report on the petroleum industry hereinafter ("Report"). Subsequently Exxon's counsel requested

> the opportunity to inspect and copy all communications (including letters, reports or memoranda, and notes, transcripts or other memorialization of oral communications) between January 1, 1970 and August 8, 1973, occurring between the Federal Trade Commission (including any member or employee) and any member of Congress (or employee of the Congress or any member) on the subject of petroleum in liquid or gaseous form,

and similar communications between the Commission and "any other government agency regarding shortages, allocations, imbalances, availabilities and noncompetitive activities involving petroleum." In essence, Exxon identified a single document and made a blanket request for all other petroleum-related Congressional correspondence and inter-agency documents.

The Commission, through Mr. Tobin granted Exxon access to Congressional communications, deleting only references that might identify informants, but denied access to the Report and to communications with other agencies, citing exemptions 5 U.S.C. § 552(b) (3) (exempted by statute), 5 U.S.C. § 552(b) (5) (interagency memoranda), and 5 U.S.C. § 552(b) (7) (investigatory files). On October 16, 1973, Exxon filed suit to compel disclosure under the Freedom of Information Act.

Shortly after filing suit, Exxon moved for a pretrial order and then for partial summary judgment in an effort to obtain from the Commission a *Vaughn* index, itemizing and cross-referencing the exemptions claimed by the Commission. On December 17, 1973, defendant filed a motion to dismiss or in the alternative for summary judgment. As part of its motion it filed an index of documents withheld, listed under each claimed exemption. In addition, the Commission filed an affidavit of Mr. Tobin attesting to the completeness of the search for documents.

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[1] *Vaughn* v. *Rosen*, 157 U.S. App. D.C. 340, 484 F. 2d 820 (1973) and *Cuneo* v. *Schlesinger*, 157 U.S. App. D.C. 368, 484 F. 2d 1086 (1973).

On December 21, 1973, Exxon noticed a deposition of Mr. Tobin. On motion of the Commission, the court quashed the deposition, ordering interrogatories to be used in place of the deposition. Exxon then filed a set of over 200 interrogatories directed to Mr. Tobin, which were answered in part and objected to in part. The court now has before it motions to reinstate the Tobin deposition and to impose sanctions for incomplete answers to interrogatories. The court also has before it defendants' motion to dismiss or, in the alternative, for summary judgment, as well as plaintiff's opposition expressed largely as challenges to the adequacy of the index under the *Vaughn* guidelines and to the appropriateness of summary judgment in view of the limitations on its discovery. At the [**758**] hearing on these motions extensive arguments were advanced. On February 26, 1974, supplemented on March 7, 1974, the Commission submitted the withheld documents to the court for *in camera* inspection. Since the court is relying in part on this *in camera* inspection, defendants' motion will be treated as one for summary judgment.

RIPENESS FOR SUMMARY JUDGMENT

Exxon argues that this case is not ripe for summary judgment for two reasons. First, there are disputed issues of material fact that require further discovery. In this regard, Exxon has filed the abovementioned discovery motions. Second, Exxon argues that the indices prepared by the Commission are inadequate under the *Vaughn* standard for a motion for summary judgment.

Exxon's first reason relates to its attempts at further discovery. Exxon seeks this discovery in order to rebut two affidavits of Mr. Tobin. In his first affidavit, filed as part of the Commission's motion to dismiss or in the alternative for summary judgment, Tobin states that he is Secretary of the Commission and legal custodian of the records. He continues by attesting that:

> 3. Subsequent to the filing of the complaint in this case, I caused a search to be made of the Commission's files in order to locate all the communications described in Paragraph 1 on page 7 of the complaint.
>
> 4. In a determined effort to locate all the requested documents as expeditiously as possible, members of my staff actively sought to assist the office of each Commission unit to conduct a thorough search through a series of telephone calls, visits and meetings with the various staff members engaged in conducting the search.
>
> 5. To the best of my knowledge and belief, the documents described in the index attached hereto and made a part hereof are all of the documents that have been located to date as a result of this search.

Tobin's second affidavit, filed with the Commission's supplementary indices, reaffirms the substance of the first affidavit, and adds that

". . . I am satisfied that all units in the Commission likely to have any of the documents requested have been directed to submit the relevant documents and I am satisfied that they have done so."

Exxon noticed Mr. Tobin's deposition. After this court directed that discovery from Mr. Tobin be made by interrogatory, Exxon sent Mr. Tobin over 200 interrogatories filling 46 pages. Tobin, assisted by counsel for the Commission, answered in part and objected in part.

Exxon argues that Mr. Tobin's affidavits and answers are, for purposes of a motion for summary judgment, deficient in three respects. First, they were prepared with the assistance of counsel. Second, they are incomplete, leaving open certain genuine issues of material fact. Third, they fail to comply with the requirements of Rule 56(e) of the Federal Rules of Civil Procedure that such affidavits and answers be made "on personal knowledge."

[1] Exxon first claims that the interrogatories answered by Tobin cannot dispose of any material issues of fact because they were prepared with the assistance of counsel. Exxon objects that "Mr. Tobin did not personally and independently answer Plaintiff's interrogatories but was assisted by two attorneys from the Federal Trade Commission. . . . In view of the assistance obtained by Mr. Tobin in answering Plaintiff's interrogatories, the primary thrust of Plaintiff's discovery was defeated." [2] After serving 46 pages of interrogatories on a high administrative official, Exxon's attempt to bar counsel in civil discovery must be deemed frivolous.[3]

[759] Exxon's more serious arguments relate to the completeness of Mr. Tobin's responses and the necessity for personal knowledge. As a result of Mr. Tobin's failure fully to answer interrogatories, Exxon argues, the following genuine issues of material fact remain: [4]

> 1. What efforts were actually made to conduct the search attested to in the Affidavit of Charles A. Tobin?
>
> 2. What offices, files, personnel or other possible sources of information were not consulted in the course of the search attested to in Charles A. Tobin's Affidavit?
>
> 3. What decisions to withhold documents were made prior to any examination of such documents or even any search for such documents?
>
> 4. What portions of documents listed in paragraphs 1 and 3 of defendants' purported Index, for which blanket exemptions have been claimed, must be

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[2] Plaintiff's motion to impose sanctions pursuant to Rule 37, p. 3.

[3] Assistance of counsel is clearly contemplated by the Federal Rules of Civil Procedure. Rule 33(a) states ". . . The answers are to be signed by the person making them, and the objections signed by the attorney making them . . . ."

[4] Statement of Genuine Factual Issues filed Pursuant to Local Rule 1–9(g).

Exxon's interrogatories extend in detail to other issues. For example, Exxon seeks a detailed description of the channels of communication in the Commission, an analysis of procedures used by the Commission to memorialize oral messages, an investigation of an alleged "leak" to the *Washington Post,* et cetera. None of these other questions is within the scope of the Tobin affidavit, and none is material to this action.

examined by this Court in order to determine whether they contain "purely factual investigative matter" not exempt under the Freedom of Information Act?

5. What documents sought by plaintiff have been withheld by the defendants but not listed in their purported Index?

Question three, asking which decisions were made prior to examining the documents, is legally immaterial. What matters is whether the Commission's decisions not to disclose were justifiable, not when they were made. Question four, unresolved when the statement of issues was filed, has been rendered moot by submission to this court of all documents listed in the index and withheld from Exxon, and by this court's *in camera* inspection of those documents. (See below.)

The remaining three issues of material fact boil down to one—was the search by the Commission adequate and complete in light of Exxon's request? This issue deserves attention.

In his affidavits and interrogatories there is testimony from Mr. Tobin that he supervised a broad and extensive national search of Commission documents. While Mr. Tobin's own efforts were limited, other employees, both in Washington and in the field, spent extensive amounts of time continuing over many months. In his answer to interrogatory 42(t), Mr. Tobin states,

> By a thorough search, I mean that to the best of my knowledge, all units of the Commission likely to have any relevant documents were contacted and requested to conduct a search, and each unit was requested to respond by returning all the documents to the Division of Legal and Public Records. To the best of my knowledge, all such units either submitted documents to my staff or informed the staff that they had no such documents.

In the other interrogatories Mr. Tobin describes in general terms his role in supervising the search, but does not give details involving the identities of other participants.[5]

[2] Clearly then, there is uncontradicted evidence attesting to the com[**760**]pleteness and thoroughness of the Commission's search. The remaining question, therefore, is whether Mr. Tobin's statements exhibit the degree of "personal knowledge" necessary under Rule 56(e). In essence, we must decide what kind of evidence is needed (and admissible) to decide whether a search of the scale sought by Exxon has been adequately carried out.

Exxon's frustration in the face of its lack of knowledge is understandable, and is the result of the inherent weakness of the adversary process in Information Act cases first noted in *Vaughn*. The logic of Exxon's argument, however, carries too far. Exxon would require affidavits or testimony to be based on personal knowledge, and would demand that those affidavits cover each aspect and detail of the search. In the typical search for a few documents whose location is clearly defined such requirements cause no problem. But Exxon, by requesting all petroleum-related Congressional and inter-agency communications, has instigated a broad, national search with no inherent limit. To satisfy Exxon's requirement for personal knowledge of each detail of the search—and it is clear from its papers that Exxon demands nothing less—would require sworn testimony from at least one individual working in every office of the Commission, throughout the country. And it must be emphasized that this problem is not unique to the summary judgment stage—it would also hold true at a full-blown trial.[6]

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[5] In its interrogatories, Exxon asks for details of the search ranging from the general to the minute. For example, Exxon asks for the names of everyone participating in the search, and requests a complete accounting of each phone call made from Mr. Tobin's office, listing caller, person called, date, and instructions given. (Interrogatory No. 41.)

The Court faces an all-or-nothing choice. Either it must allow an affidavit from the supervisor of the search to be conclusive as to its adequacy, or it must let Exxon pursue its discovery down to the level of each individual participating in the search.[7] There is no place in between for judicial line-drawing.

[3] Faced with a choice between a decision based on incomplete knowledge and discovery that is unreasonably broad and burdensome, we must return to the language of the Act. The Act specifies that requests must be made only for "identifiable records." [8] The Commission has never objected that the documents sought by Exxon were not "identifiable." This attitude on the part of the Commission is commendable, but it should not waive their right to raise such an objection at a later time. Specificity in the request is needed not only to allow the agency to find the document, but also to enable the agency to demonstrate and the court to assess the adequacy of the search. It would be unreasonable to allow Exxon the extended discovery it wants when it has caused the Commission to search every nook and cranny; its discovery is aimed not at ascertaining whether identified records have been produced, but whether there exist additional records that might be specifically identified by Exxon. It would be unreasonable to read the intent of Congress expressed in the Freedom of Information to require such discovery. Hence, on the basis of the complete record of this case, this court believes that the information provided by the Commission demonstrates the adequacy of its search for all "identifiable records," and

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[6] We would not allow trial preparation discovery to extend as far as Exxon's request. Hence there would be no new facts in the record, and we would not be in any better position to rule on the question of the adequacy of the search at trial than we are at summary judgment.

[7] These comments do not apply to Exxon's interrogatories that relate to the decisions for and reasons behind the claimed exemptions. While those questions may have been proper when the interrogatories were served, *in camera* analysis by the court, described below, renders these questions immaterial.

[8] 5 U.S.C. § 552(a)(3).

that any further discovery by Exxon would be unreasonable. Consequently we hold that any documents not found in the search described by Mr. Tobin or listed in the Commission's indices are not "identifiable records" un[**761**]der the Act.[9] Thus we reject Exxon's argument that the inadequacy of Mr. Tobin's answers keep this case from being ripe for summary judgment.

Exxon's second contention is that this action is not ripe for summary judgment because the index of documents provided by the Commission does not analyze each document in detail specifying the subject matter area and precise form of the document and itemizing paragraph by paragraph which sections of each document fit under which exemption. In essence, Exxon seeks to stretch *Vaughn* far outside its original boundaries.

[4] *Vaughn* did not lay down a *per se* rule to be applied to every Freedom of Information Act case. It rather suggested a technique to assist the court when needed. When there is "a *factual* dispute regarding whether the documents actually fit" the description by the government, and when the government claims multiple exemptions which may apply "to all or only a part of the information," in documents consisting of "hundreds or even thousands of pages," then the government must provide more than mere conclusory allegations with its *in camera* submission. *Vaughn* v. *Rosen*, 157 U.S. App. D.C. 340, 484 F. 2d 820, 824–825. In other words, the index is designed primarily to enable the court to review effectively the agency's decision not to disclose. The extent to which it facilitates adversarial analysis by the party seeking disclosure is a mere by-product. Hence it is within the court's discretion to determine whether a particular *in camera* submission requires an index, and, if so, the degree of specificity required.

[5] In this action, the court, after careful *in camera* inspection, finds the index submitted to be adequate for its needs. With respect to the single document identified by Exxon—the Report—the Commission claims that it fits in its entirety under the exemption for investigatory files, 5 U.S.C. § 552(b)(7). Since this exemption can include factual as well as non-factual material, the court agrees. Hence there is no further need for specificity in the index. The remaining items, identified only generally by Exxon but listed by the Commission, are grouped by description under each appropriate exemption. Most of these items are a few pages long, and many consist merely of a few

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[9] Decisions as to personnel and procedures to be used in the search are within the discretion of the administrator. In the circumstances of this case the court will not take the "disfavored" step of requiring the Secretary of the Commission "to testify as to the basis of his decision[s]." *D.C. Federation of Civic Associations* v. *Volpe*, 148 U.S. App. D.C. 207, 459 F. 2d 1231, at 1237 (1972); *United States* v. *Morgan*, 313 U.S. 409, 61 S. Ct. 999, 85 L. Ed. 1429 (1941); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971).

lines of deleted identification material. The court finds the index to be sufficient to enable it to consider whether the documents are properly exempt from disclosure. Hence the court considers this case ripe for summary judgment.

SUMMARY JUDGMENT

Having decided that this action is ripe for summary judgment, we proceed to examine whether the Commission can properly withhold the documents sought by Exxon.

A. STAFF REPORT

The Commission claims that the Report is exempt from discovery by virtue of exceptions b(5) and b(7). We need only consider the exemption for "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. § 552(b)(7). It is undisputed that the Commission lawfully engages in investigations for law enforcement purposes. The record reflects that currently pending before the Commission is an antitrust complaint against eight leading petroleum firms, including Exxon, charging defendants with violating Section 5 of the Federal [**762**] Trade Commission Act, 15 U.S.C. § 45. In the Matter of Exxon Corporation, et al., FTC Docket No. 8934. Recent Court of Appeals opinions indicate that a file compiled for law enforcement purposes is exempt in its entirety and is not subject to the fact-opinion dichotomy applicable to other exemptions. This is so because the exemption is designed to protect the government from having to expose its case prematurely or compromise its investigative techniques and informants. And the exemption applies even when no action is brought,[10] and after a case has been terminated.[11] Nor need there is a showing of threatened harm from disclosure.[12] The trial court's duty is to examine the total record to determine "whether the files sought . . . relate to anything that can fairly be characterized as an enforcement proceeding." [13] While mere conclusory affidavits are insufficient, once the court finds that the material was compiled for law enforcement purposes, its inquiry ends.[14]

[6] In the instant situation, there is an ongoing investigation with an existing complaint. The Report, examined *in camera*, was clearly

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[10] *Ditlow* v. *Brinegar,* 494 F. 2d 1073 (DC. Cir. 1974).

[11] *Weisberg* v. *U.S. Department of Justice,* 489 F. 2d 1195 (D.C. Cir. 1973), (*en banc*); *Aspin* v. *Department of Defense,* 491 F. 2d 24, 30 (D.C. Cir. 1973).

[12] *Ditlow,* supra, 494 F. 2d 1073 at 1074.

[13] *Bristol Myers Co.* v. *FTC,* 138 U.S. App. D.C. 22, 424 F. 2d 935, 939, (1970); *Aspin,* supra 491, F. 2d 24 at 27.

[14] *Weisberg,* supra, 489 F. 2d 1195 at 1202–1203; *Center for National Policy Review on Race and Urban Issues et al.* v. *Weinberger,* 502 F. 2d 370 (D.C. Cir. 1974).

compiled as part of the Commission's investigatory file. Exxon does not dispute this. Instead, Exxon argued that the Commission has waived the exemption by releasing the Report to Congress (and thereby to the public), and that those parts of the report containing factual data do not fall under exemption b(7).

Exxon's waiver argument fails. The Freedom of Information Act itself states that "[t]his section is not authority to withhold information from Congress," 5 U.S.C. § 552(c), and the Federal Trade Commission Act imposes informational duties on the Commission. 15 U.S.C. § 46(f). Clearly Congress intended that it should receive information not available to the public.[15] In any event, Exxon has cited no authority for their proposition that release of selected portions or release to selected persons waives the right to claim an exemption from release of other portions or to other persons.[16]

[7] Exxon's claim that factual information contained in the Report must be disclosed (and consequently must be identified by the Commission in a *Vaughn* index) must also be rejected. The fact-opinion dichotomy drawn by the Court of Appeals in *Vaughn* and other cases relates to the application of exemption b(5). When exemption b(7) applies, it exempts the *entire file*. Plaintiffs cite no case, and we have found none, where the fact-opinion dichotomy has been applied to material exempted by the b(7) exemption for investigatory files. Indeed, knowledge that particular factual material is contained in an investigatory file may reveal important tactical choices made by the investigating agency and thereby harm an investigation far more than would knowledge of the actual facts taken outside the context of the investigation.

Consequently we hold that the Report sought by Exxon fits within exemption [**763**] 5 U.S.C. § 552(b)(7) and is not required to be disclosed by the Commission. Thus we need not consider the Commission's claim that the Report falls under exemption b(5).

3. CONGRESSIONAL COMMUNICATIONS

The second type of information withheld by the Commission is found in its Congressional correspondence. This correspondence in the main involves letters complaining of various practices by oil companies (including Exxon) that were sent to members of Congress and then forwarded to the Commission. Many of the actual documents are form letters forwarding these complaints and form responses acknowledging them. Most of the letters of complaint are from franchisees and independent station operators, persons who would become subject to retaliation if their identities were known. The Commission has disclosed the Congressional-Commission correspondence only after first deleting names and identifying details. It claims that its deletions are sanctioned by an "informant's privilege," allowed under exemptions b(3) (exempted by statute), b(4) (confidential commercial information), and b(7) (investigatory files.) Again, we need only consider b(7).

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[15] See also *Aspin*, supra, 491 F. 2d 24, 26, where the court affirmed the agency's nondisclosure despite the circumstance that the report involved "was given to the Armed Services Committee of both houses of Congress."

[16] Cf. Davis, Administrative Law Treatise, 1970 Supp., § 3A.5. As for possible release to the public at large, Exxon's argument proves too much. If the Report has in fact been made public, then Exxon's claim is moot—it already has access to the Report. If parts of the Report have not been released, publication of other parts does not waive the exemption for the entire Report.

[8] The identifying details in question clearly fit under exemption b(7). An important purpose behind the exemption is to allow law enforcement agencies to fulfill their responsibilities without divulging their modus operandi or the identities of their informants. This purpose would be jeopardized if Exxon were given the names of those who had complained of its behavior. The invasion of privacy and fear of possible reprisal would keep such information from the government in the future. As the Second Circuit has said,

> If an agency's investigatory files were obtainable without limitation after the investigation was concluded, future law enforcement efforts by the agency could be seriously hindered. The agency's investigatory techniques and procedures would be revealed. The names of people who volunteered the information [during the course of] the investigation intially or who [had] contributed information during the course of the investigation would be disclosed. The possibility of such disclosure would tend severely to limit the agencies' possibilities for investigation and enforcement of the law since these agencies rely, to a large extent, on voluntary cooperation and on information from informants.[17]

[9] Whether or not an actual investigation was undertaken for any complaint in particular, these complaints were written and forwarded to instigate investigations of violations of the law, and many of them relate to the pending action cited above. Consequently we hold that the identifying details in the forwarded letters were properly deleted under exemption 5 U.S.C. § 552(b)(7).[18]

While we need not decide whether the material also falls under exemptions b(3) and b(4), the court notes that deletion of identifying detail is consistent with guidelines for exemption b(4) expressed in *Bristol-Myers Company* v. *F.T.C.*, 138 U.S. App. D.C. 22, 424 F. 2d 935 at 939 (1970) and *Grumman Aircraft Engineer Corp.* v. *Renegotiation Bd.*, 138 U.S. App. D.C. 147, 425 F. 2d 578 at 581 (1970), with the statuatory mandate to the Federal Trade Commission,[19] and with the Freedom of Information Act itself.[20]

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[17] *Frankel* v. *Securities and Exchange Commission*, 460 F. 2d 813 at 817–818 (2nd Cir. 1972), quoted in *Weisberg*, supra, 489 F. 2d 1195 at 1199, and in *Aspin*, supra, 491 F. 2d 24 at 30.

[18] *Cf. Evans* v. *Department of Transportation of the United States*, 446 F. 2d 821 (5th Cir. 1971).

C. INTER-AGENCY COMMUNICATIONS

[764] The Commission claims that its withheld inter-agency communications fit under exemptions b(3) (exempt by statute), b(4) (confidential commercial information), b(5) (inter-agency memoranda), and b(7) (investigatory files). The documents can be grouped into three sets.

[10] The first set, described in sections 3C and 3D of the index,[21] are communications between the Department of Justice and the Commission referring complaints between the agencies for possible use in law enforcement investigations. For reasons given above, these documents are exempt from disclosure under 5 U.S.C. § 552(b)(7).[22]

The second set of documents, listed in 3B and 3E of the index, includes communications relating to either the investigation discussed above (In the Matter of Exxon Corporation, et al.) or to other investigations of the Commission. After *in camera* inspection, the court finds no reason to doubt the Commission's representation that these documents come from investigatory files compiled for law enforcement purposes. Accordingly, these documents are exempt from disclosure under 5 U.S.C. § 552(b)(7).

[11] The remaining three documents, listed in 3A of the index, do not relate to an investigation undertaken for law enforcement purposes. They are claimed to be "inter-agency . . . memorandums . . . not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Under the interpretation of *EPA* v. *Mink*, 410 U.S. 73, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973), exemption b(5) applies to inter-governmental opinions, but does not allow non-disclosure of "purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents." 410 U.S. 73 at 91, 93 S. Ct. 827 at 838. After inspecting the three documents *in camera*, the court finds

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[19] 15 U.S.C. § 46(f) gives the Commission the power "To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest;" . . .

[20] 5 U.S.C. § 552(a)(2) provides:

"To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction."

[21] The index includes exhibit B of the motion of defendants to dismiss or, in the alternative, for summary judgment, filed December 17, 1973, and supplemental indices filed March 6, 1974.

[22] The Commission does not claim exemption b(7) for those communications in 3C, letters referring complaints to the Department of Justice. These letters also refer to complaints intended to lead to law enforcement investigations, however, and therefore also fit under b(7).

that none of the three contain factual material that can be severed from the remaining portions of the document without jeopardizing disclosure of the opinions expressed in those documents. Consequently these three documents are exempt from disclosure under 5 U.S.C. § 552(b)(5).

Accordingly we do not reach the application of exemptions b(3) or b(4) to any of the inter-agency communications.

For reasons expressed in this memorandum, it is, this 13th day of August, 1974,

Ordered that plaintiff's motion for a pretrial order and motion for partial summary judgment, be, and hereby are, denied as moot, and it is further

Ordered that defendants' motion for summary judgment be, and hereby is, granted, and it is further

Ordered that plaintiff's motion to reinstate the deposition of Charles A. Tobin and motion to impose sanctions for failure to answer interrogatories be, and hereby are, denied.

HARBOR BANANA DISTRIBUTORS, INC. v. FEDERAL TRADE COMMISSION*

UNITED BRANDS COMPANY AND CHIQUITA BRANDS, INC. v. FEDERAL TRADE COMMISSION*

HARBOR BANANA DISTRIBUTORS, INC. v. FEDERAL TRADE COMMISSION*

UNITED BRANDS COMPANY AND CHIQUITA BRANDS, INC. v. FEDERAL TRADE COMMISSION*

Nos. 73-1640, 73-1657, 73-2079 and 73-2080. F.T.C. Docket No. 8795.

(United States Court of Appeals, Fifth Circuit, August 22, 1974)

1. **Burden Is on the Discriminator To Establish Defense of Good-Faith Meeting of Competition**

   In a suit charging violation of the Robinson-Patman Price Discrimination Act, the burden is on the discriminator, in attempting to establish the defense of a good-faith meeting of competition, to show that it acted in a good-faith belief to meet the price or services of a competitor; the discriminator must show the existence of facts leading a reasonable and prudent person to believe that the granting of the lower price or service would in fact meet the low price or service of a competitor.

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*Reported in 499 F. 2d 395 (1974). For case before the Commission, see 82 F.T.C. 53, *modified* 85 F.T.C. 701, *modified* 88 F.T.C. 980. The title in the Commission's action was changed pursuant to Commission direction dated April 11, 1975.

2. **DETERMINATION OF WHETHER THE COMMISSION'S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE IS THE STANDARD TO BE USED BY THE COURT OF APPEALS IN REVIEWING F.T.C. ORDERS**

   In reviewing Federal Trade Commission order relative to the Robinson-Patman Act defense of a good-faith meeting of competition, the standard to be used by the Court of Appeals is to determine whether the Commission's findings are supported by substantial evidence, i.e., evidence which would justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

3. **PRICE DISCRIMINATION CHARGE HAD TO BE SET ASIDE WHERE DEFENDANT ESTABLISHED IT HAD ACTED IN GOOD-FAITH TO MEET SERVICES FURNISHED BY A COMPETITOR; AND CHARGE AGAINST JOBBER FOR INDUCING PRICE DISCRIMINATION ALSO SET ASIDE**

   Banana producer and importer, which was charged with price discrimination in favor of jobber in violation of the Robinson–Patman Act, established that it acted in good faith to meet the services furnished by a competitor; and **[396]** it followed that the charge against the jobber of inducing the price discrimination also had to be set aside.

4. **UNDER ROBINSON-PATMAN ACT PROVISION RELATING TO INDUCING PRICE DISCRIMINATION, A PROHIBITED DISCRIMINATION IS A CONDITION PRECEDENT TO A FINDING OF UNLAWFUL CONDUCT**

   A prohibited discrimination is a condition precedent to a finding of unlawful conduct under Robinson-Patman Act provision relating to inducing price discrimination.

5. **LAW AND FACT SUPPORTED F.T.C. FINDING THAT BANANA JOBBER'S ACQUISITION OF A COMPETITOR VIOLATED THE CLAYTON ACT**

   Federal Trade Commission order finding that banana jobber's acquisition of a competitor violated the Clayton Act was supported by law and fact.

(Syllabus, with substituted captions, taken from 499 F. 2d 395)

On petitions to review and set aside orders of F.T.C., court held that (1) banana producer and importer established that it had acted in good faith to meet the services furnished by competitior; thereby making it necessary to set aside the charge against the jobber of inducing the price discrimination, and (2) that law and fact supported F.T.C. finding that the jobber's acquisition violated the Clayton Act.

Two petitions granted; third petition denied.

Eberhard P. Deutsch, *Bernard Marcus*, *Charles K. Reasonover*, New Orleans, La., for Harbor Banana Distributors, Inc.

Harry L. Shniderman, *Michael J. Henke*, Washington, D.C., *Henry C. Thumann*, Los Angeles, Cal., for United Brands Co. and Chiquita Brands, Inc.

Charles A. Tobin, Secretary, *Gerald Harwood*, Asst. Gen. Counsel, *Karl H. Buschmann*, Atty., F.T.C., Washington, D.C., for the Federal Trade Commission.

Before BELL, SIMPSON and INGRAHAM, *Circuit Judges.*

BELL, *Circuit Judge:*

These appeals, consolidated for decision, involve a Federal Trade Commission complaint charging United [1] in one count with price discrimination in violation of § 2(a) [2] of the Robinson-Patman Act, 15 U.S.C.A. § 13(a), in favor of Harbor; charging Harbor in another count with violating § 2(f) [3] of the Act, 15 U.S.C.A. § 13(f), by inducing the discrimination. In an additional count Harbor was charged with violating § 7 [4] of the Clayton Act, 15 U.S.C.A., § 18, by purchasing the assets of a competitor.

The administrative law judge ruled against the Commission on the Robinson-Patman Act contentions and in favor of the Commission on the § 7 violation. On appeal by all parties, the Commission, with one member dissenting, affirmed the § 7 holding but disagreed with the initial decision as to the Robinson-Patman Act charges. Specifically, for the purposes of these appeals, the finding that United acted to meet com[**397**]petition under § 2(b) [5] of the Act, 15 U.S.C.A. § 13 (b), was rejected. Having rejected this defense, the administrative law judge was then found to have been in error in dismissing the § 2(f) charge against Harbor as well as the § 2(a) charge against United.

We disagree with the Commission as to the Robinson-Patman charges, being of the view that United was well within the § 2(b) defense in its questioned conduct. It follows from this and from the fact that there was no charge or proof that the cooperation of Standard at Long Beach with Harbor was discriminatory, that there could be no violation of § 2(f) by Harbor. As will be seen, the § 7 violation through the acquisition of a competitor is supported and there is no merit in the petition for review as to the order in that respect.

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[1] During the course of the proceeding before the Commission, United Fruit Company through merger became an unincorporated division of United Brands Company, and United Fruit Sales Corporation changed its name to Chiquita Brands, Inc.

Petitioner Harbor, the largest banana jobber in Southern California, was incorporated December 18, 1964, succeeding to a banana wholesaling business theretofore owned and operated by the Dominick Jebbia family. The evidence related to the activities and operations of both the Jebbias and Harbor.

[2] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade or quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

[3] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

[4] "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . ."

[5] "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

The alleged Robinson-Patman violation involves secondary lines of commerce, *i.e.*, banana jobbers in the Los Angeles area consisting of Harbor and its competitors. There is no primary line question in issue except by way of background in that the alleged discrimination arose out of competition between United and its major competitor, Standard.

Beginning in 1960, Standard Fruit and Steamship Company, the major competitor of United in producing and importing bananas, entered the Los Angeles market. Up until 1964, United had enjoyed one hundred per cent of Harbor's business. Indeed, Harbor was United's second largest customer in the United States.

Harbor and its competing jobbers[6] received delivery of bananas from United **[398]** at United's Wilmington, California terminal located about thirty miles south of downtown Los Angeles. Harbor had its processing plant at Long Beach about nine miles north of Wilmington, while its competitors had their processing plants in downtown Los Angeles.

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[6] Virtually all of the bananas consumed in the United States are produced in the tropical regions of the Western Hemisphere. Bananas are imported into the United States while still green. Immediately after importation, they are subjected to a specialized ripening process and thereafter marketed.

Specialized banana wholesalers (jobbers) engage in purchasing, ripening, selling, and distributing bananas in a given area. They are to be distinguished from general produce wholesalers and from direct-purchasing, self-processing and ripening retail grocery chains.

In the early 1960's, Central American banana farms were affected by a malady known as Panama disease, which attacked the "Gros Michael" banana strain. Shifts were made by major importers, Standard earlier than United, to the more varietal Cavendish banana, which was more resistant to Panama disease. Because the Cavendish banana was more easily bruised, the banana was taken from the stem in the tropics and shipped to market in 40-pound boxes as contrasted to the previous method of shipment where the bananas remained on the stem. Tropic-boxed bananas were viewed with some concern by jobbers, who felt chain stores, formerly largely dependent on jobbers, could now begin ripening their own bananas. Richway, one of the five chain-store organizations in Southern California that purchased directly from importers, began as early in 1934 ripening its own bananas. Two chains, Von's Grocery and Alpha Beta Acme, began ripening with the advent of the boxing program. In part, because of Standard's pioneering the tropic boxing system, Standard filled 92 per cent of the chain store purchases in Southern California.

Bananas are sold at advance order (pre-order), seaboard and "roller" prices. Some weeks before a ship is scheduled to arrive in port, the importer sets an advance order price for the fruit on that ship. Approximately two weeks prior to arrival, orders at the advance price are solicited from customers. A customer who places such an advance order price is able to guarantee his supply rather than risk the non-availability of excess fruit at lower prices. Cancellation cannot be made without penalty.

During the week before a given ship arrives in port, the importers announce the price at which fruit not advance ordered on that ship will be sold at dockside. This "seaboard price " is often the same as the advance order price. Depending on demand the seaboard price may be less, and in such a case, the advance order price is adjusted downward to the seaboard price. If demand is greater than anticipated, the seaboard price may exceed the advance order price.

The third category, "roller" price, refers to the price of unsold bananas which traditionally were loaded on rail cars and are now loaded on trucks, to be sold while en route to various destinations. The roller price is always lower than the advance order and seaboard prices. The longer the bananas remain unsold, the lower the roller price.

Harbor had conceived the idea of having bananas unloaded at Long Beach direct from United's ships to save the cost of transportation between Wilmington and Long Beach, Harbor's processing plant being at Long Beach. The idea was for Harbor to build a facility adjacent to the docks to permit direct delivery from the ships into Harbor's processing plant. United refused to provide this service over a period of two to three years but in 1963, Standard decided to build a new terminal at Long Beach and to relocate there from its previous location at Wilmington.

Then in early 1964, pursuant to negotiations, Harbor and Standard reached an agreement whereby Harbor arranged to construct a processing plant adjacent to Standard's proposed new terminal at Long Beach, and Standard provided a conveyor belt between the two facilities to permit the ready transfer of bananas from Standard to Harbor. Construction of the facilities began in 1964 and was completed in 1965. Even before completion, Harbor filled approximately 15 per cent of its total banana purchases in 1964 from Standard.[7] This was the first loss of Harbor's business by United.

United was quick to take notice of Standard's inroad with respect to its prime customer and then agreed to provide a partial service to Harbor at Long Beach. It is this service which is claimed as being discriminatory by the Commission. The service was continued for a period of some five years but was ultimately discontinued by United *inter alia* on account of complaints being received from its other customers.

Year	In percentage		
	United	Standard	Driscoll
1963	100	—	—
1964	85	15	—
1965	75. 2	24. 8	—
1966	77. 8	21. 7	0. 5
1967	80. 8	13. 1	6. 1
1968	75. 8	16. 1	8. 2
1969 (3 mo)	70. 6	21. 2	8. 2
1969 (5 mo)	55. 1	36. 9	8. 2

[7] **Harbor's purchases from the three importers (in Dollars).**

It is undisputed that the service provided was in an effort to meet that provided by Standard to Harbor. It is also undisputed that the service provided by United did not exceed the Standard service. In fact, it fell short of that service. Standard provided a conveyor belt from its dock directly into Harbor's plant. United continued its operation at Wilmington but simply agreed to stop one ship each week at Long Beach to unload advance or pre-ordered bananas. See fn. (6), *supra.* Harbor continued to purchase seaboard and roller priced bananas from United at Wilmington as well as some advance ordered bananas.

We assume *arguendo* that there was proscribed discrimination in fact from [**399**] the service to Harbor at Long Beach by United. This enables us to center on the § 2(b) defense of the good-faith meeting of competition.

[1] The § 2(b) defense is absolute if made out. The burden is on the discriminator to show that he acted in a good-faith belief to meet the price or service, as the case may be, of a competitor. The test in making this determination is that the discriminator must show the existence of facts which would lead a reasonable and prudent person to believe that the granting of the lower price or service would in fact meet the equally low price or service of a competitor. *Federal Trade Commission* v. *A. E. Staley Manufacturing Company*, 1945, 324 U.S. 746, 759–760, 65 S. Ct. 971, 977, 89 L. Ed. 1338; *Hanson* v. *Pittsburgh Plate Glass Industries, Inc.*, 5 Cir., 1973, 482 F. 2d 220, 226, *cert. denied*, 414 U.S. 1136, 94 S. Ct. 880, 38 L. Ed 2d 761; *Hampton* v. *Graff Vending Company*, 5 Cir., 1973, 478 F. 2d 527, 534, *cert. denied*, 414 U.S. 859, 94 S. Ct. 69, 38 L. Ed. 2d 109; *see Callaway Mills Company* v. *Federal Trade Commission*, 5 Cir., 1966, 362 F. 2d 435.

[2] The standard we use in reviewing the order of the Commission as it relates to the § 2(b) defense is to determine whether the Commission's findings are supported by substantial evidence, *Colonial Stores, Incorporated* v. *Federal Trade Commission*, 5 Cir., 1971, 450 F. 2d 733, 739–740. Evidence is substantial if it would ". . . justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury". *National Labor Relations Board* v. *Columbian Enameling & Stamping Company*, 1939, 306 U.S. 292, 300, 59 S. Ct. 501, 505, 83 L. Ed. 660; *Universal Camera Corp.* v. *National Labor Relations Board*, 1951, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456.

[3] Applying this standard of review to the record before us, we have no difficulty in concluding that the Commission's order as to the § 2(b) defense is without substantial evidence to support it. The evidence consists of facts which would lead a reasonable and pru-

dent person to believe that the granting of the service in question by United to Harbor was to meet the competition of Standard. We are unable to find any evidence to the contrary and thus United has sustained its burden. The posture of the evidence is well within the directed jury verdict in a jury trial standard, *supra*. *See Boeing Company* v. *Shipman*, 5 Cir., (en banc), 1969, 411 F. 2d 365, 370. The petition to review and set aside the cease and desist order finding a violation of § 2(a) must be granted on the basis that the § 2(b) defense was established.

[4] It follows that the § 2(f) charge against Harbor must also be set aside. Harbor was not charged with having induced a discriminatory service from Standard, only the discrimination from United. We have held that the descrimination by United was not prohibited because of the § 2(b) defense. A prohibited discrimination is a condition precedent to a finding of unlawful conduct under § 2(f). *Cf. Automatic Canteen Co.* v. *Federal Trade Commission*, 1953, 346 U.S. 61, 73 S. Ct. 1017, 97 L. Ed. 1454.

This leaves for decision the order against Harbor based on § 7 of the Clayton Act. This order finds a violation of § 7 by Harbor in purchasing a competitor. The competitor consisted of two corporations in each of which Charles C. McCann was sole stockholder.

McCann wished to go out of the banana business although its business was second only to that of Harbor in the Los Angeles market. Harbor purchased from McCann its trucks and its leases of six market stalls and a warehouse located in the downtown produce market as well as the personal property located in [**400**] the leasehold properties. A total of $150,000 was paid to McCann for these properties with McCann reserving trade names, good will and accounts receivable.

[5] At the time of the acquisition, Harbor had 40 per cent of the Los Angeles banana wholesale market and McCann had about 24 per cent of the same market. These shares of the market seem quite large in the face of the miniscule sum involved in the acquisition. Nevertheless, it is for the Commission and not this court to determine which acquisitions will be proscribed under § 7. Our role is to review the case as presented and we find that the order of the Commission finding the acquisition unlawful under § 7 is supported in law and fact and there the matter must end.

We agree with Harbor that the divestiture order may present a problem in feasibility and from the standpoint of its accomplishment. Harbor is required to restore McCann as a viable competitive entity. How this is to be done remains a mystery. It may be that Harbor is being required to do more than is physically possible or that the divestiture order is vague in some respects. The problems now presented seem hypothetical in the main and we suggest that the proper forum for resolution of problems which may occur in a good-faith effort on the part of Harbor to comply with the order of divestiture should be the Commission.

The petition to review and set aside the cease and desist order against United based on § 2(a) of the Act is granted and enforcement is denied. The petition to review and set aside the cease and desist order against Harbor based on § 2(f) of the Act is granted and enforcement of the order is denied. The petition to review and set aside the divestiture order of the Commission against Harbor based on § 7 is denied and enforcement is ordered.

UNITED STATES v. PAUL B. ELDER CO.*

Civ. A. No. 74–105. F.T.C. File No. 99–179.

(United States District Court, District of Delaware,
September 6, 1974)

On motion for summary judgment seeking payment of $3,500 for delay of 35 days in filing a special report required by F.T.C., court held that it had no discretion to show leniency and waive or reduce the statutory penalty for failure to file within thirty-day grace period allowable after notice of default from Commission. Claim that original order was misplaced made out a case of excusable negligence at best, a defense not allowed for by the statute. Summary judgment for the government was granted.

Ralph F. Keil, U.S. Atty., Wilmington, Del., for plaintiff.

Richard L. Sutton, *Morris*, *Nichols*, *Arsht & Tunnell*, Wilmington, Del., for defendant.

MEMORANDUM OF DECISION

STAPLETON, *District Judge.* Section 6(b) of the Federal Trade Commission Act (15 U.S.C. § 46(b)) authorizes the FTC "To require . . . corporations engaged in commerce . . . to file with the commission . . . reports . . . within such reasonable period as the commission may prescribe. . . ." Section 10 of the Act (15 U.S.C. § 50) provides that "If any corporation required by [section 6(b)] to file any . . . report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure. . . ."

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. (1974–2 Trade Cases) ¶ 75,238 at 97,583.

Employing proper procedures, the FTC on November 16, 1973, ordered defendant Paul B. Elder Co., among others, to complete and submit a "Prescription Drug Survey" report. Elder failed to submit the report within the prescribed sixty day period and received a notice of default on April 1, 1974. Its completed report was received by the Commission on June 5, 1974, sixty-five days later, and thirty-five days after the end of the stautory grace period.Plaintiff United States claims the $100 per day statutory forfeiture for this period, and has moved for summary judgment on the above undisputed facts.[1]

Defendant opposes the motion on the ground that the Commission's original order "had apparently been misplaced through inadvertence or mistake" (though an employee had signed a registered mail receipt for it), and that it attempted in good faith to complete the report after receipt of the notice of default, but that due to the inadequacy of its records, the small size of its staff, and the lack of guidance it received from the FTC, it did not do so within thirty days. It also notes that the report was mailed to the Commission before suit was brought, and asserts that its untimeliness "in no way harmed any person". It appeals to the discretion of this Court to consider these factors and impose no penalty, or only a nominal one.

Plaintiff argues that the Court has no discretion to waive or reduce the statutory penalty, and also disputes defendant's interpretation of the facts. The facts themselves, however, are not in dispute, and for the purposes of this motion, it is assumed that defendant's characterizations of what they show (inadvertence and good faith) are accurate.

In *St. Regis Paper Co.* v. *United States*, a case dealing with the same statutory provisions, it was said that the courts "cannot forgive statutory penalties once they legally attach. . . ." [1961 TRADE CASES ¶70,167], 368 U.S. 208, 227 (1961). Defendant states that it "does not seek 'forgiveness' of penalties but rather urges that a nominal penalty be assessed. . . ." But that would be nothing if not "forgiveness". This Court has no discretion to do as defendant asks.

In certain circumstances, statutory penalties may be, and have been, held invalid or inapplicable to a particular party. See *United States* v. *Northern Pacific Ry. Co.*, 242 U.S. 190 (1916). *Cf. Kerr S. S. Co.* v. *United States*, 284 F. 2d 61, 63 (2nd Cir. 1960) (dicta); *United States* v. *St. Regis Paper Co.* [1960 TRADE CASES ¶69,880], 285 F. 2d 607, 614 (2nd Cir. 1960) (dicta). But in this case no such circumstances are even colorably present. Defendant's case comes down to one of excusable negligence at best, and the statute leaves no room for leniency on that ground. *United States* v. *J. B. Williams Co., Inc.* [1973–1 Trade Cases ¶74,330], 354 F. Supp. 521 (S.D.N.Y. 1973), *revs'd on other grounds* [1974–1 Trade Cases ¶75,041], 498 F. 2d 414, 18 F.R. Serv. 2d 891 (2nd Cir. 1974), cited by defendant, is inapposite. That case arose under section 5(1) of the Act (15 U.S.C. § 45(1)), which explicity confers discretion on the courts by use of the language: ". . . shall forfeit . . . *not more than* $5000 for each violation. . . ." (Emphasis added.) Section 10 contains no such discretionary language.

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[1] Plaintiff claims a $3600 forfeiture, and defendant has not disputed the accuracy of this figure, but we count differently. The notice of default was received on April 1; the 30-day grace period thus ended on May 1. Penalties began on May 2 and continued through June 5, a total of thirty-five days.

Accordingly, plaintiff's motion for summary judgment will be granted.

Submit Order.

JOHN CLIFFORD HEATER, INDIVIDUALLY AND AS AN ALLEGED OFFICER OF UNIVERSAL CREDIT ACCEPTANCE CORPORATON AND INTERNATIONAL CREDIT CARD CORPORATION v. F.T.C.*

No. 73–1750. F.T.C. Docket No. 8821.

(United States Court of Appeals, Ninth Circuit, September 11, 1974)

1. The F.T.C. Does Not Have Power To Require Restitution of Monies Secured by Unfair and Deceptive Practices, Under the "Cease and Desist" Provision of the F.T.C. Act

Under "cease and desist" provision of Federal Trade Commission Act, the Commission did not possess power to order businessman to make restitution of monies secured by unfair and deceptive business practices found to have been committed by him.

2. Cure for Deficiencies in F.T.C. Act Must Come From Congress, Not the Courts

If there exists a deficiency in the Federal Trade Commission Act, the cure must come from Congress, not by judicial enlargement of the statute.

(Syllabus, with substituted captions, taken from 503 F.2d 321)

On petition to review an order of the Commission directing petitioner to cease and desist in certain unfair and deceptive practices and to make restitution of monies secured through the unfair and deceptive practices, court held that the Commission did not possess the power to order restitution under the "cease and desist" provision of the F.T.C. Act, and that if a deficiency in the F.T.C. Act existed, its cure must come from the Congress, not through judicial enlargement of the statute.

Refund provisions, of the order set aside.

Alfred L. Young, San Mateo, Calif., for petitioner.

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*Reported in 503 F. 2d 321 (1974). For cases before the Commission, see 82 F.T.C. 570; *modified* 85 F.T.C. 524.

William T. Mitchell, Federal Trade Commission, San Francisco, Calif., for respondent.

Before KOELSCH and DUNIWAY, *Circuit Judges*, and ANDERSON*, *District Judge.*

OPINION

KOELSCH, *Circuit Judge:*

John Clifford Heater petitions for review of an order of the Federal Trade Commission concerning his "Honor All Credit Cards" business. 15 U.S.C. § 45(c).

The order in question not only directs petitioner to discontinue the unfair and deceptive business practices found to have been committed by him and the several corporations which he controlled, directed and personally managed, but in addition and in effect commands him to make restitution of the moneys secured by those practices.[1]

This refund provision is based upon and reflects a far-reaching construction of the clause in Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(b), which empowers the Commission to order a person using any unfair method or deceptive act or practice in commerce to "cease and desist from using such method of competition or such act or practice."

[1] The principal question on this review is this: does the Commission under the "cease and desist" provision possess power to order the refund in ques[**322**]tion. We conclude that the answer is no."[2]

The thrust of petitioner's contention is that the Commission's remedial powers are limited to ordering the offender "to cease and desist from using such method." He reads the "cease and desist" language as limiting the Commission's power to prohibit future illegal or improper conduct and as a denial of power to punish or assess damages for such past conduct. He argues that restitution is unnecessary to bring to an end the misconduct found against him and that the order, stripped of subterfuge, constitutes an attempt to punish him and to award damages to private persons.

The Commission rejects petitioner's contention as simplistic. In its view the "critical question is whether the Commission acted within its power in concluding that it was an unfair practice for Heater to retain moneys of which he had bilked the franchisees and members." If so, the Commission concludes the order is wholly valid—it is merely the ordinary order to cease and desist from a violation of the Act. Indeed, the Commission argues, as it is the only order that will bring the illegal conduct to an end, its refund provision is manifestly within the legislative grant of broad remedial discretion. *See*, *e.g.*, *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613, 66 S. Ct. 758, 90 L. Ed. 888 (1946).

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*The Honorable J. Blaine Anderson, United States District Judge for the District of Idaho, sitting by designation.

[1] Universal Credit Acceptance Corp., et al., [1970–73 Transfer Binder] Trade Reg. Rep. ¶ 19,938 (Hearing Examiner's Initial Decision, March 14, 1972); Universal Credit Acceptance Corp., et al., [1970–73 Transfer Binder] Trade Reg. Rep. ¶ 20,240 (FTC Final Order to Cease and Desist, Feb. 16, 1973).

[2] Accordingly, we need not, and do not, resolve various ancillary issues raised by petitioner concerning the scope of the order.

Countering petitioner's argument, the Commission asserts that the order is aimed prospectively at the continuing failure to refund, that it imposes neither a punitive sanction nor compels the payment of reliance or expectancy damages[3] and that it serves the public interest independent of any incidental private benefit. *See Porter* v. *Warner*, 328 U.S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946); *Virginia Electric & Power Co.* v. *N.L.R.B.*, 319 U.S. 533, 63 S. Ct. 1214, 87 L. Ed. 1568 (1943).

In support of its position the Commission urges that retention of the moneys is properly deemed "unfair" because the practices by which they were obtained were themselves unfair and in violation of the Act,[4] because the defrauded persons, thinking they have no legal recourse, continue to be deceived, and because of the resultant distortion in the credit card market. In short, the Commission contends that the power vested in it extends not only to prohibiting the deceptive practices themselves but to remedying the secondary effects of those practices.

We are fully aware that the Act was drawn to give the Commission wide latitude in defining the statutory proscription of "unfair" trade practices,[5] that the Commission is not limited to con[**323**]demning simply violations of antitrust laws or acts deceptive in themselves (*Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)), and that the Commission, in making a determination of unfairness, may properly consider these factors:

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[3] The Commission deleted the portion of the Hearing Examiner's initial order directing petitioner to reimburse franchisees for plane fares, because, although the moneys were spent in reliance upon misrepresentations by respondents and were an element of the franchisees' damages, they were not funds received by the respondent corporations.

[4] The Commission emphasizes that petitioner's conduct was not simply a technical violation of the Act. "This is not a case of a business practice which, but for the guidance of the Commission in its capacity as interpreter of the broad proscriptions of § 5, could colorably have been considered legal and proper—this is a case, in popular vernacular, of a 'bunco' operation, a confidence game." (FTC Brief at 19.)

[5] The Senate Committee on Interstate Commerce, when reporting out the original Act, stated in the report:

> "The Committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define and after writing twenty of them into law it would be quite possible to invent others."

S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914). The House Conference Report concurred in this rationale:

> "It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task."

H.R. Rep. No. 1142, 63d Cong., 2d Sess. 19.

> "Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking. 29 Fed. Reg. 8355 (1964). 405 U.S. at 244 n. 5, 92 S. Ct. at 905.

As an abstract proposition, it is undoubtedly permissible to view the secondary effects of unfair or deceptive practices as "unfair."[6] The Commission's contention, therefore, reflects a not implausible construction of the Act, although command of an affirmative remedial act through an order to "cease and desist" from doing that act involves, at the least, some departure from the common connotation of those words.[7]

However, we reject that contention. The reason is fundamental. The construction placed by the Commission upon its power to define and prohibit "an unfair act or practice" would, if accepted, operate to invest the Commission with remedial powers which are inconsistent and at variance with the over-all purpose and design of the Act. In particular, it would permit the Commission to order private relief for harm caused by acts which occurred before the Commission had declared a statutory violation, and thus before giving notice that the prior conduct was within the statutory purview. Such an order, we think, is impermissible, regardless of the prospective public harm which might be [**324**] prevented or the public interest served by a restitution order based upon a broader definition. In this conclusion we are guided by the legislative history of the Act. From this it appears that the critical issue around which the Congressional debate over the Federal Trade Commission Act centered was the breadth of the Commission's power to define what would constitute "unfair acts."[8] Some lawmakers considered the general standard employed by the statute as it now exists to constitute an excessive delegation of legislative authority,[9] and wanted listed acts proscribed. A principal concern over the generality of the language was the risk that a businessman would be unable to determine whether a patricular practice was made unlawful until the Commission and courts gave the general language specific substance.[10]

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[6] We note that the Commission's argument proves too much. Each of the factors relied upon to support its position can be found in some degree in all cases. As the qualitative judgement that a failure to refund is "unfair" is not readily susceptible to dispute, the FTC position supports restitution as an appropriate remedy in all cases. Moreover, the Commission's approach would equally support the power to order damages or punitive sanctions. The failure to pay reliance or expectancy damages caused by an unfair practice might itself be considered an "unfair" practice which has a distorting effect on the market. Were it not for jury trial complicatons, the Commission's expansive definition of its power to remedy unfair practices would therefore support an order to cease and desist from not paying damages. The Commission concedes that § 5 does not grant it power to order damages.

[7] *See* Note, "Corrective Advertising" Orders of the Federal Trade Commission, 85 Harv. L. Rev. 477, 492–93 (1971).

It is clear that in some circumstances the Commission may order affirmative acts. *See, e.g., Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 606 n. 4, 86 S. Ct. 1738, 16 L. Ed. 2d 802 (1966) (divestiture order under § 5 of FTCA rather than § 7 of Clayton Act); *L. G. Balfour Co.* v. *Federal Trade Commission*, 442 F. 2d 1 (7th Cir. 1971) (divestiture); *J. B. Williams Co.* v. *Federal Trade Commission*, 381 F. 2d 884 (6th Cir. 1967) (Affirmative advertising disclosure); *American Cyanamid Co.* v. *Federal Trade Commission*, 363 F. 2d 757 (6th Cir. 1966) (mandatory licensing of patent).

The Act adopted the general definition standard in order to prevent clever circumvention of a more precise definition, thereby insuring the ability of the Commission to define norms of acceptable business behavior. However, to reconcile the Commission's broad power with the need for a specific notice to an individual who must conform his behavior to the terms of the Act, Congress limited the consequences of violation of the Act to a cease and desist order. It withheld from the Commission the power to make a determination which would expose the businessman to liability for acts occurring before the Commission gave the general definition specific meaning in a factual context. In particular, Congress rejected an amendment which provided a private damage suit based on a Commission finding of a violation of the Act. Senator Newlands, the principal sponsor of the bill and of the broad standard,[11] expressed the argument against inclusion of a damage suit:

> We are entering now upon a new field of inquiry as to what constitutes unfair competition. This commission, and ultimately the courts, will be called upon to make nice distinctions with reference to this matter for the purpose of determining what set of facts and circumstances constitute unfair competition. Here (in the proposed damage suit) we hold this sword of Damocles above every businessman in the country, and either compel him to abandon a practice which perhaps he thinks is right, or to pursue litigation to the bitter end, when we want through this instrumentality not to punish, but to secure higher standards of conduct, by rules that will be laid down by this commission and sustained by the court, and which will have an educational effect upon the commerce of the country. 51 Cong. Rec. 13116, 63rd Cong., 2d Sess. (1914).

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[8] *See, e.g.*, 51 Cong. Rec. 13114 *et seq.* (1914).

[9] Hart & Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1133 (tent. ed. 1958).

[10] *See* 51 Cong. Rec. 13114 (1914) (remarks of Senator McCumber).

[11] *See* 51 Cong. Rec. 11084 (1914).

The broad power to define unfair acts and practices asserted as the basis for the refund order must be read in light of the contemplated non-retroactivity of a Commission decision. As Senator Newlands indicated, the Act was designed to allow the Commission to serve an educational purpose by developing a body of administrative law, through published decisions, defining unfair acts or competition in particular situations on the basis of full knowledge of the facts.[12] The power to attach consequences to prior conduct was thought inconsistent with the Commission's contemplated quasi-legislative and educational function. As a result, recourse for harm suffered before the Commission enters a cease and desist order was left to private suits.[13]

[**325**] The impact of the refund order in the present case illustrates the reason Congress did not give the Commission the power it seeks to exercise. So far as it appears from the record, petitioner received only a salary and loans, (some of which have been repaid), from the corporations. The corporations, which actually received the funds, are now bankrupt; the order runs only against petitioner. Aside from whether petitioner is legally liable to refund sums he only constructively received, those funds were expended by the corporations to pay the salaries of employees hired to service accounts and collect member charges. Any assets of the corporations will be applied towards satisfaction of judgments in private civil suits.[14] The Commission's order operates as a determination that, as between petitioner and the innocent franchisees and members, petitioner ought in fairness to pay the losses out of his personal assets. Regardless of how egregious petitioner's conduct, or how unreasonable his reliance on the legality of the

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[12] *See generally* Hart & Sacks, *supra,* at 1136; *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 480, 72 S. Ct. 800, 96 L. Ed. 1081 (1952) (Jackson, J., dissenting).

[13] Our holding denies retroactive impact to a Commission decision, at least insofar as private rights and liabilities are involved. The Commission has argued that the propriety of an order should not be determined by inquiry into whether the order has prospective or retrospectve effect, *see Curtis Publishing Co.,* [1970–73 Transfer Binder] Trade Reg. Rep. ¶ 19,179, 21,753 (Final order to dismiss, Dkt. 8800, June 30, 1971), contending:

> "Every Commission order is 'retrospective,' in the sense that it looks to and is based upon the causes and results of the acts found to violate the statute, and at the same time it is 'prospective' in the sense that its design, purpose, and effect is to dissipate any lingering effects of the past violations and to prevent their recurrence in the future." *Curtis, supra* at 21,757.

We recognize that divestiture and corrective advertising orders support the Commission's position that it has power, in order to remedy the continuing effects of violations of the Act, to order acts imposing economic costs properly attributed to conduct occurring before the conduct is declared illegal. Moreover, we recognize that there is no economic difference in the impact of those orders and a restitution order—in each case the offender loses the benefits of money expended in reliance on the legality of conduct later found illegal. Nevertheless, the two cases must be treated differently because Congress, out of reasonable fair notice considerations, chose to leave the cure of private injuries caused by violations of the Act to whatever common-law remedies existed.

[14] A judgment well in excess of the remaining assets in the bankruptcy estate has already been obtained against the corporations in a class action brought on behalf of the franchisees. Petitioner was dismissed by the settlement stipulation and judgment in that case with prejudice and is not liable personally for amounts not recoverable from the corporations.

operation,[15] the Commission was not given the power to recast the consequences of conduct occurring prior to its entry of an order;[16] Congress was unwilling to subject the operation of a business to the risk of subsequent Commission condemnation.

Moreover, the Congressionally mandated Commission procedures are designed for the determination and expression of the public interest in a particular factual context; they become suspect if employed to adjudicate private rights. The Commission acts as both prosecutor and judge in its own proceeding. The Commission issues the original complaint, a Commission attorney prosecutes, a Commission Hearing Examiner hears the evidence, makes factual findings, and makes the initial judgment of [**326**] whether the Act is violated. An appeal may then be had back to the full Commission, which originally issued the complaint. Court review of the final Commission judgment is limited—the Commission's factual findings are conclusive if supported by substantial evidence. In such circumstances there is a real likelihood that the Commission would, in furtherance of its broad institutional mandate to protect the public interest, expand unduly the common-law liability of the violator.[17] We are certain that had Congress contemplated displacement of a private suit for rescission, under traditional judicial procedures, by an administrative proceeding, under § 5(b) procedures, as the remedy for fraud in the procurement of a contract, it would have said so more explicitly.[18]

We cannot help but note that although the Act has been on the books for sixty years, this is the first time that the Commission has advanced this construction of its power to an appeals court. Of course, non-use of a power is not conclusive of its non-existence, and the Commission's construction of the Act has never been explicitly rejected. However, statements of courts, commentators, and Congress throughout those years uniformly reflect an understanding that the Commission is without the power it seeks to exercise. Justice Brandeis, writing six years after the passage of the Act, stated:

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[15] The Commission argues that notice considerations (*see* n. 4, *supra*) play no part in this case because petitioner's acts were so patently fraudulent that he must have known his conduct violated the Act. Petitioner contends otherwise. We think it clear that Congress did not create an exception from its prohibition of retroactive sanctions for exceptional violations of the Act. Concern for the need for notice in debatable cases led to the retroactive sanctions in general, particularly since common-law remedies were available in extreme cases.

[16] We sympathize with the Commission's problem. Under the present design of the Act, those sufficiently unscrupulous or reckless to engage in conduct clearly forbidden by the Act may do so until a cease and desist order is entered, escaping with the fruits of the violation. In many situations no individual has a sufficient interest to bring a suit for redress, and a violation of the Act may be quite profitable. *See* 85 Harv. L. Rev., *supra* n. 7, at 482–86.

[17] Here, for instance, and as noted above, the Commission deleted a provision in the Hearing Examiner's order which conditioned individual franchisee's rights to a refund on proof of reliance, ordinarily an element of an action for rescission of a contract procured by fraud.

[18] The NLRB, by § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), is explicitly granted broader remedial powers than those granted the FTC. Nevertheless, the Board has interpreted its power not to extend to the award damages for violation of the Act. Ex-Cell-O Corp., 185 NLRB No. 20 (August 25, 1970).

> [I]t is necessary to bear in mind the nature of the proceeding under review. The proceeding is not punitive. The complaint is not made with a view to subjecting the respondents to any form of punishment. It is not remedial. The complaint is not filed with a view to affording compensation for any injury alleged to have resulted from the matter charged, nor with a view to protecting individuals from any such injury in the future. The proceeding is strictly a preventive measure taken in the interest of the general public. *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 432, 40 S. Ct. 572, 576, 64 L. Ed. 993 (1920) (dissent).

In 1948 the Court reiterated:

> [T]he effect of the Commission's order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 706, 68 S. Ct. 793, 92 L. Ed. 1010 (1948).

Henderson, in his landmark work on the Commission, wrote:

> The act does not expressly confer any general power, of the kind possessed by a court of equity, to compel restitution, or otherwise to so mold the decree as to do substantial justice under the circumstances. Of course, no damages can be awarded, or mandatory order entered. Where, therefore, the unfair act has already accomplished its purpose, and there is no occasion for repeating it, the Commission cannot give relief. Henderson, The Federal Trade Commission 71 (1924).

And in 1971 the Senate Committee on Commerce, in reporting out a bill which would have amended the Act to empower the Commission to order refunds, noted:

> At the present time cease and desist orders have prospective application only and afford no specific consumer redress to consumers already injured. S. Rep. No. 92-269, p. 24, 92d Cong., 1st Sess. (1971).

[327] [2] We think the foregoing views correctly reflect the scope of the powers given the Commission. The construction the Commission places on its power to define "unfair acts and practices" impermissibly expands the Commission's remedial power beyond that contemplated by Congress or written into the Act. Consumer protection is an important task. However, the Commission's endeavors must be limited to the exercise of powers granted by Congress. If there exists a deficiency in the Act, the cure must come from Congress, not by judicial enlargement of the statute. "To supply omissions transcends the judicial function." *Iselin* v. *United States*, 270 U.S. 245, 251, 46 S. Ct. 248, 250, 70 L. Ed. 566 (1926) (Brandeis, J.).

The refund provisions of the Commission's final order are set aside.

CONTROL DATA CORPORATION, ET AL., v. F.T.C., ET AL*

Civ. A. No. 4–74–Civ. 412. F.T.C. Docket No. 8940.

(United States District Court, District of Minnesota, October 2, 1974)

On motion for preliminary injunction against the Commission's withholding of documents requested under the Freedom of Information Act, court held that plaintiffs failed to show irreparable injury in that the "usual expense and annoyance" of litigation are not such "irreparable injury" as will justify a preliminary injunction and denied plaintiffs' motion therefor.

Before LARSON, *District Judge*.

MEMORANDUM ORDER

Plaintiffs here are respondents in an administrative proceeding currently pending before the Federal Trade Commission (FTC) for alleged violations of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, in the conduct of their respective electronic data processing vocational education programs. A summary of those proceedings from March 1971 to January 1974 can be found in this Court's Order and Memorandum in a prior case between the present parties. *Control Data Corporation* v. *Federal Trade Commission*, No. 4-74-Civ. 25 (D. Minn. Feb. 28, 1974).

The complaint in this case was filed on August 23, 1974. Jurisdiction is invoked pursuant to 5 U.S.C. §§ 552(a)(3), 702, 704, and 706, and 28 U.S.C. § 1361. With the complaint plaintiffs filed a motion for a preliminary injunction. Oral argument on the motion was heard on September 16, 1974. For the reasons set out below, that motion must be denied.

The complaint incorporates by reference much of the recent administrative record in the FTC proceeding. That record indicates that on February 7, 1974, plaintiffs filed with the administrative law judge a request for issuance of a subpoena directed to certain information within the control of the FTC; that on March 11, 1974, that request was granted in part and denied in part; that on March 19, 1974, plaintiffs submitted a petition to the Secretary of the FTC requesting disclosure pursuant to 5 U.S.C. § 552 of five classes of information that had been denied in the Order of March 11. The five classes of information sought were:

(1) Names and addresses of all persons, other than FTC staff, having knowledge of any of the allegations in the complaint before the Commission;

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*Not otherwise reported. *See also* pp. 852, 1002 herein.

(2) Records of every committee, group, or task force, on which the FTC participated, which studied private vocational education in the United States at any time since 1969;

(3) The membership of each committee, group, or task force described in (2);

(4) Records relating to revisions or amendment of the FTC's guidebook "Our Vocational Training Can Guarantee You the Job of a Lifetime";

(5) Various records relating to development and preparation of "Guide 10(e)" of the FTC's "Guides for Private Vocational and Home Study Schools."

On May 23, 1974, the Secretary agreed to produce a small portion of the documents requested and refused to produce the remainder. On June 10, 1974, he advised plaintiffs that they would be allowed to inspect the documents produced pursuant to the May 23 letter only after payment of a "search and segregation fee" of $183.00. The complaint and the motion for a preliminary injunction seek an Order compelling production of the documents requested of the Secretary and enjoining defendants from requiring payment of any search and segregation fees in connection with production of those documents.

Factors to be considered on a motion for a preliminary injunction are "(1) the significance of the threat of irreparable harm to plaintiff if the injunction is not granted; (2) the state of the balance between this harm and the injury that granting the injunction would inflict on defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest." 11 Wright and Miller, *Federal Practice and Procedure: Civil* § 2948, at 430–431. The most important of these factors, essential to obtaining a preliminary injunction, is the threat of irreparable harm if the injunction is not granted. *Id.*, at 430–438.

In the earlier litigation between these parties, this Court denied plaintiffs' motions for preliminary and permanent injunctions enjoining the administrative proceedings until the FTC produced certain documents then in dispute. The Court held in its Order and Memorandum of February 28, 1974, that plaintiffs had not made a showing of "irreparable injury" sufficient to stay the administrative proceedings. The setting of the present motion differs from that in the earlier case in that only production of documents, not a stay on the administrative proceedings, is sought. However, the Court holds that the test of "irreparable injury" is the same in both circumstances. In his affidavit in support of the present motion, counsel for plaintiffs claims that denial of the preliminary injunction will make it impossible to prepare adequately a defense to the administrative complaint. A very similar contention was considered and rejected in No. 4-74-Civ. 25 (Order and Memorandum of February 28, 1974, at 7-8). The Court's discussion there is fully applicable here. In brief, the "usual expense and annoyance" of litigation are not such "irreparable injury" as will justify a preliminary injunction.

It should be noted that in denying the preliminary injunction for failure to show irreparable injury, the Court expresses no view on the merits of the action.

Accordingly, upon all the records, files, and proceedings herein, IT IS ORDERED:

That plaintiffs' motion for a preliminary injunction is denied.

FEDERAL TRADE COMMISSION v. NATIONAL COMMISSION ON EGG NUTRITION*

Civ. A. No. 74 C 2185. F.T.C. Docket No. 8987.

(United States District Court, Northern District of Illinois, October 21, 1974)

On petition for preliminary injunction, court held that the Commission failed to show necessary requisite of public interest and made inadequate showings on the issues of a favorable balance of the equities and the probable chance of success.

Before PARSONS, *District Judge*.

MEMORANDUM OPINION AND ORDER

Petitioner, the Federal Trade Commission, has applied to this Court for an order granting a temporary injunction against respondent, National Commission on Egg Nutrition, to restrain certain publications pending a determination of a matter being presented to the Commission. Petitioner's application was made pursuant to Section 13 of the Federal Trade Commission Act, 15 U.S.C. § 53. Respondent has opposed any grant of the application on the grounds that the Court lacks jurisdiction, that an injunction would unlawfully abridge its constitutional rights of freedom of speech and of the press, and that the statutory and equitable prerequisites for an injunction have not been satisfied.

I.

Before proceeding to rule on petitioner's application, a review of those sections of the Federal Trade Commission Act which the Court

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*Not otherwise reported. *Reversed and remanded,* 7th Cir., 517 F. 2d 485 (1975), see p. 1344 herein; *cert. denied* 426 U.S. 919 (1976). For case before the Commission, see 88 F.T.C. 89.

found relevant seems necessary. Aforementioned Section 13 of the Act states in part as follows:

> (a) Whenever the Commission has reason to believe—
>
> (1) that any person . . . is about to engage in . . . the causing of the dissemination of any advertising in violation of section 12 (15 U.S.C. § 52), and
>
> (2) that the enjoining thereof . . . would be to the interest of the public, the Commission . . . may bring suit . . . to enjoin . . . upon proper showing a temporary injunction . . . shall be granted . . .
>
> (b) Whenever the Commission has reason to believe—
>
> (1) that any person . . . is violating, or is about to violate, any provision of law enforced by the FTC, and
>
> (2) that the enjoining thereof . . . would be in the interest of the public—the Commission . . . may bring suit . . . to enjoin . . . upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest . . . a temporary restraining order or a preliminary injunction may be granted. . . .
>
> 15 U.S.C. § 53 (a) and (b).

Section 12 of the Act, mentioned in Section 13(a), states in part as follows:

> (a) It shall be unlawful for any person . . . to disseminate, or cause to be disseminated, any false advertising—
>
> (1) . . . in commerce by any means, . . . which is likely to induce, directly or indirectly the purchase of food . . . or
>
> (2) By any means . . . which is likely to induce, directly or indirectly, the purchase in commerce of food . . .
>
> (b) The dissemination of the causing to be disseminated of any false advertisement . . . shall be an unfair or deceptive act or practice in commerce within the meaning of Section 5 (15 U.S.C. § 45). . . .
>
> 15 U.S.C. § 52 (a) and (b).

The term "false advertisement," as used in Section 12, is statutorily defined in Section 15 of the Act, which states in part as follows:

> (a)(1) The term "false advertisement" means an advertisement . . . which is misleading in a material respect. . . . 15 U.S.C. § 55(a)(1).

And Section 5 of the Act, mentioned in the aforequoted Section 12(a) of the Act, states in part as follows:

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful. 15 U.S.C. § 45(a).

II.

In requesting an order of injunctive relief, petitioner has argued that any hearing on its application should be a summary proceeding, that is, without any presentation of oral testimony or oral cross-examination. Petitioner's position is quite similar to the one it took in another case recently before me, entitled *FTC* v. *Borden*, *Inc.*, 74 C 1849. In opposing petitioner's reqeust, the respondent has argued that injunctive relief may only be ordered under Section 13, 15 U.S.C. § 53, after a full evidentiary hearing has been held.

For reasons which will be stated below, I reject both the petitioner's and the respondent's position regarding the nature of a court proceeding under Section 13, 15 U.S.C. § 53. The Court is of the opinion that it may act in either a summary manner or after a more complete evidentiary hearing is held; the decision as how to act under Section 13 must be made on a case-by-case basis, and that decision will depend on what the Court considers as necessary for a "proper showing" in any one case. Thus, a "proper showing" may be made by the FTC in some cases upon mere presentation of affidavits, while in other cases such a showing may be made only after the Court has had the benefit of both affidavits and counter-affidavits, and yet in still other cases such a showing may be made only after the court has had the benefit of a full evidentiary hearing.

III.

I am of the opinion that in certain similar cases, a full evidentiary hearing might be necessary before the Court can decide whether a "proper showing" under Section 13, 15 U.S.C. § 53, has been made because of my view on the meaning of the statutory phrase "proper showing." Contrary to the petitioner's assertions, I believe that the phrase means more than a showing that the FTC, in fact, has reason to believe. Rather, I feel that the phrase also includes at least some of the equitable burdens which those seeking the extraordinary remedy of injunctive relief have traditionally borne.

I have found very little precedent on the Federal Trade Commission's utilization of Section 13, 15 U.S.C. § 53, and thus have very little guidance on what is meant by the phrase "proper showing" in Section 13 (a) and (b), 15 U.S.C. § 53 (a) and (b). I note that although the same phrase is used in both Section 13(a) and Section 13(b) of the FTC Act, the two subparagraphs are different in their granting of discretionary powers to the district courts. Section 13(a) says "upon a proper showing . . . an injunction shall be granted" while Section 13(b) says "upon proper showing . . . (an) injunction may be granted." And Section 13(b) explicitly requires the courts to weight the equities and consider the Commission's likelihood of ultimate success in exercising their powers while Section 13(a) contains no such explicit requirement.

Notwithstanding the differences in statutory language between 13(a) and 13(b), I am of the opinion that the phrase "proper showing" has the same meaning when used both in Section 13(a) and Section 13(b), 15 U.S.C. § 53 (a) and (b), and that within that meaning is encompassed the Commission's burden of at least showing the necessary public interest, a favorable balance of the equities, and the probable chance of success. The drafters of the recently enacted Section 13(b) said that this provision was a codification of the decisions in *FTC* v. *National Health Aids*, 108 F. Supp. 340 (D. Mary. 1952) and *FTC* v. *Sterling Drug, Inc.*, 317 F. 2d 669 (2nd Cir. 1963); these two cases involved Section 13(a). The drafters may have misread *Sterling Drug*, however. See *Sterling*, *supra*, 317 F. 2d at 678 and 1973 *U.S. Congressional and Administrative News* 2533. Furthermore, the language of Section 13(b) appears to include all circumstances which fall under Section 13(a). Section 13(a) applies when a person is about to engage in a violation of Section 12, which violation is also a violation of Section 5 according to Section 12(b) and which is therefore also subject to FTC enforcement according to Section 5(a)(6). Section 13(b) applies when a person is about to engage in a violation of any provision of law enforced by the FTC, presumably including Section 12. And finally, case law under the older Section 13(a) recognizes that the broad equity principles explicitly laid out in Section 13(b) are implicit in Section 13(a) and in its phrase "proper showing." For example, the Court in *National Health Aids*, *supra*, said: ". . . the action of the court should be based on the general considerations that properly apply in the issuance of preliminary injunctions." 108 F. Supp. at 346. Petitioner has relied on the case of *FTC* v. *Rhodes Pharmacal Co., Inc.*, 191 F. 2d 744 (7th Cir. 1951) when arguing for a very limited discretionary power of the Court under Section 13, 15 U.S.C. § 53; however, this Court notes the disapproval of that case in the later *National Health Aids* case, *supra*, 108 F. Supp. at 346, which at least the Congress viewed as the prevailing law.

In light of the foregoing analysis of the statutory phrase "proper showing" and of the possible means in which the FTC may be allowed to make such a showing in a case under Section 13 of the Federal Trade Commission Act, I have concluded that in the present case an evidentiary hearing will be unnecessary and that the Commission's application can be ruled with the benefit of affidavits, counter-affidavits, legal memoranda, and oral argument. In ruling on the petition, however, both parties must understand that the decision to grant or deny the relief requested should in no way be construed as a finding on the merits of the Commission's claims against the respondent which are presently being heard in another forum.

IV.

Prior to considering whether or not the Commission has made a proper showing sufficient to warrant the issuance of an injunction, I must first consider the respondent's contention that this Court is without jurisdiction. Respondent argues that it is not a corporation, as defined by the FTC Act in Section 4, 15 U.S.C. § 44, and that its pronouncements are not advertisements within Sections 5, 12 and 13 of that Act, 15 U.S.C. §§ 45, 52, 53(a)(1) and 55(a)(1).

I am of the opinion that the respondent is a corporation under Section 4, and that it is therefore subject to the FTC's jurisdiction under Section 5(a)(6) of the Act, 15 U.S.C. § 45(a)(6). The respondent is a "company . . . organized to carry on business for (the) . . . profit . . . of its members," Section 4, 15 U.S.C. § 44. It is true that the respondent may not gain profits for itself or profits which it then distributes to its members. However, its activities do generate direct profits for its members in that many of its members are egg producers or are otherwise connected with the egg industry and that respondent's activities do directly promote, at least to some extent, the financial health of the egg industry. Although respondent is a not-for-profit corporation, the law is clear that the FTC has jurisdiction in certain instances over nonprofit corporations. See, for example, *FTC* v. *Cement Institute*, 333 U.S. 683 (1948). Respondent's attempt to analogize or otherwise compare its own members with scientists at p. 15 of its Memorandum in Opposition is clearly erroneous; in the present case, members of the respondent directly and personally profit from the respondent's activities while scientists usually do not. *Koch* v. *FTC*, 206 F. 2d 311 (6th Cir. 1953).

I am of the further opinion that even if I assume that the respondent's pronouncements, which are here under attack, are not advertisements within the meaning of Section 15(a)(1) of the Act, 15 U.S.C. § 55(a)(1), I would still have jurisdiction. Jurisdiction would lie under Section 13(b) of the Act, 15 U.S.C. § 53(b), because the respondent's pronouncements could be believed by the FTC to be "unfair or deceptive acts or practices" under the U.S. Supreme Court's recent reading of Section 5(a)(1), 15 U.S.C. § 45(a)(1), in the case of *FTC* v. *Sperry and Hutchinson Co.*, 405 U.S. 233, 92 S. Ct. 898 (1972). That recent Supreme Court decision held that the FTC could proscribe certain practices pursuant to Section 5 if they are unfair or deceptive in their effect upon consumers, regardless of their nature or quality as competitive practices of their effects on competition or their antitrust implications. The Supreme Court thus recognized the power of the FTC to investigate the fairness of certain practices in terms of the "public values," i.e., whether they cause substantial injury to consumers. *FTC* v. *Sperry and Hutchinson Co.*, *supra*, 92 S. Ct. at 905.

V.

In opposing the petitioner's application, the respondent has also contended that the granting of any injunctive relief would violate its constitutional rights under the First Amendment and thus that no such relief can be granted. Respondent has relied, in large part, on the decisions in *Scientific Manufacturing Co.* v. *FTC*, 124 F. 2d 640 (3rd Cir. 1941) and *Koch* v. *FTC*, *supra*. I find that the issuance of injunctive relief in this case would not necessarily violate respondent's constitutional rights, and note that support for this position can be found in the cases cited by the respondent.

The Court in *Scientific Mfg. Co.* recognized that the 1938 amendments to Section 5(a)(1) of the FTC Act broadened the jurisdiction of the Commission, a recognition later made by the Supreme Court in *FTC* v. *Sperry and Hutchinson Co.*, *supra*. 124 F. 2d at 643–644. The Court in *Scientific Mfg. Co.* also discussed the nature of the relationship between the FTC's powers under the Act and the First Amendment; in doing so, it stated:

> It follows from what we have said that, the present petitioners not being engaged or materially interested in the cooking utensil trade, the Commission was without power to enjoin their sale and distribution of the pamphlets which they published concerning the use of aluminum cooking utensils and, further, that the publication, sale, and distribution of matter concerning an article of trade by a person not engaged or financially interested in commerce in that trade is not an unfair or deceptive act or practice within the contemplation of the Federal Trade Commission Act, as amended, if the published matter, even though unfounded or untrue, represents the publisher's honest opinion or belief.

124 F. 2d at 644.

Unlike the petitioners in *Scientific Mfg. Co.*, the respondent and its members in this case are materially interested and are engaged in the egg industry. The Court in *Scientific Mfg. Co.* recognized this distinction when it cited the following in a footnote reference:

> In *Perma-Maid Co.* v. *FTC*, 121 F. 2d 282, where a distributor of stainless steel cooking utensils procured some of the Force pamphlets for use of its salesmen in inclining prospective customers to stainless steel rather than aluminum ware, the FTC restrained the distributor's use of the pamphlets and its action was sustained by the Circuit Court of Appeals for the Sixth Circuit. The *Perma-Maid* case, involving as it does the use of pamphlets which Force publishes and distributes well illustrates a permissible exercise of the Commission's jurisdiction and serves to point the pertinent distinction between that case and the present.

124 F. 2d at 644, footnote 8.

The Court in *Koch*, *supra*, also recognized a similar distinction which is quite relevant to the present case. On the one hand, the Court in *Koch* found that a book, entitled *The Chemistry of Immunity*, which was widely distributed among physicians and which explained the author Dr. Koch's theory of heightening the natural immunity of the body against disease, was not subject to Sections 5, 12 or 15(a) of the Act. The Court also reached a similar conclusion with respect to an address delivered by Dr. Koch to the College of Physicians and Surgeons in Quebec. *Koch*, *supra*, 206 F. 2d at 317. On the other hand, the Court found that other publications dealing with Dr. Koch's theory were subject to Section 5 of the Act because they included, "... in addition to a concise statement of Dr. Koch's theory, persuasive selling arguments to induce the purchase of the drugs and give detailed price lists." *Koch*, *supra*, 206 F. 2d at 318. Here, the respondent's pronouncements have the effect of inducing their readers to purchase more eggs—whether the respondent intended such an inducement or not.

In rejecting the respondent's First Amendment argument, it is not my intention to curtail the respondent's declarations of all its honest opinions. Again, the decision by the Third Circuit in *Scientific Mfg. Co.*, *supra*, seems relevant in its following statements:

> Surely Congress did not intend to authorize the FTC to foreclose expression of honest opinion in the course of one's business of voicing opinion. The same opinion, however, may become material to the jurisdiction of the FTC and enjoinable by it if, wanting in proof or basis in fact, it is utilized in the trade to mislead or deceive the public or to harm a competitor.

124 F. 2d at 644–645.

And although I am of the opinion that the granting of any form of injunctive relief to the petitioner would not necessarily violate the respondent's First Amendment constitutional rights, I am of the further opinion that the speech elements of the respondent's pronouncements should be considered when this Court decides whether or not injunctive relief would be in the public interest. From the evidence presented thus far, it is quite clear that a major dispute is now raging both within the medical community and the public at large about the nature of the relationship—if any—between dietary cholesterol intake and coronary heart disease. Because a significant portion of our population is concerned about the risk of heart disease, the nature of any relationship is a matter of public health and legitimate public interest. *United Medical Laboratories* v. *Columbia Broadcasting System*, 404 F. 2d 706 (9th Cir. 1968), *cert. den.* 89 S. Ct. 1197 (1969); *Lewis* v. *Reader's Digest Association, Inc.*, 366 F. Supp. 154 (D. Mont. 1973). Thus, assuming that the respondent's pronouncements are false or deceptive, even though some people are probably misled, it is also highly probable that other people become more knowledgeable about the cholesterol controversy through the respondent's pronouncements whether they are also misled or not.

VI.

The question now remaining before me is this: Has the petitioner made a sufficient showing to warrant the issuance of injunctive relief?

In order to have made a sufficient showing, the petitioner must have demonstrated that it had a reason to believe that the respondent is violating or is about to violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), as well as a demonstration of the necessary public interest, the favorable balance of the equities, and the probable chance of its ultimate success. In assessing the sufficiency of the petitioner's showing under the FTC Act, this Court must not, of course, serve as simply the rubber stamp which validates petitioner's applications; rather, this Court must exercise independent judgment in line with the relevant statutory standards and general principles of equity encompassed within the Act.

I find that the Commission has carried its initial burden, in that it has shown reason to believe that the respondent's pronouncements are at least misleading. This finding should not, however, be deemed to render fruitless any activities by the respondent in the pending FTC administrative proceeding to produce further evidence in support of its contention that the administrative proceeding is improper because the Commission lacks the requisite "reason to believe." 15 U.S.C. § 45 (b); Cf., *FTC* v. *Sterling Drug, Inc.*, *supra*, 317 F. 2d at 678. My finding of a reason to believe under Section 13, 15 U.S.C. § 53, is based upon the various affidavits which put into doubt the assertion that there is no scientific evidence that eating eggs increases the risk of heart attacks, as well as other assertions by the respondent.

I also find, however, that the Commission has not sufficiently carried the statutory burden of showing that it would be to the "interest of the public," as stated in both Sections 13(a) and 13(b)–15 U.S.C. § 53 (a) and (b), to enjoin the respondent's activities complained of pending the outcome of the administrative proceeding involving the same petitioner and respondent.

In its Memorandum of Law, the petitioner states:

> Petitioner's reason to believe that N.C.E.N. is falsely advertising the relationship between eggs and heart disease and heart attack is in itself sufficient "public interest" for purposes of this injunctive proceeding. Petitioner's Memo in Support, at p. 22.

This interpretation of the phrase "public interest" is clearly inaccurate in light of the preceding analysis of the FTC Act. The petitioner goes on to state:

> . . . the Commission also has reasonable cause to believe that increased egg consumption by the public as a result of respondent's advertising campaign poses a serious and significant danger to the public health. Memo at p. 22.

This statement also appears not to be accurate. Affiant Schrader's uncontradicted statement is that the egg supply for the next seven months is already fixed and cannot be expanded. Thus, it does not appear to me that the respondent's pronouncements herein attacked can increase egg consumption, at least for a while; and during the while, surely all the eggs will be eaten (whatever the price they sell for) and the administrative proceeding involving the respondent will probably come to an end (the FTC itself orally estimated before me that a decision in that proceeding will be reached by February 1975). As a result it seems to me that enjoining the respondent's so-called advertising campaign pending the outcome of the administrative proceeding would probably only change the members of the group of people who are going to eat eggs over the next few months and change the number of eggs each member of the group will eat, but would not change the number of eggs eaten.

I have already recognized that, assuming the respondent's pronouncements are at the least misleading or deceptive, the failure to enjoin the respondent will undoubtedly cause some people to be misled in the future. This was a significant factor in my consideration of the public interest. However, another significant factor in assessing the public interest was the previously-noted substantial probability that other people would lose the benefit of becoming more knowledgeable about the cholesterol controversy through reading the respondent's publications if the respondent was now enjoined (be they also misled or not).

Further considerations in my analysis of the public interest were the potential for public misunderstanding about the nature of any injunction ordered against the respondent and the potential for exploitation by parties not now before me of any injunctive relief which is ordered. Both the petitioner and respondent agreed during oral argument that such potentials existed, should be considered, and should be weighed at least to some small extent against the granting of the relief requested. And at least one other court has considered similar potentialities; the Court in *FTC* v. *Sterling Drug, Inc.*, *supra*, said the following:

> It is not difficult to understand the heartwarming reception this article received in the upper echelons of Sterling and its Madison Avenue colleagues; no sooner were the results of the study published in the Journal of American Medical Association when Sterling Drug and its advertising agencies decided to make the most of them. 317 F. 2d at 672.

Just as certain individuals would lose the benefit of the information specifically contained in respondent's publications if an injunction was to issue, so too would the public at large lose certain benefits if the respondent was enjoined. I have already recognized the legitimate public interest in the cholesterol controvery. The benefits to be lost to the public at large if petitioner's request is granted include not only the unavailability of the information contained in the respondent's publications dealing with the controversy, but also the unavailability of any further debate, information and the like which might be stirred by the continuation of the respondent's pronouncements, i.e., the ramifications of the respondent's activities.

Yet another consideration within the phrase "public interest" must be the effect of any injunctive order on the respondent itself and its members, for they are certainly members of the public and surely other members of the public are concerned with their welfare. While it is highly unlikely, there is a possibility that many of the egg producers who are members of the respondent corporation will be financially harmed in a very great way by the issuance of an injunction and this possibility must be taken into account. *FTC* v. *National Health Aids*, *supra*, 108 F. Supp. at 346. There is the more likely possibility that those in the egg industry will suffer less serious financial difficulties and uncertainties if an injunction is granted and this must also be considered.

Besides failing to carry its most important burden, that of showing the requisite of public interest, the petitioner has also made inadequate showings on the issues of a favorable balance of the equities and the probable chance of success. On this later issue, I do note, however, that the FTC may be in a much better position than I to gauge the public interest, as the term is used in Section 5(b) of the Act, 15 U.S.C. § 45 (b), because (a) it will have the benefit of a more complete hearing than was held before me, (b) it has the ability according to statute to view the public interest in terms of a possible permanent cease and desist order rather than only in terms of a temporary order of cessation, and (c) it has the benefit of long years of experience as well as expertise in assessing statements with respect to their truthfulness and/or deceptiveness.

In view of all of the foregoing, I decline to grant the injunctive relief sought in the application of the petitioner. This does not constitute a ruling on the merits of the FTC's claims as they now appear before the administrative tribunal.

It is so ordered and decreed.

STATE OF CALIFORNIA EX REL. C. B. CHRISTENSEN, ET AL. v. F.T.C., ET AL.*

Civ. A. No. C–74–1927 RHS. F.T.C. Docket No. 8988

(United States District Court, Northern District of California, October 29, 1974)

In an action seeking a temporary restraining order and a preliminary injunction to restrain the F.T.C. from proceeding further in Docket

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep., ¶ 75,328 at 98,038 [1974–2 Trade Cases].

8988, the Court held that there was substantial probability that the Commission was without jurisdiction to proceed against a private firm aiding the state in carrying out the questioned conduct. The Court rejected the Commission's contention that the court should not take jurisdiction until respondents had exhausted their administrative remedy under the exception to exhaustion requirement. The question was whether the Commission had jurisdiction over a state, a question that may be most efficiently and promptly resolved as a matter of statutory construction.

Donatas Januta, for State of California; *William A. Wineberg, Jr.*, of *Broad*, *Khourie & Schulz*, for Calif. Milk Producers Advisory Board and *Cunningham and Walsh, Inc.*, for plaintiffs.

Robert J. Duncan (argued), for F.T.C., defendants.

Before SCHNACKE, *District Judge.*

Findings of Fact

SCHNACKE, D. J.: 1. This action is brought by the State of California on behalf of C. B. Christensen, Director of Food and Agriculture (a civil executive officer of the State); the California Milk Producers Advisory Board (an advisory board established pursuant to the California Marketing Act of 1937 [Cal. Food & Ag. Code §§ 58601–59293] to assist the Director of Food and Agriculture in the administration of a marketing order for research, education, and promotion of market milk and dairy products in California, issued on October 8, 1969); and Cunningham and Walsh, Inc. (an advertising agency which in all matters here involved, has acted as the agent of the State). The defendant Federal Trade Commission is an independent agency of the United States Government, and the individual defendants in this action are the current members of the Federal Trade Commission and an administrative law judge thereof, who are sued solely in their capacity as Commission members or as administrative law judge.

2. On August 1, 1974, an administrative complaint was issued by the Federal Trade Commission, Docket No. 8988, naming as respondents the California Milk Producers Advisory Board and Cunningham and Walsh, Inc. The complaint was served upon the respondents, whose answer to the complaint was due before the Federal Trade Commission on September 13, 1974. In the FTC complaint certain advertisements promoting the sale of milk were alleged by the Commission to be false and misleading in violation of Sections 5 and 12 of the Federal Trade Commission Act. This action seeks a permanent injunction and a declaratory judgment against the FTC's proceeding with its administrative complaint in Docket No. 8988 upon the grounds that Congress

has not granted the FTC jurisdiction over states, state agencies, state instrumentalities, or state officers acting in their official capacities.

3. On September 11, 1974, this Court granted a temporary restraining order enjoining the Commission from proceeding for a period of 10 days. A hearing on plaintiff's application for the granting of a preliminary injunction was held on September 20, 1974. Plaintiffs have submitted a memorandum of points and authorities in support of their complaint, a reply memorandum, an affidavit (including exhibits) of William A. Wineberg, Jr. and a supplemental affidavit (with exhibits) of William A. Wineberg, Jr. The FTC has submitted a memorandum of points and authorities together with an affidavit (with exhibits) of Gerald E. Wright. The matter was argued on September 20, 1974, by a deputy of the Attorney General of the State of California, counsel for the California Milk Producers Advisory Board and Cunningham and Walsh, Inc., and Federal Trade Commission counsel.

4. The Advisory Board is an instrumentality of the State of California established to assist and advise the Director of Food and Agriculture in fulfilling his statutory duties under the Marketing Act. The Director of Food and Agriculture of the State of California and the State of California are the real parties in interest herein.

5. Since 1972, when the FTC investigation which led to the issuance of the administrative complaint commenced, the Director of Food and Agriculture, the Attorney General of the State of California, and counsel to the Advisory Board and Cunningham and Walsh, Inc., have repeatedly, by letter and legal memoranda, advised the FTC of the status of the Advisory Board under California law and the fact that the advertising in question has been authorized and issued by the Director of Food and Agriculture under the Marketing Order.

6. Cunningham and Walsh, Inc. has acted as the agent of the State in the preparation of the advertising materials.

7. The aggregate effect of the delay, expense, and uncertainty which would result from resort to the administrative process herein would result in irreparable injury to the plaintiffs herein, and the balance of hardships tips decidedly in favor of a prompt judicial resolution of this jurisdictional dispute.

Conclusions of Law

1. The jurisdiction of the Federal Trade Commission under the Federal Trade Commission Act extends to "persons, partnerships, or corporations" [15 U.S.C. § 45(a)(6)]. The definition of corporation includes an "association, incorporated or unincorporated . . . which is organized to carry on business for its own profit or that of its members" [15 U.S.C. § 44]. Neither the Federal Trade Commission Act nor

its legislative history indicates that states, state agencies, state instrumentalities, or state officers in their official capacities were intended by Congress to be included within the terms "persons, partnerships, or corporations."

2. There is a substantial probability that: (1) there is no jurisdiction in the Federal Trade Commission to proceed against the State of California, its instrumentalities, its agencies, or its officers in their official capacities [*Parker* v. *Brown*, [1940–1943 TRADE CASES ¶ 56,250], 317 U.S. 341 (1943); *New Mexico* v. *American Petrofina, Inc.* [1974–2 TRADE CASES ¶ 75,179], 501 F. 2d 363 (9th Cir. July 17, 1974)]; and (2) the FTC may not avoid this fact by seeking to proceed instead against a private corporation—here, Cunningham and Walsh, Inc.—aiding the State in carrying out the conduct in question [*E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Auth.*, [1966 TRADE CASES ¶ 71,811], 362 F. 2d 52, 56 (1st Cir. 1966)].

3. The Federal Trade Commission claims that this Court should not assert jurisdiction herein until the respondents have exhausted their administrative remedies before the Commission. While this is the general rule [see *Myers* v. *Bethlehem Ship Building Corporation*, 303 U.S. 41 (1938)], there are several well-established exceptions to this requirement [see *Lone Star Cement Corporation* v. *Federal Trade Commission* [1964 TRADE CASES ¶ 71,322], 339 F. 2d 505, 510 (9th Cir. 1964); *Borden, Inc* v. *Federal Trade Commission*, 1974–1 TRADE CASES ¶ 75,036 (7th Cir. 1974)]. The exception to the exhaustion requirement recognized in *Leedom* v. *Kyne*, 358 U.S. 184, 188–189 (1958), is fully applicable here, since the Commission is apparently exceeding its jurisdiction by seeking to subject the State of California to an administrative trial. The issue appears to be a simple question of statutory interpretation which does not require agency expertise in making factual determinations [see *Borden, Inc.* v. *FTC*, *supra*].

Significantly, in *Myers*, *supra*, and *Lone Star Cement*, *supra*, the issue was whether a proposed respondent which was a private entity was engaged in interstate commerce—a clear factual question relating to subject matter jurisdiction. There is no contention here that exhaustion is not required with respect to such issues. Here the question is whether the Commission has jurisdiction over a state, and it is thus akin to questions of *in personam* jurisdiction. It is the opinion of the Court that this type of question may be most efficiently and promptly resolved as a matter of statutory construction and that there would be no justification to delay that decision by resort to the administrative process.

For the reasons set forth above, the Court has determined that it should issue a preliminary injunction prohibiting the FTC, its Commissioners and its administrative law judge, Daniel J. Hanscom, from proceeding further against the plaintiffs herein Docket No. 8988, by requiring them to appear, answer the administrative complaint, or otherwise defend the administrative proceeding until such time as the question of whether the FTC has jurisdiction to proceed against the respondents California Milk Producers Advisory Board and Cunningham and Walsh, Inc., is finally resolved in this case. In view of the nature of this case and the parties hereto, the Court finds a filing of a bond is unnecessary.

JOHN BODNER, JR. AND SHELL OIL CO. v. F.T.C., ET AL.*

Civ. A. No. 74–1189. F.T.C. File No. 99–187.

(United States District Court, District of Columbia, October 31, 1974)

On motion to quash subpoena issued in Freedom of Information Act action and for protective order, court held that the F.T.C. had made an adequate and thorough search for requested documents and further discovery would have constituted an annoyance to the Commission; discovery was denied because it would have circumvented the reason for the exemption of intra-agency memoranda covering the factual basis on which the Commission had refused to disclose documents dealing with environmental factors.

William Simon, Washington, D.C., for plaintiffs.
Michael J. Ryan, Washington, D.C., for defendants.
Before FLANNERY, *District Judge.*

ORDER

FLANNERY, D. J.: This matter is before the court on defendants' motion to quash plaintiffs' subpoena of Roger J. Fitzpatrick and for a protective order. Plaintiffs filed opposition to this motion, the court conducted an oral hearing, and the parties have submitted supplemental memoranda.

This action was filed August 5, 1974, seeking injunctive relief under the Freedom of Information Act, 5 U.S.C. § 552. The controversy arose out of the Federal Trade Commission's promulgation of a trade regulation rule relating to the posting of research octane ratings on gasoline dispensing pumps. In its statement of basis and purpose the Federal Trade Commission, as one reason for the rule, stated "the use of a gasoline which is either too high or too low in octane rating for that particular autombile tends to create excessive emissions which contribute to air pollution." 36 Fed. Reg. 354, 363 (1971). The Federal Trade Commission stated with regard to the entire statement of basis and purpose that it had "considered all matters of fact, law, policy, and discretion including the data, views, and arguments presented on the Record." *Id.* at 355; see *id.* at 364.

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 75,329 at 98,040 (1974–2 Trade Cases).

On April 24, 1974, plaintiff requested from the Federal Trade Commission any items considered by the Commission in promulgating the trade regulation rule which dealt with environmental factors. See Complaint at 8. After a Commission-wide search the Federal Trade Commission agreed to turn over certain documents upon payment of a search fee [1] but stated that it was withholding three memoranda under the intra-agency memoranda exemption to the Freedom of Information Act. See 5 U.S.C. § 552(b)(5). Suit subsequently was instituted.

Since this action was commenced, plaintiffs have engaged in various discovery including two depositions of Federal Trade Commission officials and a number of interrogatories. This discovery has been designed primarily to ascertain the thoroughness of the Commission's search for documents. Defendants have moved to bar further discovery regarding the Commission's search. In support of their position defendants have filed extensive affidavits regarding the Commission search. Plaintiffs contend that the two depositions they have taken thus far have not been fruitful because the Federal Trade Commission has failed to produce persons most knowledgeable about the search. Thus, they seek to depose Mr. Fitzpatrick whom, after previous discovery, they believe has the most knowledge concerning the Commission's search. Plaintiffs also want leave to conduct additional limited discovery, probably in form of requests for admissions, to eliminate any possible questions that arise after deposing Mr. Fitzpatrick.

Plaintiffs' opposition to defendants' motion also rests on a second ground. Plaintiffs contend that they are entitled to additional discovery, not concerning the adequacy of the search, but rather to probe "the factual premises underlying the FTC's claimed privileges. . . . If the FTC is asserting a privilege on the rationale that no part of any of the documents was adopted as policy or as an interpretation by the Commission, plaintiffs are entitled to probe the factual validity of this assertion before being flatly denied access." Memorandum in Opposition to Defendants' Motion to Quash Plaintiffs' Subpoena and for a Protective Order at 7, filed October 3, 1974. Plaintiffs believe that the Federal Trade Commission relied upon a large secret record as well as the public record in promulgating the trade regulation rule. Thus, plaintiffs desire an opportunity to depose Mr. Fitzpatrick because "he is in a position to describe with some degree of accuracy the procedures followed by the Federal Trade Commission in promulgating the Octane Rule." Supplemental Memorandum in Opposition to Federal Trade Commission's Motion to Terminate All Discovery at 7, filed October 10, 1974; *see id.* at 8.

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[1] Plaintiffs are contesting the imposition of a search fee but for the purpose of this motion the court need not consider that issue.

The court will deal first with plaintiffs' contention that they need additional discovery concerning the adequacy of the Commission-wide search. Under *National Cable Television Association, Inc.* v. *FCC*, 479 F. 2d 183, 192–93 (D.C. Cir. 1973), the Commission was required to make a reasonable effort to identify the material in plaintiffs' request. And the court expressly endorsed the use of civil discovery to compel an agency to identify and disclose the documents that it has. *Id.* at 193. However, under *National Cable*, the agency is required only to make a reasonable search and plaintiffs may undertake discovery only to assure that such a search has been made. It appears to the court that the discovery plaintiffs have undertaken thus far, together with defendants' affidavits and other documentation, demonstrate that the Commission's search has been thorough and adequate. Charles A. Tobin of the Federal Trade Commission alerted all divisions of the Federal Trade Commission to search for the requested documents and the affidavits of Messrs. Thuot, Fitzpatrick, and Pfiefer demonstrate further the search that was undertaken. *See* Addenda 1–4, filed September 20, 1974. Any further discovery concerning the search would constitute an annoyance to the Federal Trade Commission staff and simply is unnecessary to careful resolution of the issues plaintiffs raise. Consequently, a protective order will issue barring further discovery into the Federal Trade Commission search. See generally *Exxon Corp.* v. *FTC* [1974–2 TRADE CASES ¶ 75,194], Civil Action No. 1928–73 (D.D.C., filed Aug. 14, 1974) (limiting discovery when agency demonstrates that a reasonable search has been made).

Plaintiffs' second ground for opposition to defendants' motion is that absent such discovery they will be unable to contest the factual premises underlying the Federal Trade Commission's claimed privileges. Plaintiffs cite no authority which has sanctioned the type of discovery herein sought.[2] Exemption 5 was established in part as a "bar against probing the mental processes of an executive branch decision maker. . . ." *Montrose Chemical Corp.* v. *Train*, 491 F. 2d 63, 69 (D.C. Cir. 1974). As such it continued the rule established by the *Morgan* cases of the 1930s. *Id.* To allow plaintiffs to continue discovery in order to determine the factual premises underlying the claimed exemptions or to determine the Federal Trade Commission's procedures in promulgating the rule would be a means of circumventing the protection afforded by Exemption 5. See *Washington Research Project, Inc.* v. *H.E.W.*, Civil Action No. 74–1027 (D.C. Cir., Sept. 12, 1974) (slip at 16).[3]

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[2] The *National Cable* case on which plaintiffs heavily rely sanctioned discovery only into the agency search, not into the factual premises underlying a claim of privilege.

[3] Nothing stated herein should be taken to indicate that the court has determined that the Federal Trade Commission's claim of privilege in the instant case has been properly raised. That decision must await proper briefing and argument by both sides.

The District of Columbia Circuit has recognized that a party arguing that a claim of exemption should be disallowed in a particular case is faced with considerable difficulty.

> [I]t is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. In many, if not most, disputes under the FOIA, resolution centers around the factual nature, the statutory category, of the information sought.

Vaughn v. *Rosen*, 484 F. 2d 820, 823 (D.C. Cir. 1973), *cert. denied*, 94 S. Ct. 1564 (1974). Accordingly, the Court of Appeals set forth rules regarding agency indexing of documents so that the arguments by the requesting side might be more effective.[4] In addition, there is the possibility that *in camera* review might be undertaken. The court feels that these procedures, if carefully followed by all sides, should allow the court to resolve correctly the claimed exemptions in this case, notwithstanding plaintiffs' list of disputed "factual presumptions." See Supplemental Memorandum, *supra* at 4–7.

Accordingly, it is by the court this 3rd day of October, 1974,

Ordered that defendants' motion to quash plaintiffs' subpoena of Roger J. Fitzpatrick and for a protective order be, and the same hereby is, granted; and it is further

Ordered that there shall be no further discovery in this case; and it is further

Ordered that plaintiffs respond to defendants' motion to dismiss or in the alternative for summary judgment on or before November 18th, 1974.

GIFFORD-HILL & COMPANY, INC. v. F.T.C., ET AL.*

Civ. A. No. 74–1265. F.T.C. Docket No. 8989.

(United States District Court, District of Columbia, November 13, 1974)

1. Probability of Prevailing on Merits, Showing of Irreparable Harm, and Public Interest Are Considerations Governing Issuance of Preliminary Injunctions

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[4] The court has had no occasion at this juncture to consider whether the Index provided by the agency in this case is adequate. However, from the face of the Index it appears that all items in the Memoranda which refer to environmental considerations concern facts in the public record or facts which, on payment of fees, the Commission will deliver to plaintiffs. Thus, it appears unlikely that the memoranda formed the sole basis for the Commission's decision. Compare *American Mail Line Ltd.* v. *Gulick*, 411 F.2d 696 (D.C. Cir. 1969). See also *Washington Research Project, Inc.* v. *H. E. W.*, *supra*, at 17; *Pacific Architects & Engineers, Inc.* v. *Renegotiation Bd.*, Civil Action No. 73–2093 (D.C. Cir., Oct. 8, 1974) (slip at 5–6).

***Reported in 389 F. Supp. 167 (1974). *Aff'd* D.C. Cir., 523 F. 2d 730 (1975), see p. 1537 herein. For case before the Commission, see 88 F.T.C. 441.**

Considerations governing issuance of a preliminary injunction are whether movants have shown a substantial probability of prevailing on merits, whether movant has shown that irreparable harm will follow if injunction does not issue, whether issuance of a preliminary injunction substantially harms other parties to proceedings, and where the public interest lies.

2. THE POLICIES OF THE CLAYTON AND F.T.C. ACTS ARE STILL IN FORCE AND EFFECT INASMUCH AS THE N.E.P.A. HAS NEITHER AMENDED NOR REPEALED ANY OTHER FEDERAL STATUTE

Inasmuch as the National Environmental Policy Act has neither amended nor repealed any other federal statute, it follows that the policies of the Clayton Act and the Federal Trade Commission Act are still in force and effect.

3. PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT APPLIES TO FEDERAL ACTION HAVING A REASONABLE SUBSTANTIAL RELATIONSHIP TO QUALITY OF THE ENVIRONMENT

Provisions of National Environmental Policy Act requiring, inter alia, preparation of an environmental impact **[168]** statement in connection with every recommendation or report on major federal action significantly affecting environment apply to federal action having a reasonable substantial relationship to quality of environment and include action having a direct federal impact on environment, e.g., a federal construction project, or action taken by another which will have an environmental impact and for which federal permission is required.

4. PROVISIONS OF N.E.P.A. REQUIRING PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT DO NOT APPLY TO DECISIONS OF THE F.T.C. TO PROMULGATE GUIDELINES RESPECTING CEMENT INDUSTRY

A decision of Federal Trade Commission to promulgate guidelines respecting vertical mergers in cement industry cannot be characterized as either an action which has a direct federal impact or as an action taken by another which will have such an impact, nor can decision of Commission to initiate law enforcement adjudicatory proceedings, a decision to which guidelines are but an index, be so characterized, and, thus, provisions of National Environmental Protection Act requiring preparation of an environmental impact statement in connection with every recommendation or report on major federal actions significantly affecting environment do not apply to such decisions.

5. BEFORE F.T.C. TAKES ACTION IMPLEMENTING GUIDELINES RESPECTING VERTICAL MERGERS IN CEMENT INDUSTRY, INJUNCTION WOULD NOT ISSUE TO REQUIRE COMPLIANCE WITH N.E.P.A.

Injunction would not issue to require compliance with National Environmental Policy Act before Federal Trade Commission took any action implementing its guidelines respecting vertical mergers in cement industry, including prosecution of administrative action against plaintiff, where plaintiff was not likely to succeed on its claim that decision of Commission to initiate antitrust enforcement proceedings was within range of situations to which National Environmental Policy Act was intended to apply, and plaintiff did not otherwise make a showing of possible irreparable harm, balance of harm was in favor of Commission, and public interest would be served by allowing adjudicatory hearing to proceed.

(Syllabus, with substituted captions, taken from 389 F. Supp. 167)

On motion for declaratory and injunctive relief, court held that neither the F.T.C.'s decision to file a Sec. 7, Clayton Act suit against cement industry acquisitions nor its formulation of merger guidelines for the industry were within the range of situations to which the National Enivronmental Policy Act applies. Further, because plaintiff failed to show a probability of success on the merits, there was no showing of irreparable harm, the balance of harm favored the F.T.C., and the public interest was served by a denial of the injunction, the motion for declaratory and injunctive relief was denied.

Peter J. Nickles and *John D. Taurman*, Washington, D.C., for plaintiffs.

Robert Werdig, Asst. U.S. Atty., Washington, D.C., for defendants.

Before GASCH, *District Judge.*

MEMORANDUM

GASCH, *District Judge.*.

I. The Claim

This matter is before the Court on plaintiff's motion for a preliminary injunction prohibiting certain adjudicatory proceedings before an administrative law judge of the Federal Trade Commission (FTC).[1] The plaintiff contends that such antitrust enforcement policy and procedures are subject to the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970) ("NEPA").[2]

The complaint is in four counts. Count I states that NEPA requires all agencies of the Federal Government to develop methods and procedures whereby [**169**] environmental factors may receive appropriate consideration in decisionmaking.[3] Plaintiff asserts that the FTC has specifically exempted its own law-enforcement adjudication proceedings from NEPA.[4] Plaintiff claims that this is contrary to the requirements of NEPA since the Act requires the FTC to create procedures by which adjudicatory proceedings requiring an impact statement may be identified.

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[1] The FTC believes that certain acquisitions of other companies by plaintiff are in violation both of the Clayton Act (15 U.S.C. § 18 (1970)) and of the Federal Trade Commission Act (15 U.S.C. § 45 (1970)). Administrative Complaint, In the Matter of Gifford Hill & Co., Inc., Docket No. 8989, before the Federal Trade Commission.

[2] In particular plaintiff complains of agency activity in regard to the FTC's "Enforcement Policy With Respect To Vertical Mergers In the Cement Industry," released January 17, 1967, as set forth at Trade Reg. Rep. ¶ 4520 at 6901.

[3] 42 U.S.C. § 4332(A), (B) (1970).

[4] 16 C.F.R. § 1.83(d). The Regulations specifically exempt:

> Any investigation made . . . for law enforcement purposes; any process or order issued . . . in connection with any type of investigation; any agreement of voluntary compliance or consent decree entered into by the Commission; or any adjudicatory proceedings commenced by the Commission.

Id.

The exemption specified is solely from the requirements of 42 U.S.C. § 4332(2)(C) (1970), requiring impact statements to be filed for "major Federal actions significantly affecting the quality of the human environment." *Id.* Other FTC functions are of course under NEPA. *See* 16 C.F.R. § 1.81 *et seq.*

Count II recites the FTC's alleged duty under NEPA, to consider and weigh adequately environmental concerns with respect to the continuing implementation of programs formulated before the passage of NEPA. In particular, plaintiff complains of the FTC's continuing implementation of the Cement Guidelines and the initiation and prosecution of the proceeding at issue in FTC Docket No. 8989.

Count III states that the FTC has violated NEPA in that it has not filed an environmental impact statement ("EIS") with respect to continuing implementation of the Cement Guidelines.[5] In Count IV, the plaintiff alleges that the particular adjudicatory proceeding with which it is faced is a major Federal action which requires the filing of an EIS.

On the motion for preliminary injunction, plaintiff requests that the FTC be enjoined from: 1) Taking any action implementing the Cement Guidelines, including prosecution of the administrative action involving plaintiff (FTC Docket No. 8989), unless and until the FTC has established procedures conforming to NEPA with respect to continuing implementation of its enforcement program, has considered environmental issues in connection with implementation of the Guidelines and has filed an EIS with respect to implementation of the Guidelines; 2) Taking any action prosecuting FTC Docket No. 8989 unless and until the FTC has established appropriate NEPA procedures in regard to its adjudicatory proceedings, has properly considered environmental issues in relation to prosecution of FTC Docket No. 8989 and has filed an EIS with regard to such prosecution.

II. Parties.

Plaintiff herein is Gifford-Hill and Company, Inc. ("GFH"), a corporation which has its principal place of business in Dallas, Texas. GFH and its subsidiaries are primarily engaged in the production and sale of certain construction materials, including ready-mixed concrete, aggregates, portland cement, concrete sewer and water pipe and other concrete products. Defendant Federal Trade Commission (FTC) is an agency of the Federal Government which administers several statutes regulating competitive and commercial practices. The named individual defendants are commissioners of the FTC.

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[5] Plaintiff believes that an EIS is required pursuant to the command of 42 U.S.C. § 4332(2)(C) (1970). Plaintiff, of course, thinks that continuing implementation of the Cement Guidelines is major Federal action having a significant effect on the quality of the human environment.

III. Facts.

This suit found its genesis in the FTC's decision of May, 1974, to challenge GFH's acquisition of certain companies. These acquisitions had taken place in 1967, 1970, and 1972 and included companies engaged in the manufacture of concrete products and **[170]** ready-mixed concrete and in the mining of aggregates.[6] The FTC was of the opinion that these mergers violated antitrust provisions of United States law.[7] The FTC apparently took this view because it had determined that the mergers in question were inappropriate under its guidelines respecting vertical mergers in the cement industry.[8]

The FTC advised GFH of its decision and invited attention to the possibility of settlement by a consent order procedure. Negotiations, however, were unsuccessful.[9] The main disagreement between the parties appears to have been the suggested divestiture by GFH of one of its acquisitions, Becker Sand & Gravel Co. and a ten year prohibition on acquisitions of similar firms. Becker Sand & Gravel (Becker) is a producer of mineral aggregates, including sand and gravel, and is based in North and South Carolina. Becker produces its sand and gravel by means of strip-mining operations.[9a] At some point in the negotiations, plaintiff suggested that NEPA was applicable to the FTC's adjudicatory proceedings.

Negotiations had reached an impasse and were terminated. The FTC issued an administrative complaint on August 7, 1974. This law suit was filed on August 21, 1974.

IV. Conclusions of Law.

A. Standards for a Preliminary Injunction.

[1] The considerations governing issuance of a preliminary injunction are as follows: 1) whether the movant has shown a substantial probability of prevailing on the merits; 2) whether movant has

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[6] "Construction aggregates" are sand, and gravel or crushed stone which constitute the ingredients (with cement) of concrete products such as ready-mixed concrete.

[7] 15 U.S.C. §§ 18, 45 (1970).

[8] Enforcement Policy With Respect To Vertical Mergers In the Cement Industry, released Jan. 17, 1967, *as set forth at* 1 Trade Reg. Rep. ¶ 4520 at 6901 [hereinafter cited as Cement Guidelines].

[9] The FTC's contemplated complaint had suggested divestiture by GFH of the various companies concerned and a ten year ban on similar acquisitions. This contemplated relief was eventually requested in the formal administrative complaint. Complaint in the matter of Gifford-Hill & Co., Inc., No. 8989 before the Federal Trade Commission at 8. GFH apparently rejected such relief, at least insofar as it would have applied to its acquisition of Becker Sand & Gravel Co., a mineral aggregates company. *See* Plaintiff's Complaint at 5; Memorandum In Support of Plaintiff's Motion for Preliminary Injunction.

[9a] Memorandum In Support of Plaintiff's Motion for Preliminary Injunction at 5; Affidavit of J. P. Phillips, Jr., at 2.

shown that irreparable harm will follow if the injunction does not issue; 3) whether issuance of a preliminary injunction substantially harms other parties to the proceedings and 4) where lies the public interest. *Virginia Petroleum Jobbers Ass'n* v. *Federal Power Comm'n*, 104 U.S. App. D.C. 106, 110, 259 F. 2d 921, 925 (1958). These criteria bind the Court in the present case.

B. Application of NEPA.

The sections of NEPA which purportedly govern this case,[10] require that all [**171**] agencies, to the fullest extent possible, develop methods and procedures which will permit unquantified environmental values to be considered in agency decisionmaking.[11] It also requires the preparation of an EIS in connection with every recommendation or report on legislative proposals and other major Federal action significantly affecting the environment.[12] The Court is also aware of the general policy statement which the Congress has made with regard to NEPA.[13]

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[10] 42 U.S.C. § 4332(2) (A), (B), (C) (1970). The statute reads as follows:

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes; . . . .

[11] 42 U.S.C. § 4332(2) (A), (B) (1970).

[12] *Id.* § 4332(2)(C).

[13] *Id.* § 4331. The policy statement reads as follows:

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private

(1) *Probability of Prevailing on the Merits*

The issue in this case is twofold. First, the Court must determine whether the FTC need weigh environmental factors in deciding whether to initiate an adjudicatory proceeding which has as its purpose the enforcement of United States antitrust or fair competition law. Second, assuming the answer to the first question to be affirmative, the Court must decide whether the FTC must file an EIS before proceeding with **[172]** its adjudicatory action.[14] The second aspect of the case obviously depends for its resolution upon the determination of the first aspect. The key question, then, is whether the FTC must weigh and consider environmental factors in determining whether to commence an administrative law-enforcement proceeding.

NEPA has, of course, generated much litigation. Paradoxically, however, there is a paucity of cases in point. The Court has been cited to no case that involved the application to NEPA to what was a law-enforcement adjudicatory proceeding. The Court's own researches have failed to disclose such a case. It thus appears that this is a case of first impression in the Federal system. Accordingly, the Court turns first to the legislative history of the statute to determine if the Congressional intent is clear.

The House Report [15] is not helpful since it addresses itself almost entirely to the need for a Council on Environmental Quality and the appropriate methods of operation for such a Council. The Senate Report,[16] however, contains a discussion of other provisions of NEPA.

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organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

[14] These determinations must be made within the present procedural posture of the case, *i.e.*, a motion for preliminary injunction. Any conclusions expressed by the Court are thus of necessity tentative rather than final.

[15] H.R. Rep. No. 91-378, 91st Cong., 1st Sess. (1969), U.S. Code Cong. & Admin. News, p. 2751.

[16] S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969).

After a study of that Report, however, the Court has concluded that, while helpful, the Report provides no authoritative answer to the question at issue here.[17]

The Senate Report states that the purpose of the Act is to establish

> a national policy to guide Federal activities which are involved with or related to the management of the environment or which have an impact on the quality of the environment.[18]

The Report then goes on to state the rising concern regarding the environment. By way of examples of Federal contribution to environmental degradation, it recites such things as the loss of publicly-owned beaches and open spaces to industry and commercial users, the proliferation of pesticides, the impact of airport development, water pollution and the impact of public construction projects.[19] Subsequently, in its analysis of the provisions of NEPA (then S. 1075), the Report stated:

> All agencies which undertake activities relating to environmental values, particularly those values relating to amenities and aesthetic considerations, are authorized and directed to make efforts to develop methods and procedures to incorporate those values in official planning and decisionmaking.[20]

The Report, then, does give some idea of the sort of activities at which the Act is aimed.[21] It is unfortunately silent regarding NEPA applicability to the situation now before the Court.

[2] Since the legislative history is devoid of authoritative guidance, the Court must look to case law to ascertain whether reported decisions of the courts have been sufficiently analogous to the present situation to be persuasive here. We begin this inquiry with the knowledge that NEPA has not amended or repealed any other Federal statute.[22] It follows that the policies of the Clayton [**173**] Act and the Federal Trade Commission Act are still in force and effect.

As the Court has stated, it finds no case directly in point. Plaintiff, however, seeks to convince the Court of the correctness of its views by reliance upon a number of cases which it claims are analogous. The Court will briefly discuss these cases.

First among them is *Calvert Cliffs' Coordinating Comm., Inc.* v. *A.E.C.*, 146 U.S. App. D.C. 33, 449 F. 2d 1109 (1971). There the Court dealt with AEC rules governing construction permits for power plants and the licensing of operations.[23] The Court rejected the AEC position that NEPA should be excluded from application to hearings reviewing licensing requests. The Court also required that NEPA be applied to prior continuing projects.[24] *Calvert Cliffs*, then, dealt with Government permission to build and operate major power plants. This is vastly different from the situation at bar.[25]

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[17] The Court notes, however, that the Report is of aid in reaching final conclusions regarding the Congressional intent.

[18] S. Rep. No. 91-296, *supra* note 17, at 8.

[19] *Id.*

[20] *Id.* at 20.

[21] From the legislative material quoted, it would appear that NEPA was aimed at activities of Federal agencies which have a direct impact on the environment or which are substantially related to other activities which will so impact.

[22] 42 U.S.C. §§ 4334, 4335 (1970). *See United States* v. *S.C.R.A.P.*, 412 U.S. 669, 694, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973).

In *Sierra Club* v. *Froehlke*, 486 F. 2d 946 (7th Cir. 1973), the Court considered whether an EIS filed by the Corps of Engineers was sufficient to comply with NEPA. The EIS related to the construction of a dam authorized by Congress. The procedure in question was thus a Federal construction project obviously and intimately bound up with the environment. The situation in *Froehlke* is thus distinguishable from the case at bar. The same may be said of *Hanly I*,[26] *Hanly II*,[27] and both cases entitled *Environmental Defense Fund, Inc.* v. *Corps of Engineers*.[28]

Plaintiff also relies on language in *Jones* v. *D.C. Redevelopment Land Agency*, 162 U.S. App. D.C. 366, 499 F. 2d 502 (1974). There the Court said:

> [T]he harm with which courts must be concerned in NEPA cases is not, strictly speaking, harm to the environment, but rather the failure of decision-makers to take environmental factors into account in the way that NEPA mandates.[29]

In *Jones* the Court was considering the requirements of NEPA in regard to urban renewal plans for the 14th Street area of the District of Columbia. In the Court of Appeals, however, the defendants did not contest the proposition that NEPA did apply to the Agency's activities.[30] The only question at issue before the Court was that of the appropriate time for filing the required EIS and by whom such statements should be prepared.[31] *Jones*, then, is another case in which Federal action would have a direct and apparent impact on the environment and which was obviously within the scope of NEPA.

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[23] 146 U.S. App. D.C. at 40–41, 449 F. 2d at 1116–1117.

[24] The FTC has recognized its duty in this regard. *See* 16 C.F.R. § 1.85.

[25] Similar to *Calvert Cliffs* and also vastly different from the case at bar is *Greene County Planning Bd.* v. *F.P.C.*, 455 F. 2d 412 (2d Cir.), *cert. denied* 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972). *Greene County* dealt with an FPC licensing procedure in which the Power Authority of the State of New York sought FPC permission for the construction of a high-voltage power transmission line. *Id.* at 415. The court there was concerned with the question of whether the FPC could adopt an EIS prepared by the New York state agency rather than preparing its own EIS.

[26] *Hanly* v. *Mitchell*, 460 F. 2d 640 (2d Cir. 1972). The case dealt with the building of an office complex, with jail, by the Justice Department.

[27] *Hanly* v. *Kleindienst*, 471 F. 2d 823 (2d Cir. 1972). The same jail was at issue as was at issue in *Hanly I*.

[28] The two cases are to be found at 470 F. 2d 289 (8th Cir. 1972) and at 492 F. 2d 1123 (5th Cir. 1974). The Eighth Circuit case dealt with the adequacy of the EIS filed by the Corps of Engineers in connection with another dam-flood control project. The Fifth Circuit was confronted with an action by environmentalists to enjoin the construction, by the Federal Government, of a navigation project (i.e., the building of an inland waterway).

[29] 162 U.S. App. D.C. at 376, 499 F. 2d at 512.

[30] *Id.* 162 U.S. App. D.C. at 374, 499 F. 2d at 510.

[31] *Id.*

The case of *Harlem Valley Transportation Assoc.* v. *Stafford* [32] is also distin[**174**]guishable from the case at bar. *Harlem Valley* was a suit to prohibit the Interstate Commerce Commission from going forward with rail abandonment proceedings [33] unless and until the ICC staff had, prior to any hearings on the matter, submitted a draft EIS. Abandonment of a railroad line has, of course, immediate and obvious environmental effect,[34] and such abandonment cannot be undertaken without Federal permission through the ICC. *Harlem Valley* is thus a case, much like *Greene County Planning Board* v. *F.P.C.*,[35] in which Federal permission is required for actions which will have an an impact on the environment.

[3] From its study of the legislative history of NEPA and of the case law surrounding the Act, the Court has concluded that NEPA was intended to apply to Federal actions having a reasonably substantial relationship to the quality of the environment. The Court concludes that such Federal actions as are controlled by NEPA may be seen as belonging to one of two broad categories. The first of these categories is that of direct Federal impact on the environment, e.g., a Federal construction project.[36] The other category consists of actions taken by other persons which will have environmental impact and for which Federal permission is required.[37] The Court is bolstered in its conclusions by the statement of Judge Wright that NEPA applies to those situations in which

> an agency proposes to build a facility itself, [and] also whenever an agency

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[32] 500 F. 2d 328 (2d Cir. 1974).

[33] Railroads must seek and receive the permission of the ICC to abandon service on rail lines. *See City of New York* v. *United States*, 337 F. Supp. 150 (E.D.N.Y. 1972). That permission may be affirmatively given or it may be presumed by ICC inaction for a given period. *Id.* In the latter case it is subject to revocation.

[34] The abandonment would mean an increase in other forms of transport, more road usage, etc. *See City of New York*, *supra*, note 33.

[35] *See supra* note 25 and accompanying text.

[36] In this category we may include the situations found in *Hanly* v. *Mitchell*, 460 F. 2d 640 (2d Cir. 1972) (construction of an office-jail complex); *Hanly* v. *Kleindienst*, 471 F. 2d 823 (2d Cir. 1972) (same as *Hanly* v. *Mitchell*); *Environmental Defense Fund* v. *Corps of Engineers*, 470 F. 2d 289 (8th Cir. 1972) (flood control project); *Environmental Defense Fund* v. *Corps of Engineers*, 492 F. 2d 1123 (5th Cir. 1974) (building of inland waterway); *Arlington Coalition on Transportation* v. *Volpe*, 458 F. 2d 1323 (4th Cir. 1972) (construction of an interstate highway); *Jones* v. *D.C.R.L.A.*, 162 U.S. App. D.C. 366, 499 F. 2d 502 (1974) (Federal urban renewal project); *Environmental Law Fund* v. *Volpe*, 340 F. Supp. 1328 (N.D. Cal. 1972) (highway construction); *Morningside-Lenox Park Assoc.* v. *Volpe*, 334 F. Supp. 132 (N.D. Ga. 1971) (highway construction).

[37] Examples of this category are *Calvert Cliffs' Coord. Comm.* v. *A.E.C.*, 146 U.S. App. D.C. 33, 449 F. 2d 1109 (1971) (licensing and construction permits for power plants); *Greene County Planning Bd.* v. *F.P.C.*, 455 F. 2d 412 (2d Cir. 1972) (permission to erect a high-voltage power line); *Harlem Valley Transport Assoc.* v. *Stafford*, 500 F. 2d 328 (2d Cir. 1974) (abandonment of a rail line); *City of New York* v. *United States*, 337 F. Supp. 150 (E.D.N.Y. 1972) (three-judge court) (abandonment of a rail line).

makes a decision which permits action by other parties which will affect the quality of the environment.[38]

[4] The Court believes that this view of the scope of NEPA is one which permits a harmonization of the legislative history which the Court has discussed, the language of the statute, the holdings of the cases and the fact that NEPA neither amends nor repeals any other statute. The question that now confronts the Court is to determine whether the situation at bar fits either of the categories described by Judge Wright. The Court thinks it evident that the FTC action does not fit into the first of the described categories, leaving only the second category to be considered.

[175] It is well to note at the outset that the Cement Guidelines are simply a statement of the agency's views.[39] Thus the Guidelines are not regulations and do not have the force of law. They rise at most to the level of what Professor Davis would describe as "interpretive rules."[40] These Guidelines are but a pronouncement of the FTC's opinion regarding what constitutes a valid and appropriate merger under Federal antitrust law. It is a shorthand way of warning the public about those mergers which might be deemed improper by the FTC. The Guidelines attempt to relieve the public of the onerous task of making its own determination, in each case, regarding validity of a merger. The public is thus made aware of what the FTC considers an antitrust violation and of what will trigger an inquiry.

This being so, the Court does not believe that NEPA applies to the formulation and continued existence of the Guidelines themselves. Still open is the question whether NEPA applies to the decision to initiate law-enforcement adjudicatory proceedings, a decision to which the Guidelines are but an index.

The Court thinks that this is not a case in which Federal permission is required before an action can be undertaken. Business firms can (and do) merge in defiance of FTC guidelines. The merger can be carried out, although there is a risk that Federal action will later be taken to void the acquisition. That is exactly what happened in the present case. Moreover, the sand and gravel firm, Becker, which was engaged in strip-mining before its acquisition by plaintiff is still so engaged and will continue to be so engaged whether under the ownership of plaintiff or under its own aegis.

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[38] *Scientists Inst. for Pub. Info., Inc.,* v. *A.E.C.,* 156 U.S. App. D.C. 395, 404, 481 F. 2d 1079, 1088 (1973).

[39] *See* 16 C.F.R. § 17.1(a). Sec. 17.1(a) reads as follows:

> Industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. They provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry. Failure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions. Guides may relate to a practice common to many industries or to specific practices of a particular industry.

[40] K. Davis, Administrative Law Treatise, §§ 5.03, 5.04. So-called "legislative rules" are binding on the courts in and of themselves while interpretive rules are not.

Thus, it appears that FTC action, even if it results in divestiture by GFH of its interest in Becker, will have no impact on the environment. Indeed, the only possible environmental effect suggested by GFH is that it might be required itself to mine sand and gravel for its own use if it must rid itself of Becker. This, says GFH, raises the spectre of a possible proliferation of strip mines around the landscape. This spectre does not seem to the Court to be a very imposing phantom. GFH would be free, even after divestiture, to fill its needs for sand and gravel from Becker, which would presumably not spurn efforts to buy large amounts of its product. The need to launch additional strip mines seems at best to be exceedingly speculative. Furthermore, GFH is presently free to decide that it needs more mines and to cause its subsidiary, Becker, to create them. The possible proliferation of strip mines does not seem realistically related to any decision in the case before the FTC.

[5] For the foregoing reasons, the Court is of the opinion that the FTC decision to initiate antitrust enforcement proceedings against GFH is not within the range of situations to which NEPA was intended to apply. The FTC determination to take action does not seem substantially, or even reasonably, related to the quality of the human environment. Divestiture, at least in the situation here presented, is not that sort of action which will have an effect on the environment. The case might conceivably be different if FTC approval of a merger were required, but that is not **[176]** the case before the Court. For the reasons foregoing, it appears to the Court that GFH has not shown a probability of success on the merits.[41]

There are other reasons for the Court's opinion on plaintiff probability of success. Should NEPA be applied as plaintiff suggests, logic would compel its application to other situations which the Court regards as plainly beyond the ambit of NEPA. Thus, NEPA could be applied to actions of the S.E.C. requiring divestiture of stock where the securities laws have been violated. Such an action is strikingly similar to that before the Court. NEPA could also be applied to F.D.A. actions regarding prohibition of certain drugs. It could be applied to decisions of the Justice Department regarding possible institution of civil or criminal litigation (antitrust suits leap to mind). Yet the Court thinks that these situations were never intended to come under NEPA. So it is with the case at bar.

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[41] The Court is aware of the Affidavit of Mary Todd Foldes, an employee of the FTC. filed herein. Mrs. Foldes states that she has been in continuing contact with staff members of the Council on Environmental Quality and that the Council has expressed its agreement with the FTC's exclusion of its adjudicatory proceedings from the application of NEPA. This is, of course, hearsay and would not be proper for consideration at trial or on a motion for summary judgment. Professor Moore, however, states that such statements may be considered for whatever they are worth at the preliminary injunction stage of a case. J. Moore, Federal Practice (2d ed.), ¶ 65.04[3] at 65–64, 65–65. The Court is inclined to agree but found it unnecessary to base any of its present conclusions upon the Foldes affidavit. An appropriate showing of CEQ approval of FTC practices would naturally have had a persuasive effect on the Court, but the Court cannot consider the Foldes affidavit to be such a showing.

(2) *Irreparable Harm.*

The Court does not think that plaintiff has made a showing of possible irreparable harm in this case. The case of *Jones* v. *D.C.R.L.A.*[42] does not alter the Court's views in that regard. There the Court of Appeals said that the kind of harm against which NEPA was directed was not adverse consequences to the environment but rather the possibility that decisions about Federal actions would be taken without consideration of the environmental effects of such action and after a determination that the benefits would outweigh any adverse effects.[43] *Jones* was, however, a case squarely within the first of the broad categories discussed *supra;* that is, it dealt with direct Federal action affecting the environment (an urban renewal project). The Court's statement there was thus in the context of a situation in which there were obvious and direct effects on the environment. That is not the case at bar. In the present case, any environmental effect is speculative and not related to the proposed Federal action.

The only other basis for a finding of irreparable harm is plaintiff's participation in the adjudicatory proceedings. Such participation is not usually considered to be irreparable harm. *See Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24, 94 S. Ct. 1028, 39 L. Ed. 2d 123 (1974); *Myers* v. *Bethlehem Shipping Corp.*, 303 U.S. 41, 51–52, 58 S. Ct. 459, 82 L. Ed. 638 (1938).

The Court concludes that no irreparable harm, cognizable under NEPA, has been shown where any effect on the environment will neither be a result of Federal action nor permitted by Federal action but will result, if at all, from unrelated private action. No other basis for finding irreparable harm has been shown.

(3) *Balance of Harms.*

The Court has no difficulty in concluding that the balance of harms favors the FTC position here. The adjudicatory proceedings at issue here would be completely halted and a possible anti[**177**]trust violation permitted to continue if the injunction is granted. On the other side of the scale is only a remote and speculative possibility of some environmental impact at a future date as a result of completely private action.

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[42] 162 U.S. App. D.C. 366, 499 F. 2d 502 (1974).

[43] *Id.* 164 U.S. App. D.C. at 376, 499 F. 2d at 512.

It seems to the Court that the harm to the national economy within the jurisdiction of the FTC would be the greater.

(4) *Public Interest.*

Two public policies, one of encouraging competition and the other of encouraging consideration of environmental factors in decision-making, are in apparent conflict here. Upon closer examination, however, no real clash exists. NEPA, as was pointed out *supra*, was intended to apply to decisions in one of two broad categories. The situation here fits neither category. Hence, the public interest would be served by denying the preliminary injunction and allowing the FTC adjudicatory hearing to proceed.

SUMMARY

The Court concludes that plaintiff has shown none of the elements necessary for the issuance of a preliminary injunction. Accordingly, that injunction should be denied.

F.T.C. v. DAVID R. MARKIN ET AL.*

No. K 74-268 CA. F.T.C. File No. 99-182

(United States District Court, Western District of Michigan, December 10, 1974)

1. **THIRTY-YEAR OLD SUPREME COURT DECISION HOLDING TRANSPORTATION OF INTERSTATE PASSENGERS BY TAXICABS TO BE UNRELATED TO MEANING OF "INTERSTATE COMMERCE" UNDER SHERMAN ACT WAS NOT JURISDICTIONALLY DISPOSITIVE OF F.T.C. SUBPOENA ENFORCEMENT PROCEEDING**

   United States Supreme Court decision holding that transportation of interstate passengers by taxicabs to and from railroad stations in Chicago was too unrelated to interstate commerce to constitute part thereof within meaning of Sherman Act was not jurisdictionally dispositive of proceeding by Federal Trade Commission brought almost 30 years later, to enforce administrative subpoena duces tecum in connection with Commission's investigation of operation and policies of taxicab manufacturer and its subsidiaries and affiliates in Chicago area.

2. **SUBPOENA SPECIFICATIONS SHOULD BEAR REASONABLE RELATIONSHIP TO INFORMATION REQUIRED TO ASCERTAIN WHERE RESPONDENTS STAND WITH RESPECT TO ALLEGATIONS RAISED**

   Specification of subpoena duces tecum issued in support of investigations of Federal Trade Commission should bear reasonable relationship to kinds of information which are required in order to ascertain where respondents stand with respect to allegations raised by Commission.

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*Reported in 391 F. Supp. 865, (1974).

3. A SHOWING OF CONCERTED ACTION BY RESPONDENT IN COMMERCE WHICH EITHER AFFECTED FREE COMPETITION OR WAS AN INCIPIENT MENACE TO IT WAS REQUIRED TO SUBSTANTIATE F.T.C. CHARGES

Federal Trade Commission, in order to substantiate charges that taxicab manufacturer had violated Federal Trade Commission Act through activities which might be "unfair" and have effect of "restraining or foreclosing competition", was required to show that under circumstances of case concerted action in commerce had been taken which either adversely affected free competition or was an incipient menace to it.

4. EVIDENCE IN PROCEEDING FAILED TO SHOW SUBPOENA TO BE UNDULY BROAD OR BURDENSOME

Evidence in proceeding to enforce subpoena duces tecum issued in Federal Trade Commission investigation of operation and policies of taxicab manufacturing corporation and its subsidiaries and affiliates in Chicago area failed to show that subpoena was unduly broad or burdensome to respondent.

(Syllabus, with substituted captions, taken from 391 F. Supp. 865)

In proceeding to enforce subpoena *duces tecum* issued pursuant to F.T.C. investigation, court held (1) that a previous Supreme Court decision holding that taxicab transportation of interstate passengers was too unrelated to the meaning of "interstate commerce" as used in the Sherman Act was not jurisdictionally dispositive of F.T.C.'s right to conduct investigation and (2) the subpoena was not shown to be unduly burdensome or broad.

Subpoena enforced.

Robert Greene, Asst. U.S. Atty., Grand Rapids, Mich., *Robert E. Duncan*, F.T.C., Washington, D.C., for petitioner.

Lee A. Freeman, Jr., Chicago, Ill., *Alfred J. Gemrich*, Kalamazoo, Mich., for respondents.

OPINION ON PETITION FOR ENFORCEMENT OF SUBPOENA DUCES TECUM

MILES, *District Judge.*

[866] This is a proceeding initiated by the Federal Trade Commission pursuant to Section 9 of the Federal Trade Commission Act 15 U.S.C. § 49 [1] to enforce an administrative subpoena duces tecum

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[1] For the purposes of sections 41 to 46 and 47 to 58 of this title the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any

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which was issued on March 19, 1973 in furtherance of an investigatory resolution dated January 3, 1973. The resolution, the full text of which is set forth in the margin,[2] seeks:

> To determine whether or not the activities and practices by Checker Motors Corporation, Checker Taxi Cab Company, Inc., Yellow Cab Company, Inc. (Chicago), or others in connection with the regulation, ownership, and operation of taxi services, in commerce, are conducted in an unfair manner for the purpose or with the effect of restraining or foreclosing competition, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

[1] The subpoena at issue, containing 29 specifications, requests the originals or verified copies of numerous types of corporate documentation which purportedly relate to the operation and policies of respondent corporation and its subsidiaries and affiliates in the Chicago area. Respondents have consistently asserted their right to contest this subpoena, both before the Commission and this Court, and at oral argument on this matter, and contend that we are precluded from enforcing the subpoena, or in the alternative, that even if we are not so precluded, the specifications of this subpoena are such that this Court cannot properly enforce them. Citing *United States* v. *Yellow Cab*, 332 U.S. 218, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947) and *United States* v. *Yellow Cab*, 338 U.S. 338, 70 S. Ct. 177, 94 L. Ed. 150 (1949) as being res judicata here, respondents strenuously argue that we are prohibited from enforcing this subpoena. The two **[867]** cases referred to above involved allegations that the respondents herein, along with a number of others, conspired to restrain trade in violation of Sections 1 and 2 of the Sherman Anti-Trust Act in the purchase and use of taxicabs in Chicago, Pittsburgh, New York City and Minneapolis. The cases

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court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

[2] RESOLUTION DIRECTING USE OF COMPULSORY PROCESS IN NONPUBLIC INVESTIGATION. File 721 0091

Nature and Scope of Investigation:

To determine whether or not the activities and practices by Checker Motors Corporation, Checker Taxi Cab Company, Inc., Yellow Cab Company, Inc. (Chicago), or others in connection with the regulation, ownership, and operation of taxi services, in commerce, are conducted in an unfair manner for the purpose or with the effect of restraining or foreclosing competition, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation.

Authority to Conduct Investigation:

Sections 6, 9 and 10 of the Federal Trade Commission Act, 15 U.S.C. 46, 49, 50; FTC Procedures and Rules of Practice 16 C.F.R. 1.1, et seq. and supplements thereto.

involved suits by the United States alleging that the respondents herein, along with a number of other companies, conspired to restrain and monopolize interstate trade in violation of § 1 and § 2 of the Sherman Anti-Trust Act through their methods of selling taxicabs in Chicago, New York, Minneapolis and New York City, and in their operation of taxicab companies in those same cities. In the first case, the Supreme Court reversed and remanded the District Court's finding that the complaint failed to state a claim upon which relief could be granted. The second case upheld the District Court's holding after a trial on remand that the United States had failed to sustain its burden of proof with respect to the alleged anti-trust violations.

More specifically, in the first Yellow Cab case, the court held that although the government's allegations with respect to the purchase of taxicabs and the transportation of interstate passengers between railroad stations in Chicago did state a claim under the Sherman Act, the government's allegations with respect to the transportation of interstate passengers to and from stations did not, concluding that:

> . . . such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly cross no state lines; by ordinance, their service is confined to transportation "between any two points within the corporate limits of the city." . . . In short, their relationship to interstate transit is only casual and incidental. 332 U.S. 230, 231, 67 S. Ct. 1566.

It is this holding that respondents would have us apply here with the result the current line of investigation by the FTC is barred as having been authoritatively handled in a prior litigation.

While it is true that both the United States and all the respondents herein were also parties to the *Yellow Cab* cases and that the issues both there and here bear some relationship, it must be emphasized that the *Yellow Cab* decisions arose under a different statute than that guiding us here. More importantly, however, the Court in the first *Yellow Cab* decision specifically limited its decision therein in a way directly in point to the situation now facing this Court:

> We do not mean to establish any absolute rule that local taxicab service to and from railroad stations is completely beyond the reach of federal power or even beyond the scope of the Sherman Act . . .
>
> Likewise, we are not to be understood in this case as deciding that all conspiracies among local cab drivers are so unrelated to interstate commerce as to fall outside the federal ken. A conspiracy to burden or eliminate transportation of passengers to and from a railroad station where interstate journeys begin and end might have sufficient effect upon interstate commerce to justify the imposition of the Sherman Act or other federal laws resting on the commerce power of Congress. 332 U.S. 232, 233, 67 S. Ct. 1568.

We have in this case, coming almost 30 years after the *Yellow Cab* decisions, precisely the potential for change which the Supreme Court contemplated therein. In addition, in analyzing a similar *res judicata* argument, the Second Circuit has stated:

> In any event, new violations will support new proceedings dealing with different periods of time, at least where there is no indication of harassment by the Commission. See *F.T.C.* v. *Raladam Co.*, 1942, 316 U.S. 149, 62 S. Ct. 966, 86 L. Ed. 1336; 2 Davis Adminis[**868**]trative Law Treatise 570–71 (1958); cf. *Grandview Dairy, Inc.* v. *Jones*, 2 Cir., 157 F. 2d 5, *certiorari denied*, 1946, 329 U.S. 787, 67 S. Ct. 355, 91 L. Ed. 675. *Exposition Press* v. *F.T.C.*, 295 F. 2d 869, 872 (2 Cir. 1961).

Nor do any of the respondents contest the Commission's broad power to conduct investigations. (See 15 U.S.C. § 45 and Memorandum in Opposition, p. 10).

For these reasons, we conclude that the *Yellow Cab* cases are not jurisdictionally dispositive of the present litigation and that we are therefore required to proceed to a direct consideration of the issues raised by the government's petition for enforcement of its subpoena.

Respondents also argue that we should confront the jurisdictional issues here through a consideration of whether the subject matter of this investigation is sufficiently "in commerce" under § 5 of the Act to justify this investigation. A careful study of the cases, however, would seem to lead the Court to a different procedure. In *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614 (1945), the Supreme Court considered the propriety of a subpoena issued by the Department of Labor under § 9 and § 11(a) of the Fair Labor Standards Act (which incorporates § 9 of the Federal Trade Commission Act). After a survey of the cases up to that time, the Court stated:

> Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable. As this has taken form in the decisions, the following specific results have been worked out. It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. This has been ruled most often perhaps in relation to grand jury investigations, but also frequently in respect to general or statistical investigations authorized by Congress. 327 U.S. 208, 209, 66 S. Ct. 505.

The Court then applied these principles to the subpoena, and concluded at p. 213–214, 66 S. Ct. at p. 508:

> On the other hand, petitioners' view, if accepted, would stop much if not all of investigation in the public interest at the threshold of inquiry and, in the case of the Administrator, is designed avowedly to do so. This would render substantially impossible his effective discharge of the duties of investigation and enforcement which Congress has placed upon him. And if his functions could be thus blocked, so might others of equal importance.
>
> We think, therefore, that the courts of appeals were correct in the view that Congress has authorized the Administrator, rather than the District Courts in the first instance to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence upon that question, by seeking the production of petitioners relevant books, records and papers; and, in case of refusal to obey his subpoena, issued according to the statute's authorization, to have the aid of the district court in enforcing it. No constitutional provision forbids Congress to [**869**] do this. On the contrary, its authority would seem clearly to be comprehended in the "necessary and proper" clause, as incidental to both its general legislative and its investigative powers.

This holding was clarified in *U.S.* v. *Morton Salt*, 338 U.S. 632, 652, 70 S. Ct. 357, 368, 94 L. Ed. 401 (1950) as follows:

> While they may and should have protection from unlawful demands made in the name of public investigation, cf. *Federal Trade Comm'n* v. *American Tobacco Co.*, 264 U.S. 298, 44 S. Ct. 336, 68 L. Ed. 696, corporations can claim no equality with individuals in the enjoyment of a right to privacy. Cf. *United States* v. *White*, *supra*. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. Cf. *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232, 70 S. Ct. 14, 94 L. Ed. 22; *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 65 S. Ct. 235, 89 L. Ed. 187; *Wickard* v. *Filburn*, 317 U.S. 111, at 129, 63 S. Ct. 82, 87 L. Ed. 122. Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.
>
> Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. *Federal Trade Comm'n* v. *American Tobacco Co.*, supra. But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.

Although research does not indicate a Sixth Circuit ruling in this particular area, other Federal courts have had occasion to construe these principles. Citing this line of cases, the Second Circuit in *F.T.C.* v. *Standard American, Inc.*, 306 F. 2d 231 (2 Cir. 1962) stated at 234:

> The Courts have time and again held that the Commission may exercise its broad power of investigation and subpoena, prior to the filing of a complaint;

the Commission, as an administrative agency of the United States "charged with seeing" that the Act is enforced, "has a power of inquisition"; it is "more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not"; it is sufficient if the investigation is within the Commission's authority and unless the evidence sought by the subpoenas is clearly irrelevant and immaterial it is the duty of the district court to order compliance; and subpoenaed documents may be retained by the Commission for a reasonable length of time. [Footnotes omitted]

The Eighth Circuit has formulated the requisites of a successful administrative investigatory subpoena *duces tecum* in this way:

> The investigatory authority of an administrative agency is not without limitations. There is general unanimity among the courts that a subpoena meets the requirements for enforcement if the inquiry is (1) within the authority of the agency; (2) the demand is not too indefinite and (3) the information sought is reasonably relevant. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652, 653, 70 S. Ct. 357, 94 L. Ed. 401; *Oklahoma Press Publishing Co.* v. *Walling, supra*, 327 [**370**] U.S. 186, 208, 66 S. Ct. 494, 90 L. Ed. 614; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509, 63 S. Ct. 339, 87 L. Ed. 492; *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322, 77 S. Ct. 804, 1 L. Ed. 2d 852. *Adams* v. *F.T.C.* 296 F. 2d 861, 867 (8 Cir. 1961).

Specifically in point with regard to respondent's arguments on jurisdiction is *F.T.C.* v. *Gibson*, 460 F. 2d 605 (5 Cir. 1972), wherein the Court at p. 608 held that:

> The rationale of the Oklahoma Press rule is that it allows enforcement of subpoenas where the evidence necessary to establish the interstate nature of the commerce involved is in the possession of the suspected violator and can be secured only by such a subpoena. Under this rule appellants may not litigate the jurisdictional issue as a defense in a subpoena enforcement proceeding.

Beyond these general guidelines, the courts have also evolved more concrete types of methodology with which to measure the adequacy of administrative subpoenas. At least one court has utilized a comparison of the specifications in the subpoena with the investigative resolution. See *Moore Business Forms* v. *F.T.C.*, 113 U.S. App. D.C. 231, 307 F. 2d 188 (D.C. Cir. 1962). This same case shows that a guide to the relevancy of the subpoena can be found in the elements of the offenses that have been alleged by the Commission. Id.

[2, 3] What all this would appear to mean in terms of relevancy is that the specifications of the subpoena should bear a reasonable relationship to the kinds of information which are required in order to ascertain where respondents stand with respect to the allegations raised by the Commission. As mentioned, what the Commission has done here is to raise the possibility that respondents have violated 15 U.S.C. § 45 through activities which might be "unfair" and have the effect of "restraining or foreclosing competition." Broadly speaking, in order to substantiate such charges, it must be shown that under

the circumstances of the case, concerted action in commerce has been taken, which either adversely affects free competition or is an incipient menace to it. See *F.T.C.* v. *Cement Institute*, 333 U.S. 683, 68 S. Ct. 793, 92 L. Ed. 1010 (1948), *F.T.C.* v. *Texaco*, 393 U.S. 223, 89 S. Ct. 429, 21 L. Ed. 2d 394 (1968), *LaPeyre* v. *F.T.C.*, 366 F. 2d 117 (5 Cir. 1966).

[4] Before we arrive at a final disposition of this subpoena, the wide sweep of its specifications requires that we take note of some aditional factors with respect to their potential burdensomeness. The first is the nature of respondents' arguments on this issue. We have reviewed carefully the oral argument and the memoranda that have been filed here and we find that beyond citing to us the specifications which respondents consider especially onerous, they do very little to inform the Court as to the exact nature and extent of the hardship which they would impose. We are thus left with a situation very similar to that which confronted the Second Circuit in *S.E.C.* v. *Brigadoon Scotch Distributing Co.*, 480 F. 2d 1047 (2 Cir. 1973), where the Court found at p. 1056 that "appellants have been unable to show specifically how production of this information will result in harm to their business," and where the Court concluded that:

> Thus the mere suggestion by appellants of possible damage to their business activities is not sufficient to block an authorized inquiry into relevant matters. See *Newmark & Co.* v. *Wirtz*, 330 F. 2d 576, 578 (2d Cir. 1964).

Similarly, in *F.T.C.* v. *Standard American, Inc.*, *supra*, the Third Circuit found that:

> It is settled that if appellants wanted the District Court to make "appropriate provisions for assuring the minimum interference with the conduct of [their] business,"[11] they should have met their burden of showing the unreasonableness of the Commission's demand[12] and should have "made a **[871]** record that would convince [the District Court] of the measure of their grievance rather than ask [it] to assume it."[13]

> 11. *Civil Aeronautic Board* v. *Hermann*, *supra* note 9, 353 U.S. at page 323, 77 S. Ct. at page 805.
> 12. *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, note 7, 323 U.S. at pages 217–218, 66 S. Ct. at pages 509–510.
> 13. *United States* v. *Morton Salt Co.*, *supra*, note 8, 338 U.S. at page 654, 70 S. Ct. at page 369.

Respondents should produce all information demanded with the exception of those matters conceded by petitioner. Attachment "A" of "Attachments to Memorandum in Opposition to Enforcement of Subpoena Duces Tecum" (pages 2–8). In short, respondents are to be assured of confidentiality, reasonableness in acceptance of copies of documents or summaries, shortened time periods (viz. such as using 1970 in place of 1968 in Specification No. 1) and the elimination of No. 10.

In sum, on this record, we simply cannot at this time be convinced that the production of the subpoenaed information will do serious harm to respondents' business.

This is especially so in light of the forthright offers by the Commission to adapt the subpoena's specifications to the record keeping format of respondents. This intent is conveyed both by the final specification of the subpoena,[3] and by the clear expressions of the Commission's counsel at oral argument.[4] We face circumstances similar to that confronted by the District Court in the Standard American case, supra. There, as here, the investigated party was unable to show that compliance would seriously harm his operations and the Commission showed a willingness to compromise on the mechanics of compliance.[5] In this situation, the District Court concluded at 195 F. Supp. 801, 803 and was affirmed by the Third Circuit in *F.T.C.* v. *Standard American*, *supra* that:

> We will accordingly enter an Order, but point out that if it is brought to the attention of the Court that any serious hindrance to respondents' business will be caused by adherence to the provisions of the Order, we will reconsider it as to those specific instances.

We feel it is incumbent that we here do likewise. Accordingly, based on respondents' inability to substantiate their claims of burdensomeness, the Commission's willingness to tailor the specifica[**872**]tions of the subpoena to respondents' particular situation, and our earlier findings with regard to relevancy,

It is ordered:

That respondents David R. Markin and Checker Motors Corporation produce the evidence requested in the Federal Trade Commission subpoena *duces tecum* issued March 19, 1973 [with the exception of information requested in specification 10 and other modifications set forth which the Court finds not to be relevant.]

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[3] A verified statement as will show: (a) the method used for retrieval of information from books, records and other documents including, but not limited to the following areas: (1) taxicab operations, (2) taxicab maintenance, (3) taxicab fares and destinations, salaries, and all other phases of YCC's business.

[4] At the conclusion of the Commission's argument, counsel made the following statement: Finally, on the question of burdensomeness and over-broadness of the subpoena, the Commission again does not know what the respondent's records consist of. We don't know how—exactly how they are kept, how they are preserved, whether they are on automated computer tapes, whether they can be promptly reproduced, or what sort of problems are encountered in that preservation of their records. We have offered to meet with them, and in the letter in the record, as an attachment to the respondent's memorandum in opposition, Attachment A, the concluding paragraph is an offer to meet with the respondents and their attorneys, their accountants, and to examine the actual method in which they keep documents, with the hope toward narrowing the request. This offer was not accepted, The Commission is willing to meet with respondents and to, in the course of the investigation, to narrow the documents, but the Commission cannot narrow them in advance. They cannot give up the—its responsibilities to enforce the Act before it knows what it's doing before it's had access to the documents and can consider them and weigh them in the terms of its own responsibility.

[5] In the *Standard American* case, the Commission was willing to accept copies of the subpoenaed records so that the originals would not have to be sent to Washington. Here the Commission has shown considerably more flexibility. They not only will accept copies of the requested evidence, but their offer also raises the real possibility that the subpoena's scope can be modified and possibly narrowed by agreement of the parties themselves.

The parties will, prior to the production of evidence, pursuant to the Federal Trade Commission's offer, meet in a diligent and good faith effort to modify the subpoena's terms so as to make compliance with its specifications not unduly burdensome on respondents.

In the event that compliance with the subpoena's terms becomes patently vexatious and a serious hindrance to the pursuit of respondents' business, the parties may file the appropriate motions, fully supported by briefs, and the Court will reconsider those specifications thus put in issue.

It is so ordered.

FEDERAL TRADE COMMISSION v. CONSOLIDATED FOODS CORP.*

Civ. A. No. 74 Civ. 3894. F.T.C. Docket No. C–2454.

(United States District Court, Southern District of New York, December 18, 1974)

On motion for summary judgment in civil penalties action, court held that an uncontested F.T.C. affidavit established that the agency had followed the statutorily imposed procedures, and its statement, that it was proceeding under Sec. 5(m) was sufficient under liberal standards of notice pleading and that defendant's contention that F.T.C.'s failure to enumerate the facts showing compliance with procedural steps did not make the complaint defective and deprive the court of jurisdiction; a consent order requiring filing of a report of compliance within 60 days was valid and could be enforced in civil penalties proceeding even though consent agreement did not specifically require a report at this time; the F.T.C. was not required to give respondent formal notice that it was in violation of a price discrimination consent order before the agency filed civil penalties suit.

Partial summary judgment granted.

Joseph J. Gercke, Asst. Director for Compliance, Bureau of Competition, Washington, D.C. (*Salvatore F. Sangiorgi*, Atty., F.T.C., New York, N.Y., of counsel), for plaintiff.

J. Wallace Adair and *Ray S. Bolze*, of *Howrey, Simon, Baker & Murchison*, Washington, D.C., *George H. Colin*, of *Baer & Marks*, New York, N.Y., for defendant.

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*Reported in 396 F. Supp. 1344 (1974); Trade Reg. Rep. ¶ 75,431 at 98,442 (1974–2 Trade Cases). For case before the Commission, *see* 83 F.T.C. 463.

MEMORANDUM AND ORDER

Knapp, *District Judge:* In this action, brought pursuant to Sections 5(l), 5(m) and 16(b) of the Federal Trade Commission Act, as amended, 15 U.S.C. §§ 45(l), 45(m) and 56(b), and Section 11(l) of the Clayton Act, as amended, 15 U.S.C. § 21(l), the Federal Trade Commission is seeking civil penalties and equitable relief for Consolidated Foods Corporation's alleged failure to obey a final Commission Consent Order to cease and desist from discriminating in the pricing of its decorative fabric trimming and trimming accessories products. The case is now before us on plaintiff's motion for summary judgment on liability alone, Fed. R. Civ. Proc. 56, and defendant's cross motion to dismiss the complaint. Fed. R. Civ. Proc. 12(b). These motions raise the following questions:

(1) Where the Commission has in fact taken all procedural steps necessary to establish its right to bring a civil penalty action, does its failure to enumerate such steps in the complaint deprive this court of subject matter jurisdiction?

(2) Is a consent order rendered null and void by the fact that it contains a paragraph, not contained in the prior Consent Agreement, which requires the respondent to file a compliance report?

(3) In a civil penalty action under the antitrust laws, is it mandatory that the Federal Trade Commission give formal notice to the defendant[1] that it is in violation of its order prior to instituting the action?

(4) Assuming the validity of the consent order entered into between the parties, under what circumstances are the statutory defenses of cost justification and meeting competition available to defendant?

This action is one of the first to be brought by the Commission under its new statutory authority[2] to sue in its own right. Moreover, correspondence in the record between the Commission and the Attorney General indicates that the action was brought as a "test case" to define such new authority. A more extensive opinion than might otherwise be required therefore seems appropriate.

The action dates back to the Federal Trade Commission proceeding *In the Matter of Consolidated Foods Corporation*, FTC Docket No.

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[1] Although the "defendant" here was "respondent" before the Commission, it will in the interest of clarity hereinafter be referred to as "defendant" regardless of the context.

[2] 15 U.S.C. § 45(m): "Whenever in any civil proceedings involving this Act the Commission is authorized or required to appear in a court of the United States, or to be represented therein by the Attorney General of the United States, the Commission may elect to appear in its own name by any of its attorneys designated by it for such purpose, after formally notifying and consulting with and giving the Attorney General 10 days to take the action proposed by the Commission."

15 U.S.C. § 56: "Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 14 or under subsection (l) of section 5 of this act, it shall—

"(a) certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection; or

"(b) after compliance with the requirements of Section 5(m), itself cause such appropriate proceedings to be brought."

C–2454. On or before January 26, 1972, the Commission notified defendant of the commencement of an investigation to determine whether Consolidated's Conso Products Company Division had discriminated in price between its competing direct-buying retail purchasers in the distribution and sale of Conso's drapery trimmings products, in violation of subsection 2(a) of the Clayton Act, as amended, 15 U.S.C. § 13(a). Subsequently, at defendant's request, Commission staff counsel conferred with defendant's counsel to discuss a draft administrative complaint and the possibility of terminating the proceeding by consent order. These negotiations resulted in a consent agreement, executed on June 1, 1973, in which the parties stipulated that the Commission would issue, without findings, an order requiring defendant to abandon the discriminatory pricing practices which were the focus of the Commission's investigation.

The agreement contained various important provisions, among which was, in paragraph three, a waiver by defendant of:

> (a) Any further procedural steps;
>
> (b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and
>
> (c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

In paragraph six, the agreement provided that, following entry of the order by the Commission,

> . . . the order to cease and desist shall have the same force and effect and shall become final and may be altered, modified, or set aside in the manner and within the same time provided by statute for other orders. The complaint may be used in construing the terms of the order.

Finally, in paragraph 8 of the agreement, the parties recognized defendant's duty to file compliance reports:

> Officers of proposed respondent have read the proposed complaint and order contemplated hereby, and they understand that once the order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the order, and that they may be liable for a civil penalty of up to $5,000 for each violation of the order after it becomes final.

The consent agreement with proposed order and the administrative complaint were placed on the public record for 30 days until August 25, 1973, as required by the agreement. On September 12, 1973, the Commission formally issued its complaint and decision and order to cease and desist, which were subsequently served on defendant on September 26, 1973. Defendant was directed thereafter to cease and desist from

> Discriminating, directly or indirectly, in the price of [decorative fabric trimmings and trimming accessories] products of like grade and quality by selling to

any purchaser at net prices higher than the net prices charged to any other purchaser competing in fact in the resale or distribution of such products.

The order contained one additional paragraph, not included in the prior consent agreement, which required the defendant to file a compliance report within sixty days of service of the order.

By letter dated October 24, 1973, the Commission's compliance staff suggested an outline for defendant's first compliance report, due November 26, 1973. Defendant responded to this letter on October 30, 1973, by requesting a 30-day extension of time within which to submit its first compliance report. The Commission, by letter of November 6, granted defendant the 30-day extension, but asserted that such extension did not suspend or relieve defendant from its obligation to comply with the substantive portions of the order by November 26, the day on which it became final under §§ 11(c) and 11(g) of the Clayton Act as amended, 15 U.S.C. §§ 21(c) and 21(g). On December 20, defendant requested another extension of time for filing its compliance report, which was immediately granted by the Commission.

Defendant finally submitted its compliance report on January 3, 1974. The Commission, by letter dated January 17, 1974, requested an explanation as to why defendant had not discontinued use of its prior pricing and discount plan. Defendant replied in a supplemental report dated January 23, 1974 that its discount structure had not been discontinued because of its poor financial condition, the necessity of meeting competition, and the difficulty it had encountered in implementing a new and prospective computerized cost-justified pricing system.

On February 14, the Commission notified defendant of its failure "to clearly and unequivocally disclose or represent that (it) had discontinued use of the pricing program, or significant elements thereof as utilized by Consolidated before the date of finality of the order in question." The Commission again reminded defendant that Section 3.61(d) of the Federal Trade Commission's Rules of Practice provides that a respondent ". . . must in any event, be in full compliance on and after the date the order becomes final . . . ." The Commission then explicitly rejected the compliance report, found the proposed cost justification program inconsistent with the consent order, and reserved and reaffirmed "its right to seek civil penalties or otherwise enforce the provisions of this order for any past, present or continuing violation thereof."

Thereafter, having duly notified the Attorney General, the Commission instituted this suit for civil penalties, alleging that defendant's failure to discontinue its pricing system discount structure violated the consent order. The Commission seeks penalties from the date the order became final, November 26, 1973, to at least March 1, 1974, when the defendant informed the Commission that it had implemented a new discount schedule. In its motion for summary judgment, it claims that there is no material issue of fact since, as the Commission asserts, defendant has admitted in its compliance report of January 3, 1974 to the continuation of its prohibited pricing system.

Defendant urges three grounds in support of its motion to dismiss:

(1) The Court lacks subject matter jurisdiction since the Commission did not allege facts in its complaint sufficient to show compliance with the specific procedural steps outlined in 15 U.S.C. § 45(m) (1973);

(2) The complaint fails to state a claim upon which relief can be granted because the Consent Order as issued was not in fact, consented to and is therefore null and void; and

(3) The complaint fails to state a claim upon which relief can be granted because the Commission failed to notify defendant that it was in default of the consent order, prior to instituting this action.

Jurisdiction

The crux of defendant's argument for dismissal for lack of jurisdiction is that although the complaint asserts the statutory authority under which the present action was brought, it fails to enumerate the procedural steps the Commission followed pursuant to these statutes. The Commission was given this authority so as to ensure prompt enforcement of the laws within its jurisdiction. Under the statute, the Commission may itself sue to directly enforce its orders, "after formally notifying and consulting with and giving the Attorney General 10 days to take the action proposed by the Commission". P.L. 93–153, 93rd Cong., 1st Sess., (1973), Cong. & Admin. News, 1973, p. 656.

The affidavit of Ronald B. Rowe, attorney for the Federal Trade Commission, establishes that the Commission properly followed the statutorily required procedural steps. Defendant concedes this. Nevertheless, the complaint does not enumerate the facts evidencing compliance with these procedural requirements. Defendant cites *United States* v. *St. Regis Paper Company* [1966 TRADE CASES ¶ 71,662], (2d Cir. 1966) 355 F. 2d 688, as authority for its contention that a failure to plead jurisdictional facts deprives the court of jurisdiction. The *St. Regis* case is clearly distinguishable. There, the Commission had not, as required by 15 U.S.C. § 56, certified the case to the Attorney General. Since the Commission had failed to follow the statutory mandate, which the court concluded was jurisdictional the Attorney General had no authority to institute suit. The case did not, as does ours, involve any question of the sufficiency of the pleadings.

The present liberal rules of pleading embodied in Rule 8 of the Federal Rules of Civil Procedure, were promulgated to provide flexibility and to serve as "a means to accomplish the end of a just judgment." *Maty* v. *Grasselli Chemical Co.* (1938) 303 U.S. 197, 200–201. They are intended to provide a minimum standard according to which plaintiff must give defendant fair notice of plaintiff's claim. *Conley* v. *Gibson* (1957) 355 U.S. 41, 47–8. Rule 8 requires only that a pleading contain "a short and plain statement of the grounds upon which the court's jurisdiction depends . . . and of the claim showing that the pleader is entitled to relief." These minimal requirements have been characterized as "notice" pleading. 2A Moore's Federal Practice ¶ 8.03. Under notice pleading, courts have consistently held that it is no longer necessary to state "facts" as long as fair notice of the claim is given to the opposing party. *Nagler* v. *Admiral Corp.* [1957 TRADE CASES ¶ 68,839], (2d Cir. 1957) 248 F. 2d 319; *Oil, Chemical & Atomic Workers International Union* v. *Delta Refining Co.* (6th Cir. 1960) 277 F. 2d 694; *Louisiana Farmers' Protective Union, Inc.* v. *Great Atlantic & Pacific Tea Co. of America, Inc.* [1940–1943 TRADE CASES ¶ 56,239], (8th Cir. 1942) 131 F. 2d 419. This liberal reading of the notice requirement has largely resulted from the expansive pretrial devices for discovery. 2A Moore's Federal Practice ¶ 8.13.

The complaint clearly meets the liberal standards of notice pleading, since it states the statutory authority under which the present action is brought. Furthermore, the pleading of jurisdiction in this manner conforms with the form recognized as correct when the federal government or one of its agencies is suing. 2A Moore's Federal Practice ¶ 8.07[2], n. 2. Defendant's motion to dismiss on the ground of insufficient jurisdictional pleading must, accordingly, be denied.[3]

Validity of the Consent Order

Defendant asserts that the complaint fails to state a claim upon which relief can be granted since the consent order upon which the suit is based is not the same as the proposed order agreed to by defendant. Specifically, it contains an additional paragraph, not contained in the consent agreement, requiring the submission of a compliance report within sixty days of service of the order. For the reasons set forth below, defendant's motion to dismiss on this ground must also be denied.

Defendant relies primarily upon *Swift & Co.* v. *United States* (1928) 276 U.S. 311, 323–4 and *United States* v. *Armour & Co.* [1971

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[3] Even if defendant's argument were valid, the remedy of dismissal would be too drastic, since one of the motivating forces behind the Federal Rules was to prevent dismissal for technical defects. Wright and Miller, Federal Practice and Civil Procedure, § 1343. Dismissal is especially inappropriate in light of the provision in 28 U.S.C. § 1653 allowing amendment of technical jurisdictional defects at the trial or appellate level. Moreover, at oral argument, the Commission submitted—and the court accepted—an amendment complaint in compliance with defendant's request, which specifically enumerates the procedural steps taken prior to instituting the present action.

TRADE CASES ¶ 73,589], (1971) 402 U.S. 673, 681, as authority for the proposition that a consent decree or order issued by a federal agency is a nullity and will be set aside if it was entered into without actual consent to each and every element therein. That is a valid general principle. However, it was not here violated, and, if it had been, defendant would not now have standing to complain of the violation.

In the first place, the supposedly offending paragraph added nothing to the obligations to which defendant had agreed in the negotiations leading up to the consent order. If the order had been wholly silent on the question of reporting, the defendant would nevertheless have been obligated to file a compliance report within sixty days under § 3.61 of the Commission's Rules and Regulations.[4] Moreover, the original consent agreement specifically mentioned the pertinent provisions of the Rules and called defendant's attention to the penalties that would flow from any failure to comply.

In the second place, if defendant believed the consent order invalid because of any variance from the consent agreement, its remedy was not to disobey the order, but—within the statutory 60 days—to seek reexamination of the order by the Commission [5] and if there unsuccessful, petition for review to an appropriate Court of Appeals.[6] Defendant took no such action. Instead, nearly one month before the order became final, it requested an extension of time in which to file its compliance report, thereby in essence acknowledging the validity of the order's compliance provision.

Notice

The defendant urges as a final ground for dismissal of the complaint that the Commission, prior to instituting the present action, failed to give it formal notice that it was in violation of the order. The sole basis for the defendant's assertion that such formal notice is required prior to suit is dictum contained in *Continental Baking Co.* v. *Dixon* [1968 TRADE CASES ¶ 72,394], (D. Del. 1968) 283 F. Supp. 285. The court there stated (at 287–288):

> . . . the Commission has the obligation to determine and to inform parties whether and to what extent their conduct may be in violation of a cease and desist order. It is only after the Commission has made such a finding that the penalties contemplated 15 U.S.C. § 45(1) could be assessed. . . .

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[4] "(A) In every proceeding in which the Commission has issued an order, pursuant to the provisions of section 5 of the Federal Trade Commission Act, as amended, or section 11 of the Clayton Act, as amended, and except as otherwise specifically provided in any such order, each respondent named in such order shall file with the Commission, within sixty (60) days after service thereof, or within such other time as may be provided by the order or the rules of this chapter, a report in writing . . . setting forth in detail the manner and form of his compliance . . . ."

[5] 15 U.S.C. §§ 21(b) and 45(b).

[6] 15 U.S.C. §§ 21(c) and 45(c).

In no civil penalty suit since *Continental* in which the "notice" issue was raised has it been accepted as a valid defense. In fact, in every such instance it has been flatly rejected. See, for example, *United States* v. *J. B. Williams Company, Inc.* [1974–1 TRADE CASES ¶ 75,041], (2d Cir. 1974) 498 F. 2d 414, 434–435, *United States* v. *Beatrice Foods Co.* [1974–1 TRADE CASES ¶ 74,948], (8th Cir. 1974) 493 F. 2d 1259–6, cert. pending on other grounds, *United States* v. *Swingline, Inc.* [1974–1 TRADE CASES ¶ 74,892], (E.D. N.Y. 1974) 371 F. Supp. 37, 45. The respective courts in each of these cases considered in detail the legislative history of the penalty provisions and unanimously concluded that, especially in light of the manifest purpose behind these provisions to "streamline enforcement proceedings under the Clayton Act", *U.S.* v. *Beatrice Foods Co., supra*, 493 F. 2d at 1266, "such notice is neither required by the statutory scheme nor by the Commission's rules and procedures." *Id.*, at 1265 (quoting *U.S.* v. *J. B. Williams Co., Inc.* [1973–1 TRADE CASES ¶ 74,330], 354 F. Supp. 521, 532). This is in accord with the public statement by the Commission that "the obligation of firms to comply arises, and liability for penalties may be incurred, on the effective date of the orders." 33 F.R. 19097 (1968).

Even assuming, *arguendo*, the validity of defendant's contention, a review of the facts of this case discloses that sufficient notice was given by the Commission of its intention to hold the defendant in contempt of the order. In a letter dated February 14, 1974, the Commission informed defendant that,

> We reject your report of compliance because you have failed to establish that you discontinued the pricing practices proscribed by the order . . . .
>
> . . . The Commission expressly reserves its right to seek civil penalties or otherwise enforce the provisions of this order for any past, present or continuing violation thereof.

This letter, written nearly three months after the order became final and after the Commission had already rejected two purported compliance reports, would seem to fulfill even the extraordinary [7] notice requirements outlined in *Continental Baking Co., supra.*

Since the argument concerning notice has no basis in law or fact, the defendant's motion to dismiss on that ground must be denied.

Liability

Having concluded that a valid and binding consent order was issued, it now becomes necessary, on plaintiff's motion for partial summary judgment, to determine whether the record conclusively establishes that the defendant violated such order. The Commission contends that defendant's conceded failure—until March 1, 1974—to discontinue the discount pricing system which had triggered its original investigation violated the order. Civil penalties are sought from November 26, 1973—the date the order became final—to "at least" March 1, 1974—the date the defendant finally implemented a new discount schedule.

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[7] Judge Tyler of this District has characterized the *dictum* in *Continental* here relied upon by the defendant as an "apparent misconception of the entire statutory framework", adding, "I can only assume that [the judge in *Continental*] was thinking of something different when he wrote that sentence . . . ." *United States* v. *Ancorp National Services, Inc.* (S.D.N.Y. 1971) (unreported).

The order, insofar as here relevant, directed the defendant to cease and desist from

> Discriminating, directly or indirectly, in the price of [its] products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged to any other purchaser competing in fact in the resale or distribution of such products.

In response to the Commission's charge of non-compliance, the defendant asserts that all of its sales subject to the order on or after November 26, 1973 have been at a uniform price to all competing purchasers "except where it was necessary to lower a price in order to meet competition".[8] (Defendant's memorandum, p. 4.) The essence of defendant's position is that the continuation of its price discounts to certain customers was justified by the statutory defense of meeting competition.[9] In support of its contention, defendant has submitted several affidavits which purport to describe in detail the competitive situation with which it was faced after November 26, 1973.

Defendant cites *Federal Trade Commission* v. *Ruberoid Co.* [1952 TRADE CASES ¶ 67,279], (1952) 343 U.S. 470 for the proposition that although the instant order does not specifically refer to this statutory defense, such a defense is nonetheless implicit in its terms and is as viable as if set forth in full. There can be no doubt that *Ruberoid* conclusively establishes such a proposition. However that is not the end—but rather the beginning—of our inquiry.

Whether a defense of meeting competition is available in a given situation is a mixed question of law and fact. In this particular case the availability of that defense in the situation confronting the defendant up to and including November 26, 1973—the date of the order—could have been litigated before the Commission—subject to review by a Court of Appeals. However the defendant elected not to litigate, but to consent to an order which conclusively established that no such defense was then available. Our sole concern, therefore, is whether the affidavits before us arguably support a contention that there has been a change of circumstances since November 26, 1973, which would give rise to a defense which did not exist before then. In *Ruberoid*, the Court observed (at 476):

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[8] The defendant's memorandum also speaks of the defense of "cost justification". However, nothing in defendant's affidavits addressed itself to that defense, so it will not again be mentioned in this opinion.

[9] 15 U.S.C. § 13(b).

> If questions of justification, claimed upon the basis of facts relating to costs or meeting competition, have once been finally decided against the seller, it cannot again interpose the same defense upon substantially similar facts when the Commission seeks to show that its order has been violated.

and further (at 477):

> The same result follows where the evidence supporting the defense, although not produced in the previous proceedings, was then available to the seller. In short, the seller, in contesting enforcement or contempt proceedings, may plead only those facts constituting statutory justification which it has not had a previous opportunity to present.

For the reasons that follow, we conclude that the affidavits before us do not suggest the existence of a new post-order defense but rather rely wholly upon evidence which was "available" to the defendant at the time it consented to the order, and that accordingly the requirements set forth in the quoted portion of the *Ruberoid* opinion have not been met.

To begin with, the defendant's initial compliance report, dated January 3, 1974, contains the explicit—and highly damaging—admission that while the statutory defenses were available to it during the negotiations preceding the consent order, it failed to assert them because to do so would have been too costly:

> Although respondent contends that any such deviations [from its published list prices] were fully justified under subsections 2(a) and (b) of the amended Clayton Act, *to avoid lengthy and burdensome litigation*, respondent *elected* in 1973 to enter into an Agreement containing a Consent Order to Cease and Desist with the Commission . . . (Exhibit L to plaintiff's motion for summary judgment, at p. 7) (emphasis supplied).

Moreover, in its January 23, 1974 compliance report to the Commission—attached to plaintiff's motion for summary judgment as Exhibit N—the defendant specifically stated:

> . . . if we had not *continued* the discount to customers who had been afforded a discount price over the past several months, they would have switched to competition . . . . Under the circumstances, Conso Products had no alternative but to *continue to rely* upon its meeting competition defenses (Exhibit N, at p. 2) (emphasis supplied).

This very language was repeated verbatim in the affidavit submitted by David E. Tittle, the President of Conso Products Division of Consolidated Foods Corporation, as evidence to support his conclusion that had the defendant switched to a uniformly low pricing system as required by the order it would have incurred "substantial loss[es]." Tittle Affidavit, ¶ 17.

The defendant's affidavits continually advert to the circumstance that competitive conditions before the order were substantially similar to those existing thereafter. The phrase "vigorous price competition" is used repeatedly to characterize the competitive situation both before and after November 26, 1973—the date the order became final. For example, paragraph 3 of the Tittle Affidavit reads, insofar as here relevant:

> Conso is engaged in the manufacture and sale of decorative fabric trimmings and trimming accessories. *In the period both prior to November 26, 1973 and subsequent thereto* up to the present, Conso has experienced vigorous price competition from other manufacturers and sellers of these product lines. (emphasis supplied.)

See also paragraph 2 of Robert B. Schwartz Affidavit. Indeed, the only change in the above-described competitive situation to which these affidavits refer is the entry of the consent order itself. According to the deponents.

> Competition in the manufacture and sale of decorative and fashion trimmings and accessories has accelerated rapidly since November 1973 when competitors became aware of *the Federal Trade Commission Order* against Conso. This *has caused increasing demands from customers that Conso meet new competitive prices* or lose sales and the situation cited above of our need to meet competition since November 26, 1973 or lose sales is a *direct outgrowth* of this new competitive situation since November 1973." (emphasis supplied) Tittle Affid., ¶ 13. See also Schwartz Affid., ¶ 12.

This contention presents the question whether the Supreme Court in speaking of "a new competitive situation involving different circumstances", intended to include the entry of a cease and desist order itself as such a "new" and "different" circumstance. Such a conclusion would by hypothesis render a nullity every FTC order whether obtained upon consent or after extensive litigation. We cannot, therefore, attribute such a meaning to the Court's opinion.

Legal arguments aside, the emotional thrust of the defendant's papers is that it would be impossible for it to do profitable business under the terms of the order. Conceding that it could keep those customers who were already receiving discounts by uniformly reducing its prices to all its customers, defendant urges that such a course would be financially ruinous. However, those are precisely the contentions that the defendant should have urged before the Commission—either in argument to its staff or in formal litigation—before permitting any order to have been entered. Defendant, having neglected to urge such considerations when it had an opportunity to do so, and having consented to the entry of this particular order, may not now rely upon them as grounds for defying that order. Financial difficulty, even where "ruinous", is not a defense to an FTC penalty action, but is relevant, if at all, to the assessment of penalties. *United States* v. *Beatrice Foods Co.* [1972 Trade Cases ¶ 74,057], (D. Minn. 1972) 344 F. Supp. 104, 116, *aff'd* [1974–1 Trade Cases ¶ 74,948], (8th Cir. 1974) 493 F. 2d 1259, *cert. pending*, 43 U.S.L.W. 3008.

We are left, therefore, with the inescapable factual conclusion that defendant failed to discontinue the discriminatory pricing practices proscribed by the order. Having determined that it failed to suggest a genuine issue of fact with respect to the claimed statutory defense, we find the defendant to have been in violation of the order between November 26, 1973 and March 1, 1974. Plaintiff's motion for partial summary judgment is, accordingly, granted.

In view of the circumstances that the Commission is treating this as a test case, we will entertain an application for certification pursuant to 28 U.S.C. § 1292(b), if either party wishes to apply upon due notice to the other.

So Ordered.

LOVE TELEVISION & STEREO RENTAL, ET AL. v. FEDERAL TRADE COMMISSION*

No. 73–3898 Summary Calendar.** F.T.C. Docket C–2245
(United States Court of Appeals, Fifth Circuit, August 15, 1974)

Court of Appeals Held F.T.C. Refusal to Reopen and Modify Consent Cease and Desist Order Not Reviewable

> Refusal of Federal Trade Commission to reopen and modify its cease and desist order pursuant to consent order entered by it was not reviewable by Court of Appeals, and petition for review was dismissed, though without prejudice to request for relief in district court.

(Syllabus, with substituted caption, taken from 498 F. 2d 1088)

On petition for review, court held that F.T.C. refusal to reopen and modify a cease and desist order pursuant to consent order entered by it was not reviewable by the Court of Appeals.

Petition dismissed, without prejudice to request for relief in district court.

Walter B. McClelland, E. Speer Mabry, III, Atlanta, Ga., for petitioners.

Charles A. Tobin, Secretary, Federal Trade Commission, Washington, D.C., *Gerald Harwood, William A. Doying*, Federal Trade Commission, Washington, D.C., for respondent.

Before Gewin, Godbold and Clark, *Circuit Judges*.

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*Reported in 498 F. 2d 1088 (1974). For case before the Commission, *see* 81 F.T.C. 86, 82 F.T.C. 263 and 83 F.T.C. 823.

**Rule 18, 5th Cir. *See Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York et al.*, 5th Cir. 1970, 431 F. 2d 409, Part I.

PER CURIAM:

Petitioners seek a review of the refusal by the Federal Trade Commission to reopen and modify its cease and desist order of July 11, 1972, pursuant to a consent order entered by it. The refusal to reopen or modify the order is not reviewable by this court and the petition is dismissed. *See Martin Marietta Corp.* v. *F.T.C.*, 376 F. 2d 430, 433 (7th Cir.), *cert. denied*, 389 U.S. 923, 88 S.Ct. 237, 19 L.Ed. 2d 265 (1967); *Rettinger* v. *F.T.C.*, 392 F. 2d 454, 457 (2d Cir. 1968).[1]

Petition dismissed.

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[1] Our dismissal is without prejudice to a request by petitioners for relief in the district court. *See Rettinger* v. *F.T.C.*, 392 F. 2d 454 (2d Cir. 1968).

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JOHN BODNER AND SHELL OIL CO. v. F.T.C., ET AL.*

Civ. A. No. 74-1189. F.T.C. File No. 99-187.

(United States District Court, District of Columbia, January 9, 1975)

On motion for dismissal or summary judgment under a Freedom of Information Act request, court held that the index as submitted by the Commission did not contain a sufficiently detailed description of the documents sought nor sufficient claims for their exemption. For plaintiffs to be in a better position to argue against asserted exemptions, the Government is under an obligation to make the factual description of the documents as detailed as possible without discussing the exempted material.

William Simon, Washington, D.C., for plaintiffs.

Michael J. Ryan, Washington, D.C., for defendants.

Before FLANNERY, *District Judge*.

ORDER

Presently before the court is defendants' motion to dismiss or, in the alternative, for summary judgment, and plaintiffs' opposition thereto. This action concerns efforts to obtain disclosure under the Freedom of Information Act, 5 U.S.C. § 552, of three memoranda. Under *Vaughn* v. *Rosen*, 484 F.2d 820 (D. C. Cir. 1973), *cert. denied*, 94 S. Ct. 1564 (1974), and subsequent cases in this Circuit, defendants have submitted an index concerning the three memoranda in question. After careful consideration of the index, of the documents *in camera*, and the parties' memoranda, the court concludes that the index which has been submitted is insufficient and that defendants must submit a new one.

In *Vaughn* v. *Rosen*, *supra*, and *Cuneo* v. *Schlesinger*, 484 F.2d 1086 (D. C. Cir. 1973), the Court of Appeals for the District of Columbia Circuit stressed the necessity for the Government to index carefully documents which are alleged to fall within one of the exemptions of the Freedom of Information Act (FOIA). Such an index is necessary where there is a factual dispute as to the nature of the documents in question. *Vaughn* v. *Rosen*, *supra* at 824. The index serves at least three functions, two of which are particularly relevant in the instant case. First, the index assists the trial court in its review of often voluminous documents. In this case there are only three documents of moderate length and thus the burden on the court is minimal. Second, by setting forth a detailed description of the documents and detailed justification for withholding them, the plaintiffs are put in a better position to argue against the claimed exemption. Finally, the index assists the appellate court in review of any district court decision. The Court of Appeals recently has reaffirmed the necessity for the Government to provide a "detailed justification" for withholding documents. See *Pacific Architects & Engineers, Inc.* v. *The Renegotiation Bd.*, No. 73-2093 (D. C. Cir. Oct. 8, 1974). Repeatedly the Court of Appeals has warned against conclusory and generalized allegations of exemptions. See id. at 4; *Cuneo* v. *Schlesinger*, *supra* at 1092; *Vaughn* v. *Rosen*, *supra* at 826. While this court does not doubt the Government's good faith and efforts in preparation of the present index, it finds after a review of the documents that the index could contain considerably greater detail.

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* Not reported in Federal Reporter. Reported Trade Reg. Rep. ¶60,118 at 65,268 (1975-1 Trade Cases). See also pp. 1122 and 1227 herein.

As to document A(1), the "undated draft memorandum," the court notes several deficiencies. First, while the document is undated, from its context the agency easily could estimate the date of preparation. Second, while the agency has revealed one handwritten notation, "not used by CG," it has not revealed other handwritten notations indicating other persons who saw or used the document. These other notations also will assist in dating the document. Finally, the Government has failed to indicate who authored the document or who may have received copies of it.

As to documents A(2) and A(3) the Government has failed to provide a sufficiently detailed breakdown of the documents themselves. Concerning document A(2) the Government has described in considerable detail the appendices but has failed to break down the parts of the staff report itself. A similar detailed breakdown can be made of document A(3) without revealing any possible exempt material. The Government should provide descriptions of each part of these documents and, if a particular part falls within the request made by plaintiffs, should describe why disclosure of that part would constitute an unwarranted invasion of the deliberative or policy making processes of government.

The deficiencies in the index that have been noted above are not intended to be exclusive but rather to be examples. The Government is under an obligation to make the factual description of the documents as detailed as possible without actually revealing exempted material. In this effort the Government should describe the documents themselves, their various parts, the uses made of the documents, the people to whom the documents were transmitted, and a detailed explanation concerning why disclosure of particular documents or parts thereof would violate the FOIA. E.g. *Pacific Architects & Engineers, Inc.* v. *The Renegotiation Bd.*, *supra* at 4-5. It is insufficient for the Government to say merely that a "document reflects only the legal reasoning and deliberative process of the Commission's counsel." See Index, document A(1). This is the sort of conclusory statement which the courts repeatedly have warned against. The burden is upon the Government to provide a detailed justification for each claim of exemption. See 5 U.S.C. § 522(a)(3). See also *Pacific Architects & Engineers, Inc.* v. *The Renegotiation Bd., supra* at 4-5. Should the Government fail to supply a detailed index, the court will be forced to reopen discovery or to declare that the Government has failed in its burden to sustain its action.

The Government will have one week from the date of this Order to submit a new index. Thereafter, plaintiffs may file supplemental memoranda within a week incorporating in their argument any of the new data supplied by the Government's submission. Accordingly, it is this 9th day of January, 1975.

Ordered that defendants submit a new index of documents on or before January 17th, 1975; and it is further

Ordered that plaintiffs may submit supplemental memoranda concerning this new index on or before January 24, 1975.

FEDERAL TRADE COMMISSION v. CONSOLIDATED FOODS CORP.*

Civ. A. No. 74 Civ. 3094 F.T.C. Docket No. C—2454

(United States District Court, Southern District of New York, January 24, 1975)

On motion for certification for interlocutory appeal, court held that even though previous decision giving F.T.C. partial summary judgment in civil penalties suit raised controlling questions having ground for differences of opinion, certification would not materially advance the ultimate termination of litigation, but would in fact unnecessarily burden the appellate court.

Motion for certification denied.

Salvatore F. Sangiorgi New York, N.Y., for plaintiff.

George H. Colin, Baer & Marks, New York, N.Y., for defendant.

Before KNAPP, *District Judge:*

MEMORANDUM AND ORDER

Defendant has moved, in accordance with the suggestion made at the conclusion of the court's December 16, 1974 Memorandum and Order, for certification to the Court of Appeals—pursuant to 28 U. S. C. § 1292(b)—of the issues raised by plaintiff's motion for partial summary judgment. After conducting a hearing on defendant's application and reviewing defendant's memorandum submitted in support, it became quite clear to me that, although the December 16, 1974 Order "involves a controlling question of law as to which there is substantial ground for difference of opinion", certification would not "materially advance the ultimate termination of the litigation." 28 U. S. C. § 1ears

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* Not reported in Federal Reporter. Reported Trade Reg. Rep. ¶60,130 at 65,354 (1975-1 Trade Cases). See also pp. 1147 and 1355 herein. For case before the Commission, see 83 F.T.C. 463.

that an interlocutory appeal at this time would not save any significant amount of time or expense, and would in fact unnecessarily burden the Court of Appeals. On the one hand, affirmance of my Order would leave open many as yet unresolved questions concerning the necessity of a hearing on the matter of statutory penalties, the amount—if any—of such penalties to be assessed, and the availability to defendant of various defenses in mitigation. Reversal of my Order, on the other hand, would leave the Court of Appeals without the benefit of any rulings on these questions, thus necessitating an additional hearing before that Court should there be an appeal from my eventual final Order.

Defendant's motion for certification is, accordingly, denied.

So Ordered.

CORNING GLASS WORKS v. FEDERAL TRADE COMMISSION*

No. 73-1723. F.T.C. Docket No. 8874.

(United States Court of Appeals, Seventh Circuit, January 29, 1975)

1. STATE LAW GOVERNS MCGUIRE ACT CUSTOMER RESALE PRICE RESTRICTION CLAUSE EXEMPTION.

McGuire Act's exemption of customer resale price restriction clause in wholesaler contract depends on law of state in which resale of product by wholesaler to retailer takes place.

2. PROPOSED FORM OF ORDER ACCOMPANYING COMPLAINT GAVE RESPONDENT AMPLE OPPORTUNITY TO BE HEARD ON PROPRIETY OF ORDER.

Where complaint of Federal Trade Commission was accompanied by proposed order which Commission felt should issue if facts were found to be as alleged in complaint, motion for summary decision filed by complaint counsel some eight months after issuance of complaint sought that proposed order be entered against respondent, and respondent did not attack proposed order even though complaint counsel's motion sought complete disposition of case, respondent was given ample opportunity to be heard on propriety of order.

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* Reported in 509 F.2d 293 (1975). For case before the Commission, *see* 82 F.T.C. 1675, 83 F.T.C. 217, 85 F.T.C. 1061.

3. TO INSURE EFFECTIVE TERMINATION OF ANY VIOLATION, F.T.C. MUST BE ACCORDED BROAD DISCRETION IN FRAMING ITS ORDERS.

Federal Trade Commission must be accorded broad discretion in framing its orders to insure effective termination of any violation.

4. WITH FINDING OF ILLEGALITY OF AGREEMENT, F.T.C. WAS NOT "UNNECESSARILY PUNITIVE" IN ITS CORRECTIVE ACTIONS.

Where agreement between manufacturer of products used in food preparation and service and its wholesalers obligating latter not to sell to any reseller unless such reseller had agreed with manufacturer to maintain its fair trade prices was found illegal wherever it was not sanctioned by law of state in which resale of product by wholesaler to retailer took place, Commission's order implementing finding was not "unnecessarily punitive" in requiring that manufacturer mail copy of order to all retailers in nonsigner fair trade states, that it "encourage" its signer-only state retailers to ig[294]nore its fair trade prices, and that it refrain for three years from use of pre-price product containers and use of fair trade prices in advertisements in areas where manufacturer might not lawfully control resale prices.

5. F.T.C.'S STATUS AS AN INDEPENDENT AGENCY WITH QUASI-JUDICIAL FUNCTIONS IS IN NO WAY QUALIFIED BY FACT THAT F.T.C. EXPRESSES CONSUMER POINT OF VIEW IN CONGRESSIONAL INVESTIGATIONS INTO ANTITRUST AMENDMENTS OR EXEMPTIONS.

It is proper for Federal Trade Commission to express consumer point of view when antitrust amendments or exemptions are being considered by Congress, and its performance of that public service in no way qualifies its status as independent agency entitled to respect in discharge of its quasi-judicial functions.

6. COMPLAINT COUNSEL VIEWS MAY NOT BE USED AS BASIS FOR QUESTIONING COMMISSION MEMBERS' INDEPENDENCE.

Views of complaint counsel as reported in preface may not be used as basis for questioning independence of members of Federal Trade Commission.

(Syllabus, with substituted captions, taken from 509 F.2d 293)

On petition for review of F.T.C. cease and desist order, court held that the McGuire Act exemption of a customer restriction clause in a wholesale contract depends on the law of the state in which the resale of the product by the wholesaler to the retailer takes place.

Order affirmed and enforced.

Charles C. Parlin, Jr., New York City, for petitioner.

Norman Diamond, Washington, D. C., for *amicus curiae.*

Calvin J. Collier, General Counsel, *William A. E. Doying*, Atty., F.T.C., Washington, D. C., for respondent.

Before CUMMINGS, STEVENS and SPRECHER, *Circuit Judges.*

STEVENS, *Circuit Judge.*

[295] The Sherman Act condemns vertical as well as horizontal, agreements in restraint of trade. However, by virtue of § 2 of the McGuire Act, two types of vertical agreements—those requiring a vendee to resell at prices fixed by his vendor, and those requiring the vendee to require his customers to resell only at fixed prices—are

exempt from the antitrust laws if such agreements are lawful under applicable state law.[1] The question presented by this case is whether the state law which governs the legality of the latter type of agreement between a vendor and a vendee is that of the state where the vendee is located or that of the state or states where the vendee's customers are located. We have no doubt that the vendee's location is determinative for the latter, as well as the former, type of agreement.

I.

Corning Glass Works manufactures and distributes various trademarked products used in food preparation and service.[2] Corning sells to wholesalers located in 45 states and the District of Columbia; those wholesalers, in turn, sell to retailers who resell to consumers in all 50 states and the District.

Corning's form contract with its distributors contains a fair trade agreement obligating the wholesalers (a) to sell only at prices set by Corning, and (b) not to sell to any reseller unless such reseller has agreed with Corning to maintain Corning's fair trade prices.[3] These [295] agreements are only effective "as to each state and as to such sales where it is lawful so to agree." Since the legal effect of fair trade agreements varies from state to state, the Corning form contract has a varying impact on its wholesalers.

There are currently 14 states and Puerto Rico and the District of Columbia in which fair trade agreements are illegal as a matter of state, as well as federal law; they are described as "free trade" states.[4] The remaining 36 "fair trade" states comprise two principal types. In

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[1] Act of July 14, 1952, Pub.L.No. 542, 66 Stat. 631-632, which amended § 5(a) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(2)). There is no question that, absent such a statutory exemption, both types of vertical agreements violate § 1 of the Sherman Act (15 U.S.C. § 1) and § 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)). *See Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 386, 71 S.Ct. 745, 95 L.Ed. 1035; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 453-455, 42 S.Ct. 150, 66 L.Ed. 307; *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 377-378, 87 S.Ct. 1856, 18 L.Ed.2d 1249; *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 721, 64 S.Ct. 805, 88 L.Ed. 1024.

[2] The products are known as "Corning Ware," "Pyrex," and "Corelle." The Commission does not question the fact that these products are trademarked and are "in free and open competition with commodities of the same general class" within the meaning of 15 U.S.C. § 45(a)(2).

[3] The relevant provisions in Corning's wholesale contracts are as follows: "6. FAIR TRADE AGREEMENT—As to each state and as to such sales where it is lawful so to agree (but not elsewhere or otherwise). (a) Distributor agrees that it will not (except as specifically permitted by statute) directly or indirectly advertise, offer for sale or sell any PYREX ware or CORNING WARE products at prices less than the fair trade prices now or hereafter designated and set forth in Schedule A less discounts listed in Schedule B applicable to the products sold. . . . (b) Distributor agrees that it will not sell or transfer PYREX ware or CORNING WARE products to any reseller unless such reseller has agreed with Corning to maintain Corning's fair trade prices." "7. APPLICABLE LAW—This agreement, entered between Corning and Distributor at Corning, New York, is governed by the laws of the State of New York. The agreements contained in the Fair Trade Agreement set out in paragraph 6 hereof shall apply solely to sales, offers or advertisements only when and where agreements of the character of those therein contained shall be lawful as applied to intrastate transactions under any statute, law or public policy, now or hereafter in effect, in the state in which such resale is to be made or to which products are to be transported for such resale. In other states the prices referred to in paragraph 6 hereof are merely suggested as possible resale prices which may or may not be adopted for resale in those states in the sole discretion of the Distributor."

[4] The free trade jurisdictions are:

Alabama

Nebraska

(*Continued*)

each of the "non-signer" states the legislature has authorized judicial enforcement of fair trade prices even against sellers who have not signed a fair trade contract and has permitted the use of customer restriction clauses; there are currently 14 such "non-signer" states.[5] In the "signer-only" states—of [296] which there are currently 22—either the courts have refused, usually on state constitutional grounds,[6] to enforce the statutory remedy against non-signers, or, in some instances, no remedy against non-signers has been provided by the state legislature. In either event, in such a state a fair trade agreement is lawful although it is enforceable against the "signer only." With the exception of Maine, each of these "signer-only" states also authorizes the use of customer restriction clauses.[7]

Alaska
District of Columbia
Hawaii
Kansas
Mississippi
Missouri
Montana
Nevada
Puerto Rico
Rhode Island
Texas
Utah
Vermont
Wyoming

[5] The non-signer states are:

Arizona
California
Connecticut
Delaware
Illinois
Maryland
New Hampshire
New Jersey
New York
North Dakota
Ohio
Tennessee
Virginia
Wisconsin

A typical non-signer state fair trade act is that of Illinois:

"Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

* * * * * * *

"Sec. 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

"Sec. 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

The provision of this Act shall not apply to any contract or agreement relating to any commodity which may be sold or offered for sale to the State of Illinois or to any of its administrative agencies or political subdivisions, or to any municipality, or to any free public library, endowed library, college, university or school library in this State." Act of July 8, 1935, Laws of 1935, p. 1436, as amended by Act of June 25, 1941, Laws of 1941, p. 1115. Ill.Rev.Stat. 1973, ch. 121 1/2, §§ 188-190.

[6] *See*, for example, *Corning Glass Works* v. *Ann & Hope, Inc. of Danvers*, 294 N.E.2d 354, 361-363 (Mass.1973), holding the Massachusetts non-signer provisions invalid as an unlawful delegation of legislative power to private persons. Justice Braucher's opinion describes the trend of decisions in other states as well.

[7] The signer-only states are:

Arkansas
Colorado
Florida
Georgia
Idaho
Kentucky
Louisiana
Maine
Massachusetts
Michigan
North Carolina
Oklahoma
Oregon
Pennsylvania
South Carolina

(Continued)

The problem presented by this case has assumed significance as the number of "free trade" and "signer-only" states has increased. For it principally involves the validity of Corning's customer restriction clause as applied to wholesalers in free trade states who sell to retailers in signer-only states. Does § 2 of the McGuire Act legalize Corning's attempt to require those wholesalers to refuse to sell to retailers in fair trade states who have not agreed to maintain Corning's fair trade prices?

In Count II of its five-count complaint against Corning,[8] the Commission took the position that this requirement is a non-exempt restraint of trade forbidden by § 1 of the Sherman Act, and therefore unlawful under § 5(a)(1) of the Federal Trade Commission Act. Based on a stipulated record, the Administrative Law Judge dismissed all counts of the complaint, but on appeal the Commission unanimously reversed as to Count II and issued its cease and desist order.[9] The case is here on Corning's petition for review, claiming that the Commission misconstrued the McGuire Act and that, in all events, the Commission's order was "unnecessarily punitive." We find no merit in Corning's position.

II.

[297] [1] The decision of this case depends upon the proper construction of the words "such resale" as used in the so-called "when lawful" clause in paragraph (2) of § 2 of the McGuire Act. Before

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Indiana
Iowa
Minnesota
New Mexico
South Dakota
Washington
West Virginia

A typical signer-only state fair trade act is that of Arkansas:

"No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Arkansas by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price." Acts 1937, No. 92, § 2, p. 345; Arkansas Stat.1947, 1957 Replacement, Title 70, ch. 2 § 70-202.

[8] Count I charged Corning with using its fair trade contracts to fix free trade state wholesaler minimum resale prices whenever these wholesalers sell to a fair trade state retailer. Count III alleged that Corning has required wholesalers in signer-only fair trade states to refuse to sell to retailers who fail to sign fair trade contracts with Corning. Count IV alleged that Corning worded its fair trade contracts so as to obfuscate the circumstances in which price and customer restrictions are applicable. Count V charged Corning with establishing an illegal quantity discount schedule.

[9] The parties had stipulated that relief could also be granted on Counts I and IV if the violation alleged in Count II were found.

quoting the relevant language, it is appropriate to note that the "when lawful" clause was originally enacted as part of the antitrust exemption contained in the Miller-Tydings Act[10] in 1937 and was retained verbatim when Congress broadened the vertical price-fixing exemption in 1952.

The principal ways in which the McGuire Act broadened the exemption were (1) by including the non-signer aspects of state fair trade legislation;[11] (2) by making the exemption applicable to stipulated, as well as minimum prices;[12] and (3) by adding an exemption for agreements requiring a vendee to limit his resales to persons who agree to maintain fair trade prices.[13] This last provision—the so-called "vendee clause"—is relevant to our problem.

To facilitate our explanation of our understanding of the second paragraph of § 2 of the McGuire Act, we italicize the portions of the paragraph which were not a part of the Miller-Tydings Act, we underline the "vendee clause" and the "when lawful" clause, and we print in bold face the word "resale" which appears once in the phrase following the vendee clause and twice in the "when lawful" clause.

> (2) Nothing contained *in this Act or in any of the Antitrust Acts* shall render unlawful any contracts or agreements prescribing minimum *or stipulated* prices, *or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices,* for the **resale** of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, *when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such* **resale** *is to be made, or to which the commodity is to be transported for such* **resale.** 66 Stat. 632; 15 U.S.C. § 45(a)(2).

As originally enacted in the Miller-Tydings Act, it is manifest that the word "resale" had the same meaning each time it was used. Since the vendee clause was not then a part of the statute, the word "resale" consistently referred to the first resale by a vendee, [298] rather than to any subsequent resale by a purchaser from the vendee, for at that time the exemption covered only the terms of the minimum resale price maintenance agreement between a vendor and his immediate vendee, and made no reference to agreements restricting the vendee's right to choose his own customers.

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[10] [297] Act of August 17, 1937, ch. 690, Title VIII, 50 Stat. 693-694; 15 U.S.C. § 1.

[11] This change—made necessary by the Supreme Court's decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035—was made in paragraph (3) of § 2 of the McGuire Act.

"(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby." 66 Stat. 632; 15 U.S.C. § 45(a)(3). The "vendee" clause and the "when lawful" clause, which we construe in this case, are found in paragraph (2) of § 2, quoted in the text *infra*.

[12] Note the inclusion of the phrase "or stipulated" in paragraph (2) of § 2 of the Act, 15 U.S.C. § 45(a)(2), quoted *infra*.

[13] The McGuire Act amendments were to § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and not to § 1 of the Sherman Act, 15 U.S.C. § 1, as was the Miller-Tydings Act. Nevertheless, the changes made in the McGuire Act were clearly intended to affect § 1 of the Sherman Act as well, as the "Nothing contained in this Act or in any of the Antitrust Acts . . ." language in paragraphs (2) and (3) of § 2 indicates.

We have no doubt, therefore, that if the words "such resale" as used in the McGuire Act retain the same meaning as they did in the Miller-Tydings Act, the Commission is correct in its view that the legality of a customer restriction clause in an agreement between a manufacturer and a wholesaler is governed by the law of the state in which the wholesaler resells the trademarked article.

The question, then, is what change, if any, in the meaning of the word "resale" resulted from the insertion of the vendee clause in the forepart of the paragraph. Before attempting to answer this question, it is useful to note that the word "resale" performs two quite different functions. First, it is part of the description of the kind of agreements that are covered by the exemption, and, second, it is part of the identification of the states whose law determines whether the agreement is valid or invalid. There is no doubt about Congress' intent to modify its description of exempt agreements to include customer restriction clauses as well as price-fixing clauses. There is, however, no indication that Congress intended to make any change in the identity of the states whose laws would determine the availability of the exemption, or to have the law of more than one state applicable to any one agreement. We first consider the meaning of the word "resale" as part of the description of covered agreements and then as part of the "when lawful" clause.

To make sense out of the vendee clause, and also to retain the significance of the price-fixing clause, it is necessary to give the word "resale" a double meaning in the phrase immediately following the vendee clause.[14] For, to the extent that the phrase modifies the price-fixing clause, it obviously still refers to the first resale by the immediate vendee; but to the extent that the same phrase modifies the vendee clause, it must refer to a resale by a person who has purchased from that vendee.[15] Unless the phrase performs this dual function, either the original price-fixing exemption would have been changed or else the vendee clause would be meaningless. The word "resale" as first used in paragraph (2) of § 2, therefore, has a different meaning in the two contexts in which it modifies its two antecedent clauses.

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[14] If the same descriptive language had been used twice to describe two types of vertical agreements, it would be obvious that the word "resale" had two different meanings. Comparable meaning would be conveyed by a provision describing "(a) agreements prescribing minimum or stipulated prices for the resale of a commodity . . ., and (b) agreements requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices for the resale of a commodity. . . ." In part (a) of such a provision the word "resale" would refer to the first resale whereas in part (b) the same word would refer to a subsequent resale.

[15] Alternatively, the word "vendee" might be interpreted as referring to a retailer who purchased from a wholesaler-party to a fair trade contract with the defendant manufacturer. Under that interpretation, the word "resale" would still refer to the sale by the retailer, rather than to the wholesaler's resale.

When the same word appears in the "when lawful" clause, logically it might have either of the two meanings it first conveyed, or it might again convey a double meaning. As a matter of pure grammar, there is force to the argument that the word should be given a double meaning every time it is used, particularly since it is modified by the adjective "such" when it is repeated in the "when lawful" clause.[16]

[299] Under this reading, the word "resale" would have a double meaning every time it is used, and would make the validity of a single agreement between Corning and one of its wholesalers in a free trade state depend upon the law of at least two different states.[17] Although, purely as a matter of literal construction, the word "resale" could be given a consistent double meaning, that reading is certainly not a necessary one. When it is recalled that the original phrasing of the "when lawful" clause as it appeared in the Miller-Tydings Act used the words "such resale" to refer to the first resale by the immediate vendee, it is perfectly reasonable to retain the same construction after the addition of the vendee clause. Indeed, if we were to give the word a double meaning in the "when lawful" clause, we would unnecessarily complicate the statute and broaden the exemption.[18]

The basic purpose of the statute was to exempt certain "contracts or agreements" from the Sherman Act. The statutory language—in both the prohibitory portion of the Sherman Act and the exemptions found in the Miller-Tydings Act and the McGuire Act—focuses our attention on the agreement which is challenged.[19] In this case, that agreement is between a manufacturer and a wholesaler; it restricts the wholesaler's freedom to resell in two ways: first, it establishes the prices at which he may resell and, second, it limits the persons to whom he may resell. It would be anomalous, indeed, for Congress to provide that the lawfulness of the two restrictive clauses in the same agreement should be determined by the law of two different states.[20] It is only logical that the law of the same state should control the legality of the entire fair trade agreement and, further, that the state be the one in [300] which the vendee—in this case the wholesaler—is to make the resales described in the contract.

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[16] Although Corning argues for a literal interpretation of the clause, it does not expressly suggest that the word "resale" should be given a double meaning. On the contrary, Corning argues that the words "such resale" refer to the first resale the first time they are used in the "when lawful" clause and to the [299] second resale the second time they are used in that clause. It is, however, perfectly clear that any difference in meaning between the first and second portions of the "when lawful" clause—between contracts "lawful . . . in any State . . . in which such resale is to be made" and "lawful . . . in any State . . . to which the commodity is to be transported for such resale"—could not have been intended to have any relevance to the problem presented by this case. For, we reiterate, the vendee clause was not a part of the statute when that language was first enacted. We therefore need not express any opinion on the significance, or possible superfluity, of that clause as applied to situations not before us. *See* the discussion in the Commission opinion, Corning Glass Works, 82 F.T.C. 1675, 1759 (1973). We find neither textual nor historical support for Corning's suggestion that the word "resale" has one meaning when it is used in the first portion of the "when lawful" clause and a different meaning when it is used in the second portion of that clause. If this is not a fair statement of Corning's argument, and if it is really contending that the word refers to the second, rather than the first, resale in both parts of the "when lawful" clause, then the transport clause would be just as superfluous as Corning asserts it to be under the Commission's interpretation; for in that event, the first portion of the "when lawful" clause would compel the result for which Corning contends.

[17] The price-fixing clause would be tested by the law of the state where the wholesaler is located but the customer restriction clause would be tested by the law of the state or states where the wholesaler's customers are located.

[18] It is, of course, "common experience that identical words may be used in the same statute, or even in the same section of a statute, with quite different meanings." *Wood* v. *Dennis*, 489 F.2d 849, 853 (7th Cir. 1973), *cert. denied*, 415 U.S. 960, 94 S.Ct. 1490, 39 L.Ed.2d 575, and cases cited therein. We attach greater significance to the Supreme Court's repeated admonition that exemptions from the antitrust laws are to be strictly construed, *see, e. g., United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 316, 76 S.Ct. 937, 100 L.Ed. 1209; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348, 83 S.Ct. 1715, 10 L.Ed.2d 915, than to following a nice literal construction which is certainly not compelled by either the history or the purpose of this statute.

Corning's construction would allow a manufacturer to impose an otherwise illegal restraint upon a wholesaler in a free trade state because of the fair trade policies in effect in a state where some of his customers are located. Such construction would be inconsistent with the basic explanation of both the Miller-Tydings amendment and the McGuire Act as forms of "state's rights" legislation. Thus, in 1937 Senator Tydings noted that the bill under consideration would simply enable the states "to carry into effect *their own public policy.*"[21]

The Amendment was seen as immunizing contracts in restraint of trade where such contracts were lawful under the fair trade acts of the states "where made or where they are to be performed." S.Rep.No.257, 75th Cong., 1st Sess. 2 (1937). *See also* H.R.Rep.No. 382, 75th Cong., 1st Sess. 2 (1937). The focus was on the immunization of specific contracts and not on the immunization of a series of consensual transactions.

This underlying policy, that a contract's antitrust immunity is to be determined by looking to the law of the state where the contract is executed or to be performed, was reaffirmed in the passage of the McGuire Act. The preamble of the Act provided that its purpose was "to protect the rights of States . . . to regulate their internal affairs."[22] As Representative McGuire, sponsor of the measure, noted,

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[19] Moreover, the language of Corning's own agreement purports to make its application to the parties depend upon the law of the place "where it is lawful so to agree." One might expect this language to refer to the place where the agreement at issue was either made or is to be performed rather than to the place where persons who are not parties to the agreement conduct their business.

[20] It would be particularly anomalous to have the validity of a customer restriction clause which restrains a wholesaler in free trade state "A"—and merely affects the prices at [300] which retailers may sell in fair trade state "B"—turn on the legality of customer restriction clauses in state "B". Corning's position would be less anomalous if it made the validity of the customer restriction clause in state "A" turn on the legality of the price-fixing section in state "B". There is no way the present statutory language can be so interpreted.

[21] "[I]t should be observed, in the first place, that the bill under consideration is simply an enabling act. It permits the States, without the complications of possible violation of Federal law, to carry into effect their own public policy, and it is limited to a specific type of legislation now on the statute books of 27 States.

"These State laws are applicable only to transactions consummated wholly within the borders of the State in which the legislation is in effect, that is to say, they apply only to sales made by one person to another within the territorial confines of the State." Hearings on S. 100 before the Subcommittee of the Senate Committee on the Judiciary, "Resale Price Maintenance," 75th Cong., 1st Sess. 42 (1937).

[22] "That it is the purpose of this Act to protect the rights of States under the United States Constitution *to regulate*

(Continued)

> This bill is merely an enabling measure. . . . If a State does not believe in price maintenance, it is not forced to tolerate the practice. In the absence of State legislation authorizing price maintenance, the Federal law remains unchanged. *No State need fear any encroachment on its internal affairs by neighboring States pursuing a different policy.* 97 Cong.Rec. 13404—05 (1951) (emphasis added).

Each state has an interest in determining whether its citizens should buy and sell subject to fair trade restraints or free of such restraints. That interest is essentially the same with respect to both types of vertical restraints authorized by the McGuire Act. As Corning recognizes,[23] were it to impose a resale price restriction on resales by its Missouri [301] wholesaler, such a contract provision would violate the antitrust laws.[24] Missouri is a free trade state; Missouri's public policy is not to immunize price restrictions placed on the sales of goods by Missouri merchants. It is equally clear that Missouri has not immunized customer restrictions placed on the sale of goods by Missouri merchants.[25]

Corning incorrectly assumes that the significance of the vendee provision in its fair trade contract with wholesalers is limited to price maintenance in fair trade states.[26] But even if maintaining the retail price may be the ultimate purpose of the vendee clause, it is clearly not the clause's only effect. The clause seriously restricts the Missouri wholesaler's freedom of choice in selling to retailers located in neighboring fair trade states. Thus, the clause imposes a restraint of trade in Missouri, and is inconsistent with Missouri public policy. To paraphrase Representative McGuire, a state like Missouri should not be

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their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce." 66 Stat. 631-632; 15 U.S.C. § 45 ("Purpose of Act July 14, 1952") (1970) (emphasis added).

[23] "Corning does not in any way fix the price at which the Missouri wholesaler resells the merchandise to any customer. The Missouri wholesaler determines the price at which he sells to any of his customers—including an Illinois retailer. . . ." Brief for Petitioner at 26.

[24] Thus, where a Washington, D.C., wholesaler sold fair traded goods to a New York retailer for resale in New York, the New York fair trade act determined the antitrust immunity of price maintenance provisions. *See Mead Johnson & Co.* v. *G-E-X, Inc. of Albany*, 37 Misc.2d 491, 496-497, 235 N.Y.S.2d 951, 956-957 (Sup.Ct.1963). Where, however, a Washington, D.C., establishment sold fair traded goods directly to consumers in Maryland and New York, the manufacturers were unable to rely on the fair trade acts of those states to impose resale price maintenance. The fair trade public policy of the District of Columbia, where the resale at issue took place, governed. *See General Electric Co.* v. *Masters Mail Order Co.*, 244 F.2d 681, 684 (2d Cir. 1957), *cert. denied*, 355 U.S. 824, 78 S.Ct. 32, 2 L.Ed.2d 39; *Revere Camera Co.* v. *Masters Mail Order Co.*, 128 F.Supp. 457 (D.Md. 1955).

[25] It is clear that, absent statutory exemption, such a customer restriction clause would violate the federal antitrust laws.

> "A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which *or the persons to whom its purchaser may resell*, except as the seller moves along the route which is marked by the Miller-Tydings Act." *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 721, 64 S.Ct. 805, 812, 88 L.Ed. 1024 (emphasis added).

The Commission concluded that such customer restriction clauses would also be unlawful as a matter of state law in free trade states. 82 F.T.C. 1675, 1754 n. 9 (1973). Corning has not disputed this conclusion.

[26] As Corning states at page 28 of its brief, "Since the only purpose of the vendee provision in Corning's Wholesaler Fair Trade Agreement is to effectively maintain the price in the second resale, it follows that we must look to the law of the state in which the second resale occurs to determine the propriety of the vendee provision."

forced to tolerate a practice which its own public policy does not condone; it should not be subjected to encroachment on its internal affairs by neighboring states pursuing a different policy.[27]

The Commission's interpretation of the "when lawful" clause fully respects the public policies of the three classes of states.

a. In free trade states, the policy of preventing restraints of trade is fully vindicated. Neither a vertical price-fixing clause nor a customer restriction clause contained in a contract governing the resale in the free trade state is exempt from the antitrust laws.

b. In signer-only states, the policy of permitting vertical restraints of trade which are voluntarily assumed by contracting parties while prohibiting the imposition of involuntary restraints on noncontracting [302] parties is fully vindicated. In those states Corning may continue its price maintenance program to the extent that it is able to persuade retailers to enter into price-fixing agreements voluntarily and to induce wholesalers in those states to accept customer restriction clauses in their contracts. But Corning may not restrain the freedom of a non-signing retailer to purchase from accessible wholesalers in neighboring free trade states by imposing customer restriction clauses on such wholesalers. The involuntary restraint resulting from such a clause would offend the policies of both the free trade state and the signer-only state.[28] As the Commission noted, the fact that signer-only states no longer have or enforce non-signer legislation reflects their desire to protect non-signing merchants from involuntary restraints. It would be inconsistent with that interest to deny those retailers the right to purchase from wholesalers in free trade jurisdictions free of any restraint which they had not voluntarily accepted.

c. In non-signer states, Corning's fair trade program is essentially unimpaired.[29] Even though non-signer state retailers may now obtain goods from free trade state wholesalers without first contracting with Corning, they may not lawfully sell these items below the fair trade

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[27] Amicus Rubbermaid, Inc., argues that since goods shipped from a free trade state become subject to fair trade control upon arrival for resale in a fair trade state, "it opposes logic to invest the shippers with [fair trade control] immunity on the basis of their geographic locations." Brief for Amicus at 19 n. 14. What Rubbermaid ignores is that the determination of the antitrust immunity of an eventual price restriction upon resale in a fair trade state is logically separate from the determination of the immunity of a contractual vendee clause that imposes a serious restraint on the free selection of customers by a free trade state wholesaler. Congress' express desire to immunize specific "contracts" should not be broadly read to mean the immunization of a series of contracts simply because the end result, price maintenance, is sanctioned by a state fair trade law.

[28] In *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035, the Court recognized a comparable distinction between "price fixing by contract or agreement" and "price fixing by compulsion" (p. 388, 71 S.Ct. 747), or between "coercive" and "voluntary" schemes or arrangements (p. 394, 71 S.Ct. 745).

[29] We recognize that as a practical matter a fair trade program in a non-signer state may be impaired to the extent that a manufacturer is unwilling to assume the litigation costs associated with enforcement, particularly since such costs include the risk that a non-signer state will be judicially changed into a signer-only state, as recently occurred in North Carolina. *Bulova Watch Co., Inc.* v. *Brand Distributors of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974). Although possible infirmity in the state of the law in a non-signer jurisdiction may provide a legitimate explanation for a manufacturer's decision to avoid litigation and to use customer restriction clauses as a method of enforcing its fair trade program, such possible infirmity is not a factor we may properly assess in considering the impact of our holding in a non-signer jurisdiction. For, if the test of litigation would disclose that some jurisdictions are

(*Continued*)

price. (*See*, *e. g.*, § 2 of the Illinois Fair Trade Act, *supra* n. 5). Corning may continue to insist on vendee clauses in its contracts with non-signer state wholesalers, as such clauses are lawful under the fair trade acts of all non-signer states.

In sum, we agree with the Commission's interpretation of the McGuire Act; the exemption of a customer restriction clause in a wholesaler contract depends on the law of the state in which the resale of the product by the wholesaler to the retailer takes place. This interpretation fully respects the public policies of all three types of jurisdictions and accords with the basic federal "policy in favor of competition." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974).

III.

[2] With respect to the Order issued by the FTC in this case, Corning argues that it was not given an adequate opportunity to be heard on the terms of the final order. We disagree.

The Commission's Complaint, issued January 13, 1972, was accompanied by a proposed order, described in the accompanying Notice as "the form of Order which the Commission has reason to believe should issue if the facts are found to be as alleged in the Complaint." The Motion for Summary Decision filed by complaint counsel sought "that the order to cease and desist proposed by the Commission be entered against Respondent." This motion was served on October 2, 1972, some eight months after the issuance of the Complaint. Corning did not attack the proposed order, even [303] though complaint counsel's motion sought a complete disposition of the case. Only in its Motion for Reconsideration, filed after the Commission's decision, did Corning contest the form of the Order. While concluding that Corning's contentions were not timely, the Commission nevertheless considered, and rejected, the merits of Corning's arguments. We feel that Corning was given an ample opportunity to be heard on the propriety of the Order.

Corning, finally, contends that the Order is "unnecessarily punitive" in three respects. It objects to the requirements that it mail a copy of the Order to all retailers in the 14 non-signer fair trade states, that it "encourage" its signer-only state retailers to ignore Corning's fair trade prices, and that it refrain for three years from the use of pre-priced product containers and the use of fair trade prices in advertisements in areas where Corning may not lawfully control resale prices.

[3] The Commission must be accorded broad discretion in framing its

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improperly classified as non-signer states, the policy considerations applicable to free trade and signer-only states should be respected in those states.

orders to insure the effective termination of any violation. As we stated in *L. G. Balfour Co.* v. *F.T.C.*, 442 F.2d 1, 23 (7th Cir. 1971),

> It is well settled that the choice of the remedial order is committed to the discretion of the Commission. *F.T.C.* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392–393, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959); *Niresk Industries, Inc.* v. *F.T.C.*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883, 81 S.Ct. 173, 5 L.Ed.2d 104 (1960). Except where the remedy selected bears no reasonable relation to the unfair practices found to violate Section 5, the courts will not reverse or modify the Commission's choice. *F.T.C.* v. *National Lead Co.*, 352 U.S. 419, 428–429, 77 S.Ct. 502, 1 L.Ed.2d 438 (1957); *National Bakers Services, Inc.* v. *F.T.C.*, 329 F.2d 365, 367 (7th Cir. 1964).

[4] The Commission has met these requirements. While the retailers in the 15 non-signer states will still be required to maintain the fair trade retail prices for Corning's products, they now may purchase those products from free trade state wholesalers at non-fixed prices.[30] Thus, by requiring Corning to inform these retailers of the FTC Order, the Commission furthers the goal of removing the vestiges of past Corning violations.

Similarly, the FTC decision may open a significant source of supply for retailers in signer-only states who do not wish to maintain the fair trade price. Some of those retailers who signed fair trade contracts with Corning may have acted under the compulsion of the illegal Corning customer restriction clause in the free trade state wholesale contracts. The Commission could reasonably conclude that the most effective way to abolish the effects of this violation is to inform those signer-only state retailers whose fair trade contracts were submitted through free trade state wholesalers that "unless and until [they] enter into new retailer contracts, [they] may and are encouraged to" sell Corning's merchandise at such prices as they wish. This is what the FTC order requires.

We also agree with the Commission that any practical problems Corning may have in preventing the use of pre-marked containers and fair trade priced advertisements in areas where Corning may not lawfully fix prices are best resolved as a compliance matter, rather than by revising the language of the Order.

[5,6] Finally, we note Corning's challenge to the impartiality of the Commission because of its consistent opposition to resale price maintenance in general and legislative exemptions from the antitrust laws for this form of pricefixing in particular. There is no merit to this challenge. It is certainly proper for the [304] Commission to express the consumer point of view when antitrust amendments, or exemptions, are being considered by the Congress. Its performance of that public service in no way qualifies its status as an independent agency entitled to our respect in the discharge of its quasi-judicial functions. Moreover,

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[30] This relief was ordered based on the violation alleged in Count I of the Complaint. *See* n. 7, *supra*. The parties had stipulated prior to the FTC decision that if a violation were found on Count II, relief could be ordered on Counts I and IV as well.

contrary to Corning's argument, the views of complaint counsel as reported in the press certainly may not be used as a basis for questioning the independence of the members of the Commission itself. Indeed, we think our interpretation of the statute is strongly buttressed by the fact that it accords with the expert and experienced views of the agency charged with administration of the statutory scheme of which the McGuire Act is a part.[31]

Accordingly, we affirm and enter judgment enforcing the order of the Federal Trade Commission.

ALUMINUM COMPANY OF AMERICA, ET AL. v. FEDERAL TRADE COMMISSION, ET AL.*

Civ. A. No. 75 Civ. 17. F.T.C. File No. 99-196

(United States District Court, Southern District of New York, February 5, 1975)

1. **PLAINTIFFS HAD BURDEN OF DEMONSTRATING (1) PROBABLE SUCCESS OR MERITS AND PROBABILITY OF IRREPARABLE HARM OR (2) EXISTENCE OF SERIOUS QUESTIONS TO MERITS OF CASE IN ACTION SEEKING PRELIMINARY INJUNCTIVE RELIEF FROM F.T.C. REQUIREMENT OF ANNUAL LINE OF BUSINESS REPORTS.**

   In respect to motion for a preliminary injunction filed by plaintiff corporations, which brought class action against Federal Trade Commission and others, alleging that the Commission, in adopting and implementing an information-gathering program requiring annual line of business reports from corporations, exceeded its statutory and constitutional authority, plaintiffs had the burden of clearly demonstrating either (1) probable success on the merits and the possibility of irreparable damages, or (2) the existence of serious questions going to the merits and the tipping of the balance of hardships sharply in their favor.

2. **THE FIRST BRANCH OF PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF WOULD BE CONFINED TO NAMED PLAINTIFFS THAT SUBMITTED INFORMATION IN SUPPORT OF RENEWED MOTIONS TO QUASH WITHOUT CONSENT TO RELEASE, IN CLASS ACTION ALLEGING COMMISSION EXCEEDED STATUTORY AND CONSTITUTIONAL AUTHORITY.**

   In class action brought by 12 corporations against the Federal Trade Commission and others, alleging that the Commission, in adopting and implementing an information-gathering program requiring annual line of business reports from corporations, exceeded its statutory and constitutional authority, the first branch of plaintiffs' motion for preliminary injunctive relief, seeking to enjoin the Commission from disclosing any information received in connection with the program, would be confined to the ten named plaintiffs that submitted information to the Commission in support of renewed motions to quash without consenting to its release.

3. **MAKING CONFIDENTIALITY RULES APPLICABLE ONLY TO INFORMATION CONTAINED IN OR OF TYPE CONTAINED IN LB FORMS WAS NOT DISPOSITIVE OF MOTION FILED FOR PRELIMINARY INJUNCTIVE RELIEF.**

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[31] [304] *See, e. g., Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616, and cases cited therein.

* Reported in 390 F. Supp. 301 (1975).

Whether or not Federal Trade Commission had altered its policy, by making its confidentiality rules applicable only to information contained in or of the type that would be contained in so-called LB forms, as distinguished from information submitted in connection with motions attacking Commission's or[302]der to corporations to file annual line of business reports, was not dispositive of motion filed by certain corporations for preliminary injunctive relief.

4. MOVANTS FAILED TO DEMONSTRATE EITHER THE POSSIBILITY OF IRREPARABLE INJURY OR THE TIPPING OF THE BALANCE OF HARDSHIPS SHARPLY IN THEIR FAVOR IN MOTION ALLEGING COMMISSION EXCEEDED ITS STATUTORY AND CONSTITUTIONAL AUTHORITY.

Motion of corporations, which brought class action against Federal Trade Commission and others, alleging that the Commission, in adopting and implementing an information-gathering program requiring annual line of business reports from corporations, exceeded its statutory and constitutional authority, for a preliminary injunction enjoining the Commission and its employees from disclosing any materials submitted by the movants in support of renewed motions to quash Commission order requiring the submission of financial data would be denied, as the movants failed to demonstrate either the possibility of irreparable injury or the tipping of the balance of hardships sharply in their favor.

5. THE COMMISSION WOULD NOT BE COMPELLED TO GIVE NOTICE THAT IT MIGHT LACK AUTHORITY TO PREVENT PUBLIC DISCLOSURE OF INFORMATION SUBMITTED IN CONNECTION WITH THE LINE OF BUSINESS PROGRAM BY VIRTURE OF THE FREEDOM OF INFORMATION ACT.

In class action brought by 12 corporations against Federal Trade Commission and others, alleging that the Commission, in adopting and implementing an information-gathering program requiring annual line of business reports from corporations, exceeded its statutory and constitutional authority, the Commission would not be compelled to give notice to all members of the purported class that, by virtue of the Freedom of Information Act, the Commission might lack authority to prevent public disclosure of information submitted in connection with the program, since the other members of the purported class had access to legal advice and required no advice or guidance from plaintiffs.

6. PLAINTIFFS WOULD NOT BE GRANTED AN ORDER ENJOINING THE F.T.C. FROM SERVING DEFAULT NOTICES PENDING DETERMINATION OF CLASS ACTION ISSUE.

In class action brought by 12 corporations against Federal Trade Commission and others, alleging that the Commission, in adopting and implementing an information-gathering program requiring annual line of business reports from corporations, exceeded its statutory and constitutional authority, plaintiffs would not be granted an order enjoining the Commission from serving default notices pending determination of the class action issue, since efficient judicial administration required no such order and since, even if the court were moved by a desire to avoid additional complaints by other members of the purported class, there would be no need to enjoin the issuance of default notices.

7. SINCE IT IS NOT A FUNCTION OF THE CLERK'S OFFICE NOR ONE DELEGATED BY CONGRESS, THE DISTRICT COURT CLERK WOULD NOT BE AUTHORIZED TO RECEIVE REPORTS SUBJECT TO DISCLOSURE ONLY UPON COURT ORDER.

In class action brought by 12 corporations against Federal Trade Commission and others, alleging that the Commission, in adopting and implementing an information-gathering program requiring annual line of business reports from corporations, exceeded its statutory and constitutional authority, the district court clerk would not be authorized to receive such reports from those companies electing to file them, subject to disclosure only upon court order, since that was not a

function of the clerk's office or one delegated to it by Congress, and since, moreover, no reason existed to burden the clerk in the manner suggested.

(Syllabus, with substituted captions, taken from 390 F. Supp. 301.)

On motion for preliminary injunctive relief, court held inter alia, that motion for preliminary injunction enjoining F.T.C. and its employees from disclosing materials submitted by movants in support of motions to quash order requiring submission of financial data would be denied because movants failed to demonstrate irreparable injury or the tipping of balance of hardships sharply in their favor.

Motion denied.

Weil, Gotshal & Manges, New York City, for plaintiffs; *Ira M. Millstein*, *Mark A. Jacoby*, *Salem M. Katsh*, New York City, of counsel.

Paul J. Curran, U.S. Atty., S.D. New York, New York City, for United States; *William S. Brandt*, Asst. U.S. Atty., *Calvin J. Collier*, Gen. Counsel, F.T.C., *Gerald Harwood*, Asst. Gen. Counsel, F.T.C., *James P. Timony*, Washington, D.C., *William A. Cerillo*, Alexandria, Va., *Warren S. Grimes*, and *Bruce G. Freedman*, Washington, D.C., F.T.C., of counsel.

Before WEINFELD, *District Judge*.

OPINION EDWARD WEINFELD, *District Judge*.

Plaintiffs, twelve corporations, commenced this class action on behalf of **[303]** themselves and all other corporations similarly situated against the Federal Trade Commission and its members ("Commission") and the Comptroller General of the United States. The plaintiffs' claims, among others, are that the Commission, in adopting an information gathering program ("LB Program") requiring Annual Line of Business Reports ("LB Forms") from corporations,[1] and in implementing and attempting to implement the program, exceeded its authority under the Federal Trade Commission Act,[2] and violated the Fourth and Fifth Amendments to the Federal Constitution; the Federal Reports Act;[3] the Administrative Procedure Act;[4] section 1905 of the United States Criminal Code;[5] section 103 of the Budget and Accounting Procedure Act of 1950;[6] and section 9 of the Census Act.[7] Plaintiffs seek, in addition to other relief, a judgment enjoining the Commission from implementing the LB Program.

The purpose of the LB Program is to enable the Commission to publish aggregate financial data for various industries derived from information contained in the LB Forms to be submitted by leading manufacturing firms for each of their "lines of business" as defined by the Commission. The Commission's objectives, as stated by it, are (1) to effectuate and foster resource allocation by competitors and potential competitors, investors, labor groups and others; and (2) to enable the Commission to pinpoint non-competitive markets for law enforcement purposes.

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[1] 39 Fed.Reg. 30377 (Aug. 22, 1974).

[2] 15 U.S.C. § 41 et seq.

[3] 44 U.S.C. § 3501 et seq.

[4] 5 U.S.C. § 551 et seq.

[5] 18 U.S.C. § 1905.

[6] 31 U.S.C. § 18b.

[7] 13 U.S.C. § 9.

The twelve named plaintiffs and the companies on whose behalf the action is asserted to be brought are 345 of the leading manufacturing companies of the United States, each of whom the Commission served with an Order to File Special Report ("Order") requiring the submission of certain financial data. The matter now before the court is a motion by the twelve plaintiffs for preliminary injunctive relief pending the decision of a motion for class action determination, which motion has yet to be argued. The motion for injunctive relief, the plaintiffs explain, is addressed only to so much of the complaint as alleges that the Commission has violated and has unlawfully modified its Confidentiality Rules governing the LB Program,[8] and has misrepresented its legal authority to limit disclosure of information obtained from plaintiff corporations.

In substance, the sought-for relief would:

(1) enjoin the Commission and all its employees from disclosing to any person not expressly authorized to have access thereto under the Commission's Confidentiality Rules any information received from the companies in connection with the LB Program, and from publishing any such information in any manner or form;

(2) direct the Commission to notify all companies required to file reports that, notwithstanding the Commission's representation that access to all information submitted by the companies in connection with the LB Program could and would be limited to certain specified Commission employees, the Commission may lack the authority to prevent the public disclosure of, and so limit access to, all such information, by virtue of the Freedom of Information Act[9] and other provisions of law;

(3) enjoin the Commission from serving a notice of default[10] upon any company prior to ten days after this court's [304] determination as to whether this action may be maintained as a class action; and

(4) authorize the deposit with the Clerk of this Court of LB Forms by companies which elect to file them, subject to disclosure only upon order of this court.

[1] The broad sweep of the proposed relief upon its face is such that it would, pending a trial, effectively halt the LB Program in its tracks.

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[8] Rules and Procedures for the Use of Confidential Individual Company Data Collected under the FTC's Line of Business Program.

[9] 5 U.S.C. § 552.

[10] 15 U.S.C. § 50.

The plaintiffs, under the frequently enunciated rule in this circuit, have the burden of clearly demonstrating either (1) probable success on the merits *and* the possibility of irreparable damages, or (2) the existence of serious questions going to the merits *and* the tipping of the balance of hardship sharply in their favor.[11] We therefore turn to the essential facts to decide if plaintiffs have made a sufficient case for such drastic relief.

The LB Program had its genesis in the Commission's view that the data sought from the companies was required in order to carry out two distinct aspects of its statutory responsibility: first, its duty to investigate the extent of competition in the United States economy in general and in specific industries, and to report its findings to the Congress and the public; second, its responsibility to develop rational policy planning procedures for the enforcement of the antitrust laws. In addition, the Commission considered that the data was needed to encourage favorable decisions by potential investors in particular industries. Accordingly, the Commission, pursuant to 44 U.S.C., section 3512, submitted its proposed LB Form to the Comptroller General for his approval, which was granted on May 13, 1974.[12] The Comptroller General found that the information sought in the Commission's LB Form was not presently available from another source within the federal government.

Thereafter, on August 2, 1974, the Commission passed a "Resolution Requiring Annual Line of Business Reports from Corporations," in which it resolved to proceed to collect the information called for in the LB Form. The resolution further provided that the data submitted by an individual company would be afforded confidential status in accordance with rules which were incorporated by reference in the resolution. In pertinent part these Confidentiality Rules provide:

> The names of companies, financial data and all other information which are obtained from respondent companies in connection with the Federal Trade Commission's Line of Business Reporting Program are confidential, and persons authorized to have access to this information may not release, discuss or in any way provide access to such information to anyone not authorized to have access. Further, all such Line of Business data are considered to be exempt from the disclosure provisions of the Freedom of Information Act.

On or about August 19, 1974, the Commission served its Order on 345 companies, comprising the purported class in this case, directing them to file completed LB Forms within 150 days. The following day, on August 20, 1974, eight of the named plaintiffs herein[13] filed with the Commission a joint motion to quash the Order to file the LB Forms and for ancillary relief.[14] The movants advanced, among other contentions, (1) [305] that the order was in excess of the Commission's authority and in violation of the movants' constitutional rights in that it was excessively burdensome, broad, vague, arbitrary and capricious, and (2) that the order was unlawful because it failed to provide adequate protection against disclosure of confidential data to be filed by individual reporting companies, and because aggregate LB data to be published by the Commission could be broken down to disclose the confidential financial data of individual reporting companies. Simultaneously the movants themselves publicized their motions, and their counsel consented to the release by the Commission of copies of their motion papers. Thereafter, other companies filed motions to quash, based on substantially the same grounds advanced by the initial eight movants. In all, approximately 226 of the 345 companies required to file LB reports made such motions.

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[11] *Columbia Pictures Indus., Inc.* v. *American Broadcasting Cos.*, 501 F.2d 894 (2d Cir. 1974); *American Brands, Inc.* v. *Playgirl, Inc.*, 498 F.2d 947, 949 (2d Cir. 1974); *Sonesta Int'l Hotels Corp.* v. *Wellington Associates*, 483 F.2d 247, 250 (2d Cir. 1973); *Pride* v. *Community School Bd.*, 482 F.2d 257, 264 (2d Cir. 1973).

[12] Approval was granted subject to conditions not relevant to this motion.

On September 24, 1974, the Commission denied the various motions to quash. The denial, however, was without prejudice to a renewal of the motions limited solely to the issues of undue burden and lack of confidentiality. As to the issue of lack of confidentiality the Commission stated it would only consider claims relating to the possible discovery of confidential corporate information through techniques of disaggregating individual firm data from the aggregate multi-firm data to be published under the LB Program, and further required the companies to particularize the techniques relied upon in support thereof. As to the issue of undue burden, the Commission limited this issue to the cost of compliance with the Order and required those asserting such claims to give specific information in support thereof.

On October 4, 1974, a joint renewed motion to quash was filed by the twelve named plaintiffs herein—the eight original movants and four other companies.[15] The briefs in support of the joint renewed motion specifically authorized the Commission "to release the present motion and the names of the moving parties to the public." Thereafter 111 other companies filed renewed motions to quash.

On October 30th the attorneys representing the twelve plaintiffs herein submitted to the Commission the opinion of an expert, whose opinion in turn was supported by another expert, that disaggregation of the information contained in the aggregate reports was feasible. The Commission was expressly authorized by the movants to release both experts' opinions to the public. Also submitted on October 30, on the issue of undue burden, were letters from each of the joint movants (plaintiffs herein) except one, B. F. Goodrich Co. Simultaneously the attorneys requested of the Commission that "[b]ecause confidential information is contained in some of these letters, and to preserve the rights of the Moving Parties with respect to confidentiality, . . . these letters be afforded confidential treatment pursuant to all applicable Commission rules." However, one of these companies, General Electric, expressly stated it had no objection to the publication of the material contained in its letter.

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[13] Aluminum Company of America, E. I. DuPont de Nemours and Company, General Electric Company, General Motors Corporation, B. F. Goodrich Company, International Paper Company, Owens-Illinois, Inc., and Union Carbide Corporation.

[14] The motion was filed pursuant to § 2.12(b) of the Commission's Procedures and Rules of Practice, 16 C.F.R. § 2.12(b).

[15] The Coca-Cola Company, Kraftco Corporation, Armco Steel Corporation, and International Harvester Company.

In addition to the eleven plaintiffs, thirty-nine other companies submitted information in support of their claims of lack of confidentiality or undue burden. Thus, out of 226 companies who originally moved to quash, after the denial thereof, 123 renewed such motions, and of that number only fifty submitted information purporting to support the claims of confidentiality or undue burden.

While the Commission had under consideration the renewed motions to quash, by letter dated November 27, 1974, it advised the attorneys representing the 123 companies that had filed renewed motions that a request had been received **[306]** from the Consumers Union under the Freedom of Information Act[16] to inspect and copy all motions to quash, including renewals thereof, as well as the identity of each movant. The Commission further advised the attorneys that its Confidentiality Rules did not apply to motions to quash or materials submitted in support of such motions, but only to information contained in the LB Forms, none of which had yet been filed; accordingly, that it had granted the Consumers Union's request as to the initial motions to quash, as none of the motions contained any information exempt from the provisions of the Freedom of Information Act. Parenthetically it should be noted that those motions contain no information other than general arguments in support of the attack upon the validity of the Order directed to the companies to file LB Forms; they contained no information about any particular company.

With respect to the Consumers Union's request for copies of all renewed motions to quash and materials in support thereof, the Commission advised that it had deferred final determination in order to consider whether any of the commercial or financial information contained therein was exempt from disclosure under Exemption 4 of the Freedom of Information Act.[17] The Commission further requested that it be advised of any information or material contained in the documents filed which was not public and which, if disclosed, was likely to cause harm to the competitive position of the company. The company was required to support such a claim by an affidavit specifying which portions of the document contained alleged confidential information and a written justification of any contention that disclosure was likely to cause substantial harm to its competitive position. The information was to be submitted within fifteen days, and if no response was received, all materials in connection with the renewed motions to quash would be immediately released to the Consumers Union. The Commission promised to give ten days' notice of any determination to release information submitted by any company advancing a proper and timely claim of confidentiality. The Commission is yet to rule upon the requests of individual companies that material be granted confidential status. It has agreed to withhold decision pending a determination by this court of the instant application.

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[16] 5 U.S.C. § 552.

[17] 5 U.S.C. § 552(b)(4).

At the time of the commencement of this suit, the Commission had not ruled on the renewed motions to quash; accordingly, one of its contentions in opposition to this motion for preliminary injunctive relief was that administrative procedures had not been exhausted. However, on the very day of the argument the Commission denied the renewed motions to quash, but did not inform the court and the parties until the following day.[18] As to the issue of undue burden, the Commission found that no company had demonstrated that the cost of complying with the LB Form is unduly burdensome. As to the issue of confidentiality, it found that while many of the companies made general arguments as to the techniques that might be employed to disaggregate material, none went into sufficient detail to prove that disaggregation is possible. It took note of the experts' opinion offered by the companies, but deemed disaggregation in the circumstances "highly improbable." In any event, the Commission specifically noted its purpose to adhere to its Confidentiality Rules with respect to the LB Forms and not to publish aggregate information in such a way that it would disclose information about private companies.

Of the 345 companies originally served with the Order, only 164 were required to file their LB Forms on or about January 15, 1975. Of these 164, [307] 123 had filed LB Forms with the Commission as of January 28, 1975.[19] The Commission granted extensions to February 15, 1975 to 147 companies, including the plaintiffs herein.[20]

Against this background the court turns to the relief requested by the plaintiffs. With respect to the first request—that the Commission be preliminarily enjoined from disclosing any information received from the companies in connection with the LB Program—the court considers only the potential disclosure of information contained in the ten letters in support of the renewed motion submitted by the named plaintiffs other than B. F. Goodrich, which did not submit a letter, and General Electric, which consented to the release of its letter. As to the General Electric letter and the names of the parties who made motions and publicized or consented to the publication of such motions, there is clearly no occasion for injunctive relief.

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[18] It appears that the Commission lawyers who were present at the argument of the motion were unaware of the Commission ruling.

[19] Of the 123 LB Forms that had been filed as of January 28, 18 are considered by the Commission to have been filed under protest.

[20] The Commission staff has apparently granted extensions to 34 additional companies.

[2] The plaintiffs urge that they are acting on behalf of all 345 companies that received the Order; they request that injunctive relief be extended to the thirty-nine other companies who filed material in support of the renewed motions, as well as to all other corporations to the extent that relief may be available, such as restraining the Commission from publishing their names or disclosing information contained in LB Forms. The plaintiffs, together with the remaining 333 corporations that the Commission requested to file reports are the giant manufacturing corporations of the nation. Each is possessed of substantial financial resources; each has at its command capable legal representation; each is sensitive to and fully aware of the nature of the information submitted or yet to be submitted to the Commission; each is fully aware of the claims asserted by these plaintiffs that the Commission exceeded its authority and violated both contractual and statutory provisions. Yet as of the date of argument on this motion, none of the corporations other than the named plaintiffs had filed suit against the Commission or sought to intervene in this action. While the matter was sub judice, only a handful of these other corporations have taken such action.[21] Indeed, as noted, 123 companies have already filed LB Forms. Moreover, there is no indication that any of the thirty-nine corporations other than the named plaintiffs object to disclosure of material submitted in support of the renewed motions. It may well be that, like General Electric, they do not regard disclosure as contrary to their interest. Under the circumstances, consideration of the first branch of the instant motion will be confined to the ten named plaintiffs that submitted information in support of the renewed motions to quash without consenting to its release.[22]

Plaintiffs emphasize that the relief they seek on this motion is restricted. It is limited to their claim that disclosure of the material submitted in support of the renewed motions to quash would violate the Commission's Confidentiality Rules. Plaintiffs' purpose in so confining the issue is evident from their acknowledgment that notwithstanding the Rules, disclosure may be mandated under the Freedom of Information Act[23]—in short, that the Commission's rules may contravene the statute—a point emphasized by their re[308]quest as part of the relief sought on this motion that the Commission notify each of the 345 companies that the Commission "may lack legal authority to limit" under its Confidentiality Rules access to the information submitted under the LB Program. Thus, by design, there is not now before the court the issue of whether or not the material is subject to mandatory disclosure under the Freedom of Information Act.

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[21] 23 companies have joined in motions to intervene in this action. 2 other companies have filed with this court a complaint adopting by reference the allegations made in the complaint in this case. 7 companies have brought a similar action in the District Court in Delaware.

[22] Since none of the named plaintiffs have filed LB Forms, there is no need to consider the potential release of these Forms or of aggregate LB data, which plaintiffs claim can be disaggregated to reveal individual company LB data.

[3] The plaintiffs contend that the Commission's decision to examine the material to determine whether any part is confidential is inconsistent with its stated position, as set forth in its Confidentiality Rules, that all information submitted in connection with the LB Program is confidential, and that this alteration in the Commission's policy squarely presents to this court the question whether the Commission may violate its own rules or modify them after companies have acted in reliance upon them. The court does not agree that this is the focal point for decision. Whether or not the Commission has altered its policy, by making its Confidentiality Rules applicable only to information contained in or of the type that would be contained in the LB Forms, as distinguished from information submitted in connection with motions attacking the Commission's Order, is not dispositive of this motion for preliminary injunctive relief.

[4] The essential question at this juncture of the litigation is whether the plaintiffs have made out a sufficient case to warrant this court's invoking its equitable powers on their behalf. This they have failed to do. The Commission, through its attorneys appearing for it on this motion, has represented that it will give all affected companies, including plaintiffs, ten days' notice of any determination to release information submitted in support of the renewed motions to quash.[24] While the named plaintiffs have submitted in camera to this court copies of the material, disclosure of which they contend would be detrimental to their interest, it does not appear from the face of such material in what respect publication would be harmful to them. True, general statements are made to this effect, but there is no factual support therefor. And, as already noted, one plaintiff expressly consented to disclosure. Under these circumstances, the plaintiffs have

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[23] 5 U.S.C. § 552.

[24] Thus there is no longer any question whether the Commission's promise to give ten days' notice extends to those companies, including all named plaintiffs except Kraftco Corp., which failed to follow the required procedures in filing responses to the November 27 letter.

not satisfied either branch of the oft-stated standard for the issuance of a preliminary injunction;[25] they have not demonstrated either the possibility of irreparable injury or the tipping of the balance of hardship sharply in their favor. In short, plaintiffs will suffer no injury by awaiting notice of the Commission's determination. If the Commission decides against the release of the information, obviously there will be no basis for the relief requested; if the Commission decides to release the information, plaintiffs will have ten days in which to apply for injunctive relief upon a factual showing, here lacking, that equity requires it be granted. Accordingly, plaintiffs' motion for a preliminary injunction to enjoin the Commission from disclosing information received in connection with the LB Program is denied.

[5] Plaintiffs' second request for relief is that the Commission be directed to give notice to all the members of the purported class that by virtue of the Freedom of Information Act the Commission may lack the authority to prevent the public disclosure of all information submitted in connection with the LB Program. The purpose of such an order, in the plaintiffs' view, would be to minimize the possibility that companies will file LB Forms or other material in reliance upon the Commission's assurance that such material is confiden**[309]**tial and considered exempt from the disclosure provisions of the Freedom of Information Act, which assurance plaintiffs contend exceeded the Commission's authority. Clearly the named plaintiffs, which have raised this issue of the Commission's authority to protect the material submitted, are in no need of notice that such a question exists. This second request for relief is assertedly made for the benefit of the other members of the purported class, and it is denied for the same reason that the court confined consideration of the first branch of the motion to the named plaintiffs. The other corporations no doubt have access to thorough legal advice and have been sensitive to the issues posed in this action. They do not require the advice or guidance of plaintiffs, with which some are in competition; each has the capacity and resources to fend for itself.

[6] Both the plaintiffs and the Commission agree that a company need not file an LB Form if it is judicially contesting the lawfulness of the LB Program. Plaintiffs make their third request, for an order enjoining the Commission from serving default notices pending determination of the class action issue, in order to remove the need for all the members of the purported class to file lawsuits to protect themselves. The plaintiffs' expressed concern is to avoid a multiplicity of lawsuits and promote efficient judicial administration. The court is unpersuaded that efficient judicial administration requires any such order. Any problems that may arise by reason of multidistrict litigation

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[25] Note 11 *supra* and accompanying text.

can readily be resolved pursuant to the terms of section 1407 of Title 28 or other applicable statutory provisions.

Even if the court were moved by the desire to avoid additional complaints by the other members of the purported class, there would be no need to enjoin the issuance of default notices. Under section 10 of the Federal Trade Commission Act,[26] daily fines for failure to file reports such as the LB Form do not begin to accrue until 30 days after a default notice is issued. Default notices by themselves carry no adverse consequences, and there is therefore no need to enjoin their issuance. If any company receives a default notice, it will have ample time to seek the court's protection before suffering any injury.[27] It should also be noted that the Commission may decide to enforce its Order without resort to default notices and the threat of consequent fines. Under section 9 of the Federal Trade Commission Act,[28] the Commission can bring suit for a mandatory injunction to enforce its Order without issuing a default notice. Upon argument of this motion, plaintiffs' counsel conceded that in such an action plaintiffs could advance as defenses thereto all claims asserted in this action.

[7] Finally, the plaintiffs request that the Clerk of the Court be authorized to receive LB Forms from those companies that elect to prepare them for the purpose of facilitating an assessment of the reliability and meaningfulness of the data to be collected. This is not a function of the Clerk's office, or one delegated to it by Congress. Moreover, there is no reason to burden the Clerk of the Court in the manner suggested; to the extent that plaintiffs believe that any data is necessary to demonstrate the strength of their claims in this lawsuit, such data may be submitted at the appropriate time in camera under adequate provisions, as was done in the instance of eleven plaintiffs herein.

For the above reasons, plaintiffs' motion for preliminary injunctive relief is denied.

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[26] 15 U.S.C. § 50.

[27] *See St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 225-227, 82 S.Ct. 289, 7 L.Ed. 2d 240 (1961); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 654, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *FTC* v. *Claire Furnace Co.*, 274 U.S. 160, 174, 47 S.Ct. 553, 71 L. Ed. 978 (1927); *Genuine Parts Co.* v. *FTC*, 445 F.2d 1382, 1391-1395 (5th Cir. 1971).

[28] 15 U.S.C. § 49.

UNITED STATES v. ITT CONTINENTAL BAKING COMPANY*

No. 73-1290. F.T.C. Docket No. 7880.

(United States Supreme Court, February 19, 1975)

1. **FAILURE TO CROSS-PETITION FOR CERTIORARI PROHIBITED RESPONDENT FROM ATTACKING JUDGMENT INSOFAR AS IT SUSTAINED IMPOSED PENALTIES.**

Not having cross-petitioned for certiorari to review judgment affirming findings of trial court that it had violated FTC consent order prohibiting it from making certain business acquisitions within given time period, respondent could not attack judgment insofar as it sustained such findings and imposed penalties for such violations.

2. **SUPREME COURT DOES NOT, AS A MATTER OF PRACTICE, ENTERTAIN CHALLENGE TO DECISION ON MERITS WHERE PETITION FOR CERTIORARI PRESENTS QUESTION SOLELY ON REMEDY GRANTED FOR LIABILITY FOUND TO EXIST.**

Ordinarily, as matter of practice and control of Supreme Court's docket, if not its power, it does not entertain challenge to decision on the merits where only petition for certiorari presents solely a question as to the remedy granted for a liability found to exist, even if respondent is willing to accept whatever judgment has already been entered against him.

3. **CONSENT DECREES SHOULD BE CONSTRUED BASICALLY AS CONTRACTS.**

Since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to legislation government originally sought to enforce but never proved applicable through litigation.

4. **CIRCUMSTANCES SURROUNDING FORMATION OF CONSENT ORDER AND TECHNICAL MEANINGS OF WORDS USED IN DOCUMENTS ARE AIDS IN CONSTRUING CONSENT DECREES.**

Since consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract; such aids include circumstances surrounding formation of consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree.

5. **BOTH COMPLAINT AND APPENDIX WERE PROPER AIDS TO CONSTRUCTION OF CONSENT ORDER WHERE F.T.C. AND RESPONDENTS SO PROVIDED.**

In interpreting Federal Trade Commission consent order for enforcement purposes, and particularly because parties themselves so provided, both the complaint and appendix incorporated by reference in the consent order were proper aids to construction of order and of agreement of which it was part.

6. **SINCE THE PARTIES WERE COMPOSING A LEGAL DOCUMENT IN SETTLEMENT OF ANTITRUST MATTERS, SUPREME COURT ASSUMED THAT SPECIALIZED TERMS WERE USED RELATIVE TO THE ANTITRUST FIELD.**

Supreme Court, in construing consent order issued under provisions of Clayton and Federal Trade Commission Acts, would assume that parties used words with the specialized meaning they had in the antitrust field, since they were composing a legal document in settlement of an antitrust complaint.

7. **"ACQUIRING" MEANT BOTH THE ORIGINAL ACQUISITION OF ASSETS AND THEIR SUBSEQUENT RETENTION AND USE.**

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* Reported in 420 U.S. 223, 95 S.Ct. 926 (1975), Trade Reg. Rep. ¶60,164 at 65,485 (1975 Trade Cases), 43 L.Ed.2d 148. *See also* pp. 306,775 herein. For case before the Commission, *see* 60 F.T.C. 1183.

As used in Federal Trade Commission consent order prohibiting manufacturer of baking goods from "acquiring" other bakeries within specified time period, word "acquiring" meant both act of first obtaining assets of other bakeries and subsequent retention and use of those assets; since order banned continuing act of obtaining and retaining certain assets, violation of order was a "continuing failure or neglect to obey" order, and daily penalties could therefore be imposed under Clayton and Federal Trade Commission Acts. Since order banned the continuing act, violation of the order was a "continuing failure or neglect to obey", and daily penalties could be imposed.

(Syllabus, with substituted captions, taken from 95 S.Ct. 926.)

In an action seeking to resolve a conflict between Courts of Appeals concerning proper application of the continuing violation clauses of the Clayton and Federal Trade Commission Acts toward the wording employed in a large number of F.T.C. consent orders, the Supreme Court held, under the consent order as it was written, the word "acquiring" meant both the act of obtaining assets and the subsequent retention and use of those assets, that violation of the order constituted a "continuing failure or neglect to obey" it, and daily penalties could be imposed under the Federal Trade Commission and Clayton Acts.

Reversed and remanded.

Mr. Justice Stewart dissented and filed opinion in which Mr. Chief Justice Burger, Mr. Justice Powell and Mr. Justice Rehnquist joined. *Daniel M. Friedman*, Washington, D. C., for petitioner. *John H. Schafer, III*, Washington, D. C., for respondent.

[928] Mr. Justice BRENNAN delivered the opinion of the Court.

The question presented by this case is whether violations of the prohibition of a Federal Trade Commission (FTC) consent order against "acquiring" other companies constituted single violations [929] within the meaning of the applicable civil penalty statutes, 15 U.S.C. § 21(*l*), 15 U.S.C. § 45(*l*) or whether such violations constituted a "continuing failure or neglect to obey" within the meaning of those statutes, authorizing imposition of daily penalties. The United States District Court for the District of Colorado interpreted the consent order to proscribe only the initial act of acquisition and held that therefore only a single penalty might be imposed. 1972 CCH Trade Cases ¶ 73,993 (Aug. 2, 1971). The Court of Appeals for the Tenth Circuit affirmed the District Court to that extent, 485 F.2d 16 (1973). A subsequent decision of the Court of Appeals for the Eighth Circuit is in conflict, *United States* v. *Beatrice Foods Co.*, 493 F.2d 1259 (1974), cert. pending No. 73-1798. In interpreting a consent order worded in its pertinent terms similarly to that in this case, the Court of Appeals for the Eighth Circuit held that acquisition is a continuing offense until it is undone, noting that the construction of "acquiring" as a single rather than continuing violation "ignores the crucial effects of an acquisition and would render nonacquisition orders virtually meaningless." 493 F.2d, at 1270.

[1,2] We granted certiorari in order to resolve this conflict between courts of appeals concerning the proper application of the continuing violation clauses of 15 U.S.C. §§ 21(*l*) and 45(*l*) to wording employed in a large number of FTC consent orders.[1] Since we interpret "acquiring" as used in the consent order in this case to mean both the initial transaction and the maintaining of the rights obtained without resale, we hold that violation of the consent order is a continuing violation subject to daily penalties, and reverse.[2]

I

[930] The FTC alleged in 1960 that Continental Baking Company ("Continental"),[3] a major producer of bread and other bakery products, had violated § 7 of the Clayton Act, 15 U.S.C. § 18, and § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by various acquisitions which "may have the effect of substantially lessening competition or tending to create a monopoly. . . ." Before any decision in the case, the

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[1] According to the Petition for Writ of Certiorari and Brief for the United States in this case, there were in all as of June 18, 1974, 68 FTC orders, of which most are consent orders but some are litigated orders, which bar acquisitions in language similar to the language of the order in this case. All of these orders bar future acquisitions but do not expressly bar the "holding" or "retention" of stock or assets acquired in violation of their terms.

[2] The petition for certiorari of the United States presented the single question whether its prayer for daily penalties was properly denied. Respondent did not cross-petition, yet seeks to raise several issues not presented by the petition. Respondent contends that (1) the three transactions for which penalties have been or are to be imposed did not violate the consent order; (2) the consent order was not binding upon ITT Continental as successor after Continental ceased to exist, so that daily penalties could not accrue for the period after the merger; and (3) daily penalties could not be imposed because the Commission had not advised respondent of the alleged violations prior to the filing of the complaint. We do not address any of these issues in deciding this case.

Respondent recognizes that not having cross-petitioned, it cannot attack the judgment insofar as it sustained the findings of violations and imposed penalties for such violations. *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 563, 68 L.Ed. 1087 (1924). Cf. *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 57 S.Ct. 325, 81 L.Ed. 593 (1937). Respondent argues that it may nevertheless seek to sustain the Court of Appeals' limitation on the penalties on the theory that no penalty should have been awarded at all. Ordinarily, however, as a matter of practice and control of our docket, if not of our power, we do not entertain a challenge to a decision on the merits where the only petition for certiorari presents solely a question as to the remedy granted for a liability found to exist, even if the respondent is willing to accept whatever judgment has already been entered against him. *Strunk* v. *United States*, 412 U.S. 434, 437, 93 S.Ct. 2260, 2262, 37 L.Ed.2d 56 (1973); *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 n. 4, 93 S.Ct. 74, 77, 34 L.Ed.2d 201 (1972); *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 431-432, 61 S.Ct. 693, 697-698, 85 L.Ed. 930 (1941). Cf. *Langnes* v. *Green*, 282 U.S. 531, 538, 51 S.Ct. 243, 246, 75 L.Ed. 520 (1931). But see *LeTulle* v. *Scofield*, 308 U.S. 415, 60 S.Ct. 313, 84 L.Ed. 355 (1940). We follow that rule of practice in this case, particularly because the issue of whether there were any violations concerns only a particular order as applied to a discrete set of facts and therefore would not merit this Court's grant of a petition for certiorari.

The courts below did not decide the other two issues because they were not pertinent once it was determined that there was no [930] continuing violation. (The District Court did express the opinion that "it would seem unreasonable to permit the Commission to knowingly let daily penalties accrue without giving notice of the Commission's position at the earliest reasonable time," 1972 CCH Trade Cases, at 92,129, but it said that this statement was "obiter dictum.") In the absence of decisions on these questions by the courts below, we decline to address them. *FTC* v. *Anheuser Busch, Inc.*, 363 U.S. 536, 542, 80 S.Ct. 1267, 1270, 4 L.Ed.2d 1385 (1960); *Jaffke* v. *Dunham*, 352 U.S. 280, 77 S.Ct. 307, 1 L.Ed.2d 314 (1957); *Aetna Casualty & Surety Co.* v. *Flowers*, 330 U.S. 464, 468, 67 S.Ct. 798, 800, 91 L.Ed. 1024 (1947). Cf. *Dandridge* v. *Williams*, 397 U.S. 471, 476, n. 7, 90 S.Ct. 1153, 1157, 25 L.Ed. 2d 491 (1970).

[3] Continental was merged on September 13, 1968, with a wholly owned subsidiary of International Telephone and Telegraph Corporation called ITT Continental Baking Company ("ITT Continental"). While ITT Continental has never contested its liability under the merger agreement for any violations of the consent order committed by Continental before the merger, it continues to maintain in this Court, as it did below, that it is not itself bound by the consent order. See n. 2, *supra*.

parties agreed to a proposed consent order which was approved by the Commission in May 1962. The order, among other things, prohibited Continental for 10 years[4] from "acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or noncorporate, engaged in any State of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order permits such an acquisition. . . ." Alleging that Continental had acquired assets in three companies in violation of this order, the Government brought suit in the District of Colorado under § 11(*l*) of the Clayton Act, 15 U.S.C. § 21 (*l*)[5] and § 5(*l*)of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*),[6] for civil penalties and [931] other relief. The complaint prayed for penalties of $1,000 per day from the date of the contract of acquisition to the day of filing of the complaint on each of the three counts.

The District Court held that two of the three transactions were in fact in violation of the consent order. It declined, however, to order daily penalties, finding that "the terms of the consent order proscribe only the act of acquisition and that the violations of the consent order . . . did not constitute a 'continuing failure or neglect to obey' [15

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[4] The consent order expired by its own terms on May 15, 1972. In April 1972, the FTC ordered ITT Continental Baking Company to show cause why the order's ban on acquisitions should not be extended until April 1977. Although the administrative law judge recommended the extension, the FTC declined to approve the extension because of inadequate proof of increased concentration in the relevant, local markets. In the Matter of ITT Continental Baking Co., No. 7880, 84 F.T.C. 1349 (1974). However, the Commission did express a continuing concern with the levels of concentration in the baking industry. It issued an order requiring ITT Continental to inform the Commission "of any acquisitions of any interest in any concern engaged in the production and sale of bread and bread-type rolls, such report to be filed not less than sixty (60) days prior to each such acquisition." *Id.*, at 1400. ITT Continental and other members of the baking industry were informed that "Any significant mergers in this industry, and particularly any that promises to raise concentration still higher in a metropolitan area that already appears to be dangerously close to the borderline between effective competition and effective monopoly, will receive the most searching attention from this agency." *Id.*, at 1399.

[5] 15 U.S.C. § 21(*l*) provides:

"(*l*) Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense."

[6] 15 U.S.C. § 45(*l*) provides:

"(*l*) Any person, partnership, or corporation who violates an order of the Commis[931]sion to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense."

The maximum penalty for each violation under both 15 U.S.C. § 21(*l*) and 15 U.S.C. § 45(*l*) has since been increased from $5,000 to $10,000. Pub.L. 93-153, § 408(c), 87 Stat. 591.

Although the Government requested $1,000 per day per violation, the statutes prescribe no minimum penalty, and the District Court has discretion to determine the amount of the penalty for each violation whether the transactions are construed as single or as continuing violations. Thus, while totalling the penalty as a series of daily violations rather than as a single violation could raise substantially the total penalty assessed, the statutory scheme does not require that result, and the trial judge's determination would prevail in the absence of an abuse of discretion.

U.S.C. §§ 21(*l*), 45(*l*)] said order. . . . Once these two acquisitions were accomplished, the violations were complete." 1972 CCH Trade Cases, at 92,129. The District Court therefore entered a judgment against ITT Continental for $5,000 for each of the two violations found.[7]

The Court of Appeals reversed the District Court only insofar as it had held one of the three transactions not in violation of the consent order. It affirmed on the matter of daily penalties, holding that "whether the order was directed to the acquisition or to the acquisition and retention of assets or interests . . . [is] an interpretation of the consent order, and the result is in accordance with the prevailing standards." 485 F.2d, at 21. Remand to the District Court was ordered only for imposition of a penalty for the third violation.

II

The basic question before us is whether there has been a "continuing failure or neglect to obey" an FTC order within the meaning of 15 U.S.C. §§ 21(*l*) and 45(*l*).

The "continuing failure or neglect to obey" provision of § 45(*l*) was added to the Federal Trade Commission Act in 1950, and the like provision of § 21(*l*) to the Clayton Act in 1959. Although the legislative history of these provisions is sparse, some examples of behavior intended to be covered by the "continuing" violation provisions do appear in the legislative history. These include continuing conspiracies to fix prices or control production, maintenance of a billboard [932] in defiance of an order prohibiting false advertising, failure to dissolve an unlawful merger, and failure to eliminate an interlocking directorate. See Letter from FTC General Counsel to Senator Fulbright, 96 Cong.Rec. 3026-3027 (1950); Hearings on H.R. 432, H.R. 2977, H.R. 6049, and S. 726 before the Antitrust Subcommittee of the House Judiciary Committee, 86th Cong., 1st Sess., 21 (1959); H.R.Rep. No. 580, 86th Cong., 1st Sess., 7 (1959). These violations share two discernable characteristics: the detrimental effect to the public and advantage to the violator of each continues and increases over a period of time, and the violator could eliminate the effects of the violation if it were motivated to do so, after it had begun. Without these characteristics, daily penalties for such violations would probably have no greater deterrent effect than a single penalty and accumulating daily penalties would therefore be unfair.

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[7] The complaint also requested a permanent injunction enjoining future compliance with the consent order. The District Court found that it was empowered in a civil penalty proceeding based on an FTC order to grant equitable relief, and it issued an injunction in the exact words of the FTC order. This injunction expired, as did the consent order, on May 15, 1972. See n. 4, *supra*. Since the Court of Appeals decision in this case, Congress has amended 15 U.S.C. § 45(*l*) expressly to empower district courts in civil penalty proceedings to grant equitable relief. Pub.L. 93-153, § 408(c), 87 Stat. 591.

Although the complaint did not request a divestiture order, the Government later requested divestiture, and this request was embodied in the District Court's pretrial order. App., at 27. However, the District Court declined to order this relief, 1972 CCH Trade Cases at 92,129, and the Court of Appeals affirmed this denial as within the discretion of the trial court. 485 F.2d, at 21.

The legislative history also makes clear that Congress was concerned with avoiding a situation in which the statutory penalty would be regarded by potential violators of FTC orders as nothing more than an acceptable cost of violation, rather than as a deterrence to violation. For example, Senator Aiken, chief proponent of the 1950 amendment, said that if daily penalties for certain violations of the Federal Trade Commission Act were not permitted, "the fine would amount to a license in the amount of $5,000 for misrepresentation, which would be a very cheap fine, indeed." 96 Cong.Rec. 3025 (1950). Similarly, the House of Representatives Judiciary Committee said in its report on the 1959 amendments:

> Although the maximum penalty may be severe, in certain cases it would be appropriate. In the absence of the maximum penalty for a continuing offense, for example, commission and board orders with respect to mergers and interlocking directorships would be ineffective. In such cases, unless the maximum penalty applied and each day of a continuing violation considered a separate offense, an order dissolving an unlawful merger could be ignored after the mere payment of a $5,000 fine.

H.R.Rep. No. 580, 86th Cong., 1st Sess., 7, U.S.Code Cong. & Admin.News, p. 1807 (1959). See also Hearings on H.R. 432, H.R. 2977, H.R. 6049, and S. 726, *supra*, at 30 (Letter from FTC General Counsel).

Thus, the "continuing failure or neglect to obey" provisions of 15 U.S.C. §§ 21(*l*) and 45(*l*) were intended to assure that the penalty provisions would provide a meaningful deterrence against violations whose *effect* is continuing and whose detrimental *effect* could be terminated or minimized by the violator at some time after initiating the violation. It seems apparent that acquisition in violation of an FTC order banning "acquiring" certain assets could be such a violation. Any anticompetitive effects of an acquisition continues as long as the assets obtained are retained, and the violator could undo or minimize any such effect by disposing of the assets at any time after the initial transaction. On the other hand, if violation of an order prohibiting "acquiring" assets were treated as a single violation, any deterrent effect of the penalty provisions would be entirely undermined, and the penalty would be converted into a minor tax upon a violation which could reap large financial benefits to the perpetrator. As we have seen, Congress added the continuing penalty provisions precisely to avoid such a result.

III

Respondent insists, however, that the underlying FTC order was a consent order proscribing only the initial act or acquisition, and that therefore the imposition of daily penalties which might otherwise be mandated cannot be permitted. Their argument is that "acquiring" in the consent order unambiguously refers only to the initial transaction, **[933]** and that to read it otherwise is to add the words "holding" or "retaining" assets to the literal language of the order. This addition to the language of the order, ITT Continental contends, violates the principle of a line of cases culminating in *United States* v. *Armour & Co.*, 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971), that any command of a consent decree or order must be found "within its four corners," 402 U.S. at 682, 91 S.Ct. at 1757, and not by reference to any "purposes" of the parties or of the underlying statutes. See *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 79 S.Ct. 944, 3 L.Ed.2d 1054 (1959); *Hughes* v. *United States*, 342 U.S. 353, 72 S.Ct. 306, 96 L.Ed. 394 (1952). Respondents ask us to conclude that the "acquirings" prohibited by the consent order are not capable of persisting over time, and that therefore there can be no "continuing failure or neglect to obey" the order. The Government, on the other hand, contends that the parties meant "acquiring" to include both purchase and retention of assets, and that therefore it is unnecessary to depart from the "four corners" rule of *Armour* to conclude that there has been a continuing violation.

In *Armour*, it was first determined that the construction of the consent decree urged by the Government was inconsistent with the express terms of the consent decree it was seeking to enforce.[8] The decree involved in *Armour* was the Meatpackers Consent Decree of 1920, entered in settlement of an antitrust case filed in district court. Paragraph Four of the decree enjoined Armour from engaging in certain businesses. The Greyhound Corporation, which was engaged in some of those businesses, acquired control of Armour. The Government claimed that this acquisition was in violation of the consent decree, contending that the purpose of the decree was structurally to separate the meatpackers from the retail food business entirely, and that the relationship, between Armour and Greyhound was therefore prohibited.

The Court noted that the language of the decree "*taken in its natural sense*, bars only active conduct on the part of the defendants. . . . [T]he decree does not speak in terms of relationships in general, but, rather, prohibits certain behavior, and in doing so prohibits some but not all economic interrelationship between Armour and the retail food business. . . . In short, we do not find in the decree a structural separation such as the Government claims. . . . [T]he decree leaves gaps *inconsistent* with so complete a separation." 402 U.S., at 678–680, 91 S.Ct., at 1755. (Emphasis supplied.)

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[8] The Court in *Armour* noted that the Government might be able to obtain the relief sought in ways other than by construction of the consent decree. First, it could have brought a new action to enjoin the acquisition under § 7 of the Clayton Act. Second, "if the Government believed that changed conditions warranted further relief against acquisition, it could have sought modification of the Meatpackers Decree itself." 402 U. S., at 674-675, 91 S.Ct., at 1754. Respondents argue that these alternatives are also present in this case, and that it is therefore unnecessary to adopt the construction of the order urged by the Government. However, the possible availability of other means of obtaining sanctions against the acquisitions challenged here cannot preclude the Government from obtaining whatever penalties may be proper for violations of the consent order.

Similarly, in both *Atlantic Refining* and *Hughes* the Court first undertook to determine whether the language of the decree could support the construction urged by the Government and concluded that it could not. In *Hughes*, the decree provided that Hughes was *either* to dispose of his stock in certain corporation *or* commit the voting rights of his stock to a trustee "until [he] shall have sold his holdings of stock." 342 U.S., at 355, 72 S.Ct., at 307. The Court said that "A reading of the either/or wording *would make most persons believe* that Hughes was to have a choice of two different alternatives. Hughes would have [934] no such choice if the first 'alternative' was to sell the stock and the second 'alternative' was also to sell the stock." 342 U.S., at 356, 72 S.Ct., at 308. (Emphasis supplied.) Therefore, the Court concluded, the consent decree could not be construed, as the Government desired, to require Hughes to sell his stock.

In *Atlantic Refining*, the Court concluded that the construction urged by the Government was a "strained construction." 360 U.S., at 22, 79 S.Ct., at 946, inconsistent with the "normal meaning," 360 U.S., at 23, 79 S.Ct., at 946, of the language used. It commented that if the parties had intended the meaning urged by the Government, "one can hardly think of less appropriate language." 360 U.S., at 22, 79 S.Ct., at 946.

[3] In all three of these cases, it was only *after* concluding that the language, fairly read, could not support the Government's construction that the Court turned to the contention that the restrictive reading was inconsistent with the purposes of the decree and of the antitrust laws assertedly violated. It was in this context that the Court noted that, because consent decrees are normally compromises in which the parties give up something they might have won in litigation and waive their rights to litigation, it is inappropriate to search for the "purpose" of a consent decree and construe it on that basis. "[T]he *decree* itself cannot be said to have a purpose; rather the *parties* have purposes generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. . . . [T]he instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation."[9] *Armour*, 402 U.S., at 681-682, 91 S.Ct., at 1757. Thus, the basic import of

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[9] In *Hughes*, the Court likewise rejected an invitation to further the asserted "purposes" of the consent decree by approving an interpretation the "language cannot support." 342 U.S., at 356, 72 S.Ct., at 307. It noted that evidence might show that the sale requirement was justified, but it regarded the construction urged by the Government as effecting "a substantial *modification* of the original decree." [Emphasis supplied.] 342 U.S., at 357, 72 S.Ct., at 308. While it believed this modification could be had after a proper hearing proving the need for such modification under applicable standards, it would not sanction such modification in the guise of construing a consent decree. 342 U.S. at 357-358, 72 S.Ct., at 308.

Similarly, in *Atlantic Refining*, while the Court agreed that the interpretation offered by the Government might

(*Continued*)

Armour, Atlantic Refining, and *Hughes* is that, since consent decrees and orders have many of the attributes of ordinary contracts,[10] they should be construed basically as contracts, without reference to the legisla[935]tion the Government originally sought to enforce but never proved applicable through litigation.

We note that this case differs from *Armour, Hughes,* and *Atlantic Refining* in a most important respect. In each of those cases the question of whether or not the consent decree was violated was the question for decision; in this case respondent was found to have committed violations, and the issue before us affects only the manner of assigning penalties for each violation found. Thus, respondent is subject to some penalty, and there is no possibility as there was in *Armour, Atlantic Refining,* and *Hughes* that respondent will be penalized for behavior not prohibited at all by the order "within its four corners," *United States* v. *Armour & Co.,* 402 U. S., at 682, 91 S.Ct., at 1757. Nothing in the consent order suggests that although the parties agreed that Continental would refrain from "acquiring," they also agreed to limit the penalties which would otherwise apply if respondent did not refrain from that behavior. Such an agreement would be exceedingly odd, for it would undermine whatever prohibitions were imposed. As we have seen, Part II, *supra,* it is quite possible that under §§ 21(*l*) and 45(*l*) violation of an FTC adjudicated order against "acquiring" would be subject to daily penalties. It is not clear that *Armour* would require a different result merely because we are dealing with a consent order, since the parties reached no agreement at all concerning penalties to be applied in case of violation of the order.

We need not, however, determine whether §§ 21(*l*) and 45(*l*) would permit the imposition of daily penalties even if the consent order must be read as respondent maintains to proscribe only the initial act of acquisition. For we agree with the Government that the order "as it is written" does support an interpretation that the act of acquisition continues until the assets acquired are disgorged.

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better effectuate the purposes of the Acts assertedly violated, this "does not warrant our substantially *changing* the terms of a decree to which the parties consent without any adjudication of the issues. And we agree with the District Court that accepting the Government's present interpretation would do just that." 360 U.S., at 23, 79 S.Ct., 946. (Emphasis supplied.) Again, the Court noted that modification might be appropriate, but modification disguised as construction was not. See also *Liquid Carbonic Corp.* v. *United States,* 350 U.S. 869, 76 S.Ct. 114, 100 L.Ed. 769 (1955), reversing 123 F.Supp. 653 (EDNY1954); *United States* v. *International Harvester Co.,* 274 U.S. 693, 47 S.Ct. 748. 71 L.Ed. 1302 (1927).

[10] Consent decrees and orders have attributes both of contracts and of judicial decrees, or, in this case, administrative orders. While they are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the Court or administrative agency. Compare *United States* v. *Swift & Co.,* 286 U.S. 106, 115, 52 S.Ct. 460, 462, 76 L. Ed. 999 (1932), with the language in *Armour* cited in the text, p. 933, *supra.* Because of this dual character, consent decrees are treated as contracts for some purposes but not for others. See Jinkinson, Negotiation of Consent Decrees, 9 Antitrust Bull. 673, 675-676 (1964); Handler, Twenty-fourth Annual Antitrust Review, 72 Col.L. Rev. 1, 33-34 (1972).

IV

[4] Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree.[11] Such reliance does not in any way depart from the "four corners" rule of *Armour*.

[5] In this case, the consent order was part of an agreement between the parties entitled "Agreement Containing Consent Order to Divest and to Cease and Desist." The agreement incorporates by reference an "appendix," which sets forth at length the background leading to the complaint and the proposed order. In addition, the agreement provides that "[t]he complaint may be used in construing the terms of the order." Since the parties themselves so provided, both the appendix and the complaint are proper aids to the construction of the order and of the agreement of which it is part.[12]

The complaint alleged that Continental had pursued "a continuous practice of **[936]** *acquiring* various bakeries throughout the United States," (emphasis supplied), which were thereby "eliminated . . . as independent competitive factors in the manufacture, sale and distribution of bread and bread-type rolls . . . ." If the "acquiring against which the order and the complaint incorporated in it was directed were limited to the single transaction by which Continental obtained rights in another company, it is hard to see why the effect which the complaint alleged followed from acquisitions would necessarily occur. Even if Continental had sold the companies acquired as soon as the initial transactions were completed to other, independent companies, the bakeries would not have been "eliminated . . . as independent competitive factors."

Reference to the appendix also supports the conclusion that "acquiring" as used in the order means both the initial transaction granting Continental rights in an independent bakery and the maintaining of those rights without resale. The appendix notes that "One of the principal problems in the baking industry is the tendency towards concentration and the continuous growth of major baking companies *through acquisition*. Such *acquisitional growth* and tendency towards concentration places in the hands of a few large companies the means to set the pattern of competition. . . . If this order is adopted by the Commission, the respondent's alleged continuous practice of *acquiring* companies baking and selling bread and bread-type rolls will be brought to a halt . . . ." (Emphasis supplied.) It is apparent that the "acquisitional growth" referred to in the appendix cannot be achieved merely by discrete transactions without reference to what is done with the assets obtained after those transactions. If Continental were merely a speculator in baking companies, buying assets in them and selling them soon thereafter, it would not necessarily create "through acquisition" a "tendency towards concentration" giving it the "means to set the pattern of competition." Thus, "acquiring" in both the appendix and the order, parts of the same agreement, must mean obtaining and retaining assets, not merely the former.

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[11] "Assuming that a consent decree is to be interpreted as a contract, it would seem to follow that evidence of events surrounding its negotiation and tending to explain ambiguous terms would be admissible in evidence." Handler, Twenty-fourth Annual Antitrust Review, 72 Col.L.Rev. 1, 23 n. 148 (1972).

[12] Respondent argues that even if the complaint and appendix can be used as aids to construction, they only show that the parties could use broader language than that in the order itself, making the limited language actually used highly significant and controlling. One Court of Appeals has used similar reasoning to approve a strict reading of a consent decree which was accompanied by a collateral agreement. *Artvale, Inc.* v. *Rugby Fabrics Corp.*, 303 F.2d 283 (CA 2 1962). However, this reasoning is erroneous as applied to this case. Where parties in one agreement include both a consent order and an explanation of that order, and also provide that the complaint is to be used to con-[936]strue the order, it seems logical to conclude that, at least as to interpretations not precluded by the words of the order itself, the collateral documents can and should be used to give meaning to the words of the order.

[6] Even without the aid of these explanatory documents properly usable to construe this particular order, we would have to conclude that "acquiring" as used in an antitrust decree or order continues until the assets obtained are disgorged. As the foregoing analysis of the ancillary documents here illustrates, "acquiring" and related words do not, as respondent insists, unambiguously refer to a single transaction. Rather, as a matter of ordinary usage they can, and in the antitrust context they do, encompass the continuing act of obtaining certain rights and treating them as one's own. We must assume that the parties here used the words with the specialized meaning they have in the antitrust field, since they were composing a legal document in settlement of an antitrust complaint.

We need not go beyond the Clayton Act itself to conclude that "acquisition" as used in § 7 of the Act means holding as well as obtaining assets. The Act provides that the FTC, if it finds a violation of § 7, can require a party to "divest itself of the stock, or other share capital, or assets, *held . . . contrary to the provisions* of [§ 7 of the Clayton Act]." 15 U.S.C. § 21(b). (Emphasis supplied.) Thus, the framers of the Act did not regard the terms "acquire" and "acquisition" as unambiguously banning only the initial transaction of acquisition; rather, they read the ban against "acquisition" to include a ban against holding certain assets.

This Court's opinions reflect the same understanding. For example, in ***FTC*** v. *Western Meat Co.*, 272 U.S. 554, 47 S.Ct. [937] 175, 71 L.Ed. 405 (1926), the Court, in discussing an FTC order based on a violation of § 7, said that "The order here questioned was entered when respondent actually *held and owned* the stock *contrary to law*. The Commission's duty was to prevent *continuance of this unlawful action* by an order directing that it cease and desist therefrom and divest itself of *what it had no right to hold*." 272 U.S., at 559, 47 S.Ct., at 177. (Emphasis supplied.) See also *Arrow-Hart & Hegeman Elec. Co.* v. *FTC*, 291 U.S. 587, 596-599, 54 S.Ct. 532, 536, 78 L.Ed. 1007 (1934).

Similarly, this Court's opinion in *United States* v. *du Pont*, 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957), rests upon the conclusion that "acquisition" can mean, and in the context of § 7 of the Clayton Act does mean, both the purchase of rights in another company and the retention of those rights.

In *du Pont*, a § 7 case was brought in 1949 but based on a purchase of stock by du Pont in 1917-1919. It was argued that "the Government could not maintain this action in 1949 because § 7 is applicable only to the acquisition of stock and not to the holding or subsequent use of stock." 353 U.S., at 596-597, 77 S.Ct., at 879. Thus, du Pont was seeking to interpret "acquire" as used in § 7[13] much as respondent here seeks to read "acquiring" in the consent decree.

The Court in *du Pont* rejected the interpretation urged upon it. Instead, the Court held that there is a violation "any time when the acquisition threatens to ripen into a prohibited effect. . . . To accomplish the congressional aim, the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that may lead to a restraint of commerce or tend to create a monopoly of a line of commerce." 353 U.S., at 597, 77 S.Ct., at 879. Thus, there can be a violation at some time later even if there was clearly no violation—no realistic threat of restraint of commerce or creation of a monopoly—at the time of the initial acts of acquisition. Clearly, this result can obtain only because "acquisition" under § 7 is not a discrete transaction but a status which continues until the transaction is undone.[14]

[938] [7] Thus, under the order "as it is written" "acquiring" must

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[13] The first paragraph of § 7, at the time the *du Pont* case was brought, provided:

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

The statute was amended in 1950 to provide:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

While the change in the wording is substantial, no reason suggests itself why the meaning of "acquire" and "acquisition" should differ in the two versions. *Du Pont* was decided several years after the 1950 amendments and makes not the slightest suggestion that the result pertinent here would not obtain under the new version.

[14] The dissent in *du Pont* recognized that this was the import of this holding, with which it disagreed. 353 U.S., at 619-621, 77 S.Ct., at 890-891 (Burton, J., dissenting).

Some lower federal courts have also recognized that the status approach to acquisition is the proper one. See *Gottesman* v. *General Motors Corp.*, 414 F.2d 956, 965 (CA 2 1969): "[T]he very acquisition and position of potential control which was found violative of the Clayton Act as of 1949 [in *du Pont*] continued through 1961. . . . [W]hat was

(*Continued*)

mean both the act of first obtaining assets and the retention and use of those assets. To conclude otherwise would be to ignore the flexibility of the English language, as well as the circumstances surrounding the order and the context in which the parties were operating. And, since the order bans the continuing act of obtaining and retaining certain assets, a violation of the order is a "continuing failure or neglect to obey" it, and daily penalties may be imposed under 15 U.S.C. §§ 21(*l*) and 45(*l*).

Because the Court of Appeals erred in concluding that daily penalties could not be imposed, we reverse and remand for proceedings consistent with this opinion.

It is so ordered.

Reversed and remanded.

Mr. Justice STEWART, with whom THE CHIEF JUSTICE, Mr. Justice POWELL, and Mr. Justice REHNQUIST join, dissenting.

The respondent Continental made corporate acquisitions in violation of a 1962 consent order that, in pertinent part, prohibited Continental from "acquiring" described baking companies. The Government sought to impose daily penalties upon Continental for the continued holding of those assets. The Government's theory was that daily penalties were appropriate because Continental's retention of the assets was a "continuing failure or neglect to obey a final order," within the meaning of the relevant civil penalties statutes, 15 U.S.C. §§ 21(*l*), 45(*l*).[1] The issue in this case is whether the consent order can be so construed.[2] The District Court and the Court of Appeals ruled that the consent order prohibited only the distinct acts of "acquiring" the bakeries, not the "retaining" or the "holding" of the assets after acquisition. The Court of Appeals indicated that an order to divest would have been an appropriate remedy for the unlawful acquisitions, but held that the retention of the assets was not in itself a continuing refusal to obey the consent order such as would support the sanction of daily penalties. I think that under our controlling precedents, the District Court and the Court of Appeals were clearly correct.

The governing rule of construction, and its rationale, were stated plainly and aptly by this Court in *United States* v. *Armour & Co.*, 402 U.S. 673, 681-682, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971):

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the

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unlawful was du Pont's *status* as stockholder in General Motors, and that status continued until divestiture." (Emphasis supplied); *United States* v. *Schine*, 260 F.2d 552, 555-556 (CA 2 1958): "[I]t is the *maintenance* of conditions in violation [938] of the decree [prohibiting acquisitions, among other things] which is the charge against respondents." Therefore, the court in *Schine* concluded, it was irrelevant that the initial transactions occurred prior to the statutory limitations period.

[1] These provisions are set out in full in the Court's opinion, *ante*, at 930 nn. 5, 6. [p. 1192 herein]

[2] For the reasons stated by the Court, I agree that the other issues that the respondent seeks to raise in this case need not and should not be addressed.

> issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. *For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.* Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the **[939]** conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation. (Emphasis added) (footnote omitted.)

See also *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 79 S.Ct. 944, 3 L.Ed.2d 1054 (1959); *Hughes* v. *United States*, 342 U.S. 353, 72 S.Ct. 306, 96 L. Ed. 394 (1952).

The application of this straightforward standard to the consent order here is hardly a difficult task. The order literally prohibits only the "acquiring" of the forbidden assets. Once an acquisition was consummated, the violation was complete. A prohibition on the retention of assets cannot be found in any provision of the order. Because the order is a compromise agreement negotiated without any adjudication of antitrust liability, we are not at liberty under *Armour* to construe the unambiguous term "acquiring" in the light of conjecture or argument about the "purposes" of the decree or of the parties. We may not, consistent with *Armour*, conclude that the Government intended that the order should prohibit as a continuing offense the retention of unlawfully acquired assets, when the Government did not insist upon language objectively manifesting that intention. Nor may we conclude that Continental agreed to restrict its future business conduct or become subject to penalties in any manner not clearly delineated in the order itself. The provisions of the order are something less than the Government could have sought and might have obtained. The rule of construction of consent decrees, however, depends not upon an expedient construct of what the parties are thought to have intended, but upon the explicit provisions to which the parties have agreed.

After giving a casual nod in the direction of the standard of construction required by *Armour*, the Court embarks upon a laborious search for "purposes" that are "incorporated in" the consent order in order to change the meaning of the unambiguous term "acquiring." We are led through the antecedent complaint, through an appendix to the consent order, through the intricacies of an opinion of this Court construing the term "acquisition" in light of the policies underlying the Clayton Act, and through the legislative history of the statutory provisions that impose daily penalties for continuing refusals to obey

Commission orders. Drawing upon these disparate sources, the Court determines that the consent order, despite its literal language, must be construed to prohibit not only the proscribed acquisitions but also the "retention" of unlawfully acquired assets.[3] One is reminded of an observation once made by Mr. Justice Grier in a somewhat different context: "[T]he fact that it required so ingenious and labored an argument by my learned brother to vindicate such a construction . . . seems to me, of itself, conclusive evidence that the construction should not be given to it." **[940]** *Chenango Bridge Co.* v. *Binghamton Bridge Co.*, 70 U.S. (3 Wall.) 51, 83, 18 L.Ed. 137 (dissenting opinion).

What the Court does today is to proclaim a new rule of construction for consent orders or decrees totally at odds with our previous decisions:

> Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of any consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree. *Ante*, at 935. [p. 1197 herein]

This novel approach, for which the Court cites not a single supporting precedent, is directly contrary to the "four corners" rule of *Armour*. For an inquiry into the *purpose* of a consent decree is precisely what that rule forecloses: "[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." 402 U.S., at 682, 91 S.Ct. at 1757. The Court today thus indulges in precisely the exercise that *Armour* sought to preclude: a wide-ranging search for a "purpose" in a decree that, as explained in *Armour*, cannot be said to have a purpose except to delineate explicitly the terms and provisions of the settlement that the parties negotiated.[4]

Before straining to pull the Government's chestnuts out of the fire,

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[3] Upon this premise, the Court then proceeds to hold that the conjured-up "continuing offense" of retaining these assets is a "continuing failure or neglect to obey a final order" within the meaning of the daily penalty statutes. 15 U.S.C. §§ 21(*l*) and 45(*l*). But even if the consent order could be correctly read to prohibit not only the acquisition of the described assets but also the retention of assets unlawfully acquired, it is far from crystal clear that the "continuing offense" of retaining the assets would be a "continuing failure or neglect to obey a final order" within the meaning of the daily penalty statutes. Penalty provisions must be strictly construed, and due process requires that such provisions must give fair warning of the conduct that invokes their extraordinary sanction. Cf. *Giacco* v. *Pennsylvania*, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). The legislative history of the daily penalty statutes, as recited in the Court's opinion, shows that the mischief sought to be remedied was precisely the mischief to which Congress addressed its language: a "continuing failure or neglect to obey a final order," as, for example, the refusal to divest after a specific order of divestiture has been entered.

[4] Whatever the utility of extrinsic aids in construing a typical commercial contract, this technique is singularly inappropriate in an area where certainty of prohibition is necessary and where, as *Armour* makes clear, there can be found no guiding purpose underlying a negotiated decree. Moreover, even assuming, *arguendo*, that such aids might be admissible to construe borderline issues of application—for example, whether a particular acquired company was engaged in the production of "bread-type" rolls within the meaning of the consent order—such aids must not be used to impose a wholly separate prohibitory requirement upon a company that consented to be bound only by the plain language of the consent order. This is demonstrably not a case of ambiguity or of borderline construction. It is a case, instead, where the Court has used extrinsic aids to alter a term that is, on its face, wholly unambiguous.

The Court relies upon the decision in *United States* v. *du Pont*, 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957), for

(*Continued*)

the Court should count with greater care the costs of abandoning the rule stated in *Armour*. Until today, the parties to any consent decree could have confidence that its explicit terms alone would control the judicial construction of its prohibitory language. Now, otherwise unambiguous terms of a consent decree may be construed in light of such considerations as the antecedent complaint, the "meaning" of antitrust decisions, and the policies said to underlie the statutory provision for daily penalties. Certainty and reasoned reliance have always been the *sine qua non* of the consent orders that terminate about 70 to 80% of the antitrust complaints that are filed by the Justice Department.[5] But after today's decision that kind of certainty will no longer exist. For there will be no apparent limit on the power of the judiciary to alter the plain language of a decree in light of the "circumstances surrounding the order and the context in which the parties were operating." *Ante*, at 938 [p. 1200 herein]. If a negotiated consent decree fails to leave a dispute clearly [941] and firmly settled, the necessary result will be that those charged with antitrust violations will be less inclined to settle their cases and more apt to insist upon time-consuming and costly litigation. Today's decision will also pose serious difficulties for the enforcement of all existing and all future consent decrees. For, as Mr. Justice Jackson once observed, "the validity of a doctrine does not depend on whose ox it gores."[6] The same purpose-oriented techniques of construction that the Court today serves up to expand this consent order beyond its terms can be expected to be availed of by alleged violators of consent orders who will seek to narrow and thereby to evade the plain language of any prohibition.

The Court concludes that "if violation of an order prohibiting 'acquiring' assets were treated as a single violation, any deterrent effect of the penalty provisions would be entirely undermined, and the penalty would be converted into a minor tax upon a violation which could reap large financial benefits for the perpetrator." *Ante*, at 932 [p. 1194 herein]. This is not merely overstatement; it is incorrect. Both the parties agree, and the Court of Appeals held, that an order to divest unlawfully acquired assets is an appropriate remedy for violation of a consent order barring acquisition. Moreover, the *Armour* rule of construction would not impair in any way the power of the Govern-

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the proposition that the term "acquire" in a consent order is a term of art that prohibits a "status which continues until the transaction is undone." *Ante*, at 937. But the Court's reliance on the policy considerations discussed in the *du Pont* opinion is wholly inconsistent with the *Armour* rule. The opinion in *United States* v. *du Pont* does not, in any event, render the term "acquiring" in a consent decree a term of art. That case addressed the positive reach of the Clayton Act under certain circumstances. The Court fails to explain how its opinion there has served to transform the plain term "acquiring" into a "term of art" that would by common understanding have the meaning that the Court today ascribes to it.

[5] Note, 73 Col.L.Rev. 594 (1973).

[6] [941] *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514, 525, 73 S.Ct. 856, 862, 97 L.Ed. 1211 (1953).

ment, in future cases, to obtain through negotiations consent orders that contain a clear and explicit description of the conduct that is prohibited.[7]

In my view, the Court's departure from precedent threatens to retard significantly the effective use of consent decrees in the administration of the antitrust laws. I would adhere to the rule stated in *Armour* that "the scope of a consent decree must be discerned within its four corners, *and not by reference to what might satisfy the purposes of one of the parties to it.*" 402 U.S., at 682, 91 S.Ct., at 1757 (emphasis added). Applying this standard, I would affirm the considered judgments of the District Court and the Court of Appeals.

A.O. SMITH CORPORATION et al. v. FEDERAL TRADE COMMISSION et al.[*]

Civ. A. No. 75-15. F.T.C. File No. 99-199.

(United States District Court, District of Delaware, February 19, 1975)

1. **WHERE CASE AROSE UNDER F.T.C. ACT AND REQUISITE AMOUNT AS TO EACH PLAINTIFF APPEARED TO BE IN CONTROVERSY, DISTRICT COURT HAD NONDISCRETIONARY JURISDICTION TO ENTERTAIN COMPLAINT.**

   Federal district court had nondiscretionary jurisdiction to entertain complaint against Federal Trade Commission where case arose under Federal Trade Commission Act and requisite amount appeared to be in controversy as to each plaintiff.

2. **UNDER STATUTE PROVIDING DISTRICT COURTS WITH ORIGINAL JURISDICTION OF ANY CIVIL ACTION ARISING UNDER ACT OF CONGRESS REGULATING COMMERCE, DISTRICT COURT HAD JURISDICTION OF ACTION AGAINST F.T.C.**

   Federal district court had jurisdiction of an action against Federal Trade Commission under statute providing that district courts shall have original jurisdiction of any civil action arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

3. **UNDER THE ADMINISTRATIVE PROCEDURE ACT THERE IS A PRESUMPTION OF REVIEWABILITY OF FINAL AGENCY ACTION.**

   There is a presumption of reviewability of final agency action under the Administrative Procedure Act.

4. **TO PRECLUDE JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, LEGISLATIVE INTENT PRECLUDING JUDICIAL REVIEW MUST BE CLEAR AND CONVINCING.**

   Legislative intent to preclude judicial review of administrative action must be clear and convincing.

5. **ADMINISTRATIVE PROCEDURE ACT DOES NOT DEPRIVE DISTRICT COURT OF JURISDICTION TO JUDICIALLY REVIEW FINAL ACTION OF F.T.C.**

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[7] The Gqvernment informs us that as of May 1974 there were outstanding 54 consent orders with language that prohibits acquiring certain assets but does not expressly prohibit the retaining of these assets. This Court need not assume that flagrant violations of consent orders will occur, nor that the remedies of divestiture and fine for the single offense of acquisition will not adequately deter unlawful conduct.

[*] Reported in 396 F.Supp. 1108 (1975). See also, pp. 1293, 1474 herein.

The Administrative Procedure Act did not contain any provision depriving federal district court of jurisdiction to judicially review final agency action of Federal Trade Commission.

6. IN VIEW OF FITNESS OF ISSUES RAISED FOR JUDICIAL REVIEW AND IN VIEW OF HARDSHIP IF COURT REFUSED TO HEAR CASE, ISSUES PRESENTED WERE RIPE FOR PREENFORCEMENT REVIEW.

   Issues presented by action challenging Federal Trade Commission order in regard to preparation of certain business reports were ripe for preenforcement review in view of fitness of issues raised for judicial review and in view of hardship to plaintiffs if court refused to hear the case.

7. F.T.C. LINE OF BUSINESS ORDERS CONSTITUTED FINAL AGENCY ACTION UNDER ADMINISTRATIVE PROCEDURE ACT.

   Orders of the Federal Trade Commission requiring certain line of business reports by plaintiffs constituted final agency action within review provisions of the Administrative Procedure Act.

8. HARDSHIPS ARISING FROM F.T.C. ORDER REQUIRING CERTAIN BUSINESS REPORTS WOULD BE VIEWED AS SUFFICIENTLY GREAT, IMMEDIATE AND COMPELLING TO RENDER CONTROVERSY RIPE FOR PRELIMINARY INJUNCTION.

   Where plaintiffs who sought preenforcement review of a Federal Trade Commission order requiring certain business reports would be subject to an [1109] enforcement action, criminal sanctions of up to three years' imprisonment, a $5,000 fine, civil penalties of $100 per day, and burden of compliance was substantial in that significant, time-consuming and costly efforts would be required to prepare required reports, such hardships would be viewed as sufficiently great, immediate and compelling to render controversy ripe for preenforcement review.

9. MOVING PARTY MUST GENERALLY SHOW A REASONABLE PROBABILITY OF EVENTUAL SUCCESS, THAT IT WILL BE IRREPARABLY INJURED *pendente lite*, THE POSSIBILITY OF HARM TO OTHERS, AND PUBLIC INTEREST AS A PREREQUISITE TO ISSUANCE OF A PRELIMINARY INJUNCTION.

   As a prerequisite to issuance of a preliminary injunction moving party must generally show a reasonable probability of eventual success, that it will be irreparably injured pendente lite if relief is not granted, possibility of harm to other interested persons and public interest.

10. GROUNDS THAT PLAINTIFFS HAD ADEQUATE REMEDY AT LAW BASED ON RAISING LEGAL DEFENSES IN ENFORCEMENT PROCEEDING, WHERE NO ENFORCEMENT PROCEEDING WAS INITIATED WAS INSUFFICIENT TO DENY PRELIMINARY INJUNCTIVE RELIEF AGAINST ENFORCEMENT OF LINE OF BUSINESS ORDERS ISSUED BY F.T.C.

    Preliminary injunctive relief against enforcement of a Federal Trade Commission order requiring furnishing of certain business reports would not be denied on ground that plaintiffs had an adequate remedy at law based on raising legal defenses in enforcement proceeding where in fact no enforcement proceeding had been filed by the Federal Trade Commission.

11. EVIDENCE ESTABLISHED PLAINTIFFS WOULD SUFFER IMMEDIATE IRREPARABLE INJURY, BASED ON COST OF COMPLYING WITH F.T.C. ORDER.

    Evidence, in action wherein plaintiffs sought preliminary injunctive relief against a Federal Trade Commission order requiring furnishing of certain business reports established that plaintiffs would suffer immediate, irreparable injury based on unrecoverable costs and commitment of diverse business resources incident to preparation and compliance with Commission order.

12. THOUGH POSSIBILITY OF HARM TO OTHERS WAS NONEXISTENT OR AT BEST SPECULATIVE, PREENFORCEMENT PRELIMINARY INJUNCTIVE RELIEF WOULD NOT BE DENIED.

Preenforcement preliminary injunctive relief against a Federal Trade Commission order requiring preparation of certain business reports would not be denied on basis of possibility of harm to other interested persons where such possibility of harm was nonexistent or at best speculative.

13. CONFLICT WITH PUBLIC INTEREST NOT BEING ESTABLISHED WAS INSUFFICIENT TO PRECLUDE PREENFORCEMENT PRELIMINARY INJUNCTION AGAINST F.T.C. LINE OF BUSINESS ORDER.

Preenforcement preliminary injunctive relief against a Federal Trade Commission order requiring certain line of business reports would not be denied on basis of conflict with public interest where, under the evidence, it was not established that public interest would be harmed by delay in corporate plaintiffs' filing their line of business reports.

14. PLAINTIFFS FAILED TO ESTABLISH A REASONABLE PROBABILITY OF PROBABLE SUCCESS IN LITIGATION CHALLENGING VALIDITY OF ORDER, BUT DID ESTABLISH SUFFICIENT PROBABILITY OF SUCCESS ON BASIS THAT F.T.C. VIOLATED ADMINISTRATIVE PROCEDURE ACT.

Certain business corporations seeking preenforcement preliminary injunctive relief against a Federal Trade Commission order requiring line of business reports did not establish a reasonable probability of eventual success in litigation challenging validity of the order on basis of unreasonable search and seizure, failure to comply with appropriate statutes in evolving the LB-report, on theory of taking of property without due process, on theory of vagueness of instructions in the LB form, on theory of undue burden imposed by the order, or on theory of lack of statutory authority, but plaintiffs did establish a sufficient probability of success on merits on basis that Commission violated the Administrative Procedure Act in promulgating its LB program.

15. WHEN ITS ACTION CONSTITUTES RULE-MAKING, F.T.C. IS BOUND BY PROCEDURES SET FORTH IN THE ADMINISTRATIVE PROCEDURE ACT.

Mere fact that Federal Trade Commission seeks disclosure of information under broad authority granted by the Federal Trade Commission Act does not relieve it of the necessity to proceed in a manner prescribed by the Administrative Procedure Act when its action, whatever the Commission may label it, constitutes rule-making.

16. INVESTIGATORY AND RULE-MAKING POWERS ARE NOT MUTUALLY EXCLUSIVE, BUT COMPLEMENTARY, AS CONTEMPLATED BY F.T.C. ACT.

The investigatory and rule-making powers contemplated by the Federal Trade Commission Act are not mutually exclusive but complementary.

17. INSTITUTION OF LINE OF BUSINESS PROGRAM UNDER FTC'S BROAD STATUTORY POWERS OF INVESTIGATION DOES NOT IPSO FACTO COMPEL CONCLUSION THAT PROGRAM INVOLVED NO ELEMENTS OF RULE MAKING UNDER A.P.A.

[1110] Fact that Federal Trade Commission's line of business-reporting program was instituted pursuant to its broad statutory powers of investigation did not ipso facto compel conclusion that such program involved no elements of rule making contemplated by the Administrative Procedure Act.

18. FACT THAT REPORTING AND RECORDKEEPING REQUIREMENTS OF FTC LB PROGRAM HAD GENERALIZED ACROSS-THE-BOARD APPLICABILITY TO A LARGE NUMBER OF INDUSTRIAL CONCERNS AND REQUIREMENTS WERE PROSPECTIVE IN EFFECT, THE PROGRAM POSSESSED EARMARKS OF RULE MAKING.

Federal Trade Commission order requiring a line of business-reporting program possessed earmarks of rule making for purposes of requiring compliance with Administrative Procedure Act in view of fact the reporting and rule-making requirements of the program had generalized across-the-board applicability to a large number of industrial concerns, and requirements were prospective in effect requiring compliance on or before specified future dates.

19. FOR PURPOSES OF DETERMINING RIGHT TO PRELIMINARY INJUNCTIVE RELIEF, RULES PROMULGATED BY FTC IN WAY OF ORDER MIGHT BE FOUND INVALID WHERE PROCEDURES UTILIZED DID NOT COMPLY WITH THE APA.

Where procedures utilized by government did not constitute substantial compliance with the APA, rules promulgated by FTC in way of orders might, for purposes of determining right to preliminary injunctive relief, be found invalid.

(Syllabus, with substituted captions, taken from 396 F.Supp. 1108.)

On petition for declaratory and preliminary injunctive relief, court held that plaintiffs failed to show probable success of challenging validity of order on basis of unreasonable search and seizure, failure to comply with appropriate statutes, or on theories of taking of property without due process, of vagueness of instructions in LB form, of undue burden imposed by order or of lack of statutory authority; however, plaintiffs did establish sufficient probability of success on merits on basis F.T.C. violated the Administrative Procedure Act.

Injunction order in accordance with opinion; motion to dismiss for want of jurisdiction denied.

Richard F. Corroon, Charles F. Crompton, Jr., Potter, Anderson & Corroon, Wilmington, Del., *Gilbert J. Helwig,* Pittsburgh, Pa., *Edward T. Tait, Lee A. Rau, John M. Wood,* Alexandria, Va., *Reed, Smith, Shaw & McClay,* Washington, D.C., for plaintiffs.

Ralph Keil, U.S. Atty., Wilmington, Del., *Calvin J. Collier, Gerald Harwood, James P. Timony, William A. Cerillo, Warren S. Grimes, Bruce E. Freedman,* F.T.C., Washington, D.C., for defendant Federal Trade Commission.

Ralph Keil, U.S. Atty., Wilmington, Del., for defendant General Accounting Office.

OPINION

MURRAY M. SCHWARTZ, *District Judge.*

This case arises from a complaint filed by A. O. Smith Corporation ("Smith") and six other corporations seeking a declaratory judgment and preliminary and permanent injunctive relief against the Federal Trade Commission ("Commission" or "FTC"), its chairman and each commissioner separately, and the Comptroller General of the United States. This suit is, in effect, a request for pre-enforcement judicial review of an order by the Commission requiring the plaintiffs, along with 338 other large corporations engaged in manufacturing in the United States, to file with the Commission annual line-of-business reports ("LB Reports").[1] The grounds for relief asserted in the complaint are, *inter alia,* lack of statutory authority to issue the order, failure to follow the rule-making procedure prescribed by the Administrative Procedure Act ("APA"), undue burden required to prepare the report, and various constitutional grounds.

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[1] From the record it appears the Commission at one time contemplated receipt of LB Reports from 500 large manufacturing corporations representing 70% of the manufacturing capacity of the United States. The record is silent as to why the number of proposed reporting corporations was reduced to 345 and the percentage of manufacturing capacity represented by those companies. Nonetheless, one can infer the percentage of manufacturing capacity of the proposed reporting companies is significant.

Defendants responded by filing a motion to dismiss for lack of jurisdiction.[2] [1111] Defendants' motion was joined for hearing with plaintiffs' motion for preliminary injunction. This opinion contains the Court's decision on defendants' motion and constitutes its findings of fact and conclusions of law as to plaintiffs' motion for preliminary injunction.

I. BACKGROUND

Pleadings, affidavits, and briefs establish the following undisputed facts.

During the period from August 1973 to August 1974 the Federal Trade Commission was evolving a plan which eventually became the current Line-of-Business Program ("LB Program"). On August 3, 1973 an early proposal for annual line-of-business reports was submitted to the Office of Management and Budget ("OMB") for approval as then required under the Federal Reports Act, 44 U.S.C.A. § 3501 et. seq. (1969).[3] Some oral comments apparently were received by OMB on the proposal, but no statement of approval was forthcoming from OMB, as then required by law, 44 U.S.C.A. § 3509(2) (1969), before Congress amended the Federal Reports Act on November 16, 1973 by enactment of Section 409 of the Trans-Alaska Pipeline Authorization Act, P.L. 93-153, 44 U.S. C.A. §§ 3502, 3512 (1975 Supp.).

In March 1974 the Commission forwarded for approval a revised LB Report form to the Comptroller General of the United States, who assumed certain responsibilities previously held by OMB. During April and May of 1974 the Comptroller General received oral and written comments on the program. On May 13, 1974 the Acting Comptroller General formally approved with certain "provisions" the LB Report form which had been submitted to that office for review.

Meanwhile, the Business Roundtable ("Roundtable"), an unincorporated association of which most plaintiffs are members, through its attorneys, requested the Commission to hold hearings on its various proposed annual LB Reports by letters dated November 13, 1973, January 29, 1974 and March 21, 1974. The last letter also mentioned the necessity of the Commission complying with the APA. By letter dated April 4, 1974 the Commission denied these requests.

In May 1974 the Roundtable made a letter request that the

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[2] Defendants' motion cites "lack of jurisdiction" without specifying whether subject matter or personal jurisdiction is implied. Defendants' Brief Outline cites an absence of "subject matter jurisdiction," and the brief itself makes clear this includes issues of justiciability (e.g. ripeness) and limitations on a court's discretion to invoke equitable remedies.

[3] The statutes in question reference the "Director of the Bureau of the Budget." A 1970 Administrative Reorganization resulted in the terminology of Office of Management and Budget.

Commission "fully comply" with the requirements of Section 409 of P.L. 93-153 by engaging in "meaningful exchange between the Commission and business representatives to 'advance the ease and accuracy of line-of-business reporting' " as expressed in a provision of the Acting Comptroller General's letter to the Commission and by exploring coordinating or consolidating the Commission's line-of-business data needs with data collected by other Federal agencies. The same letter again drew attention to the necessity for compliance with the APA. The Commission denied all requests and asserted the APA was inapplicable by letter dated June 11, 1974.

On June 14, 1974 a meeting was held between top financial executives from several domestic corporations assembled by the Roundtable and the Commission's Bureau of Economics staff. Views were exchanged but apparently not to the satisfaction of the Roundtable, which next requested by letter dated the same day that proposals raised by corporate representatives at the meeting be presented directly to the Commission at a special meeting. This last letter was never acknowledged, nor was such a meeting ever held.

On August 2, 1974 the Commission issued a "Resolution Requiring Annual Line of Business Reports from Corporations," which appeared on August 22 in the Federal Register. By this act the Commission resolved to adopt the LB Program requiring annual LB Reports to include detailed information as to [1112] each corporation's affiliations and a breakdown of costs, profits, assets, and other expenditures according to line-of-business categories established by the Commission. Also on August 2, 1974 the Commission issued an identical "Order to File Special Report" ("Order") to 345 of the nation's largest manufacturing companies, requiring them to complete and file annual LB Reports. The initial report limited the data required as to each firm's fiscal year ending between July 1, 1973 and June 30, 1974. Subsequent reports were to include all the data indicated as required by the form itself although at oral argument the FTC indicated the LB Report form might be modified in the future. This Order and the accompanying form were served upon the instant plaintiffs on varying dates between August 13, 1974 and August 23, 1974. Filing with the Commission was required within 150 days of receipt of the Order or within 150 days of the end of the fiscal year, whichever was later. The Order ended with this warning: "You are advised that penalties may be imposed under applicable provisions of Federal law for failure to file this report or for the filing of a false report."

Pursuant to the Commission's Procedures and Rules of Practice, each plaintiff seasonably moved to quash the aforementioned orders in August and September 1974. On September 24, 1974 the Commission denied the motions of four of the plaintiffs, subject to a limited right to renew such motions "solely on the issues of undue burden and lack of confidentiality." In its denial the Commission stated neither the original motion to quash nor filing of a renewal motion would toll the 150 day period directed by the Commission. This right to renew or amend was also made available to those whose original motions had not yet been acted upon by the Commission. Five of the seven plaintiffs did timely renew or amend their motions to quash, the last having been filed on October 29, 1974. The Commission not having disposed of plaintiffs' outstanding motions by December 27, 1974, and the 150 day period having nearly drawn to a close, counsel for plaintiffs wrote to the Commission pointing out its inaction was effectively becoming a denial on the merits in a manner violative of due process. On the same date, the Commission denied the three remaining plaintiffs' motions to quash; on January 7, 1975 the Commission denied all renewed or amended motions filed by plaintiffs.

Because the Commission's staff required considerable time to respond to all of these motions, the Director of the Commission's Bureau of Economics granted a thirty day extension of time to file the LB Report to all plaintiffs. The new deadline for filing was February 10, 1975 as to one plaintiff, February 17 as to five plaintiffs, and February 19 as to one plaintiff. Argument was had on plaintiffs' and defendants' motions on February 5, 1975. By letter to the Court dated February 7, 1975 the Commission advised that no injunctive enforcement action would be sought against any plaintiff until after February 19, 1975, and no notice of default would be served upon any plaintiff until this Court had issued its opinion on the pending motions.[4] Disposition of the motions requires a discussion of jurisdiction, ripeness, and the merits. With regard to the latter, all expressions are in the procedural context of an application for preliminary injunction.

II. JURISDICTION

[1,2] But for the ripeness question raised by the seeking of pre-enforcement [1113] review of Federal agency action, this Court has non-discretionary jurisdiction to entertain plaintiffs' complaint. Because this case arises under the Federal Trade Commission Act, September 26, 1914, 38 Stat. 717, as amended, 15 U.S. C.A. § 41 et seq., and the requisite amount appears to be in controversy as to each

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[4] The Court has been advised two other actions against the FTC are currently pending in the Southern District of New York which involve suits by several other corporations required to file LB Reports. In addition, the Commission has within the last two weeks initiated enforcement action in the Southern District of New York. Finally, six other actions similar to the matter *sub judice* were filed in this district on February 14, 1975.

plaintiff, this Court has Federal Question jurisdiction under 28 U.S.C.A. § 1331.[5] Alternatively, jurisdiction under 28 U.S.C.A. § 1337[6] is obvious because the Federal Trade Commission Act falls clearly within the ambit of that statute. Because jurisdiction is so easily found, other bases of jurisdiction urged by plaintiffs as conferring jurisdiction will not be considered.

[3] Because plaintiffs urge this Court to review action of a federal agency, reference must be made to the APA to ascertain whether it contains any provision which would deprive the Court of jurisdiction. Plaintiffs urge they are aggrieved by final agency action and are entitled to judicial review thereof under Section 10 of the Administrative Procedure Act, 5 U.S.C.A. §§ 702, 704. In support, they cite the August 2, 1974 order and the final denial of their motions to quash dated January 7, 1975. There is a presumption of reviewability of final agency action under the APA.[7] Reference to the statute indicates two grounds upon which review is to be denied:

> § 701(a). This chapter [on judicial review] applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review;[8] or
>
> (2) agency action is committed to agency discretion by law.

[4,5] The second ground is neither urged by defendants nor is any basis for asserting it readily obvious to the Court. As to the first ground, the legislative intent to preclude review must be "clear and convincing." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).[9] Defendant has cited no legislative history and the Court has found nothing in the statute which suggests a Congressional intent to deny judicial review.

III. RIPENESS

Under the *Abbott Laboratories* trilogy, and in view of the equitable relief here sought, the Court must now examine justiciability, focusing with particularity upon ripeness. Ripeness in the context of pre-enforcement review involves a two-pronged test of 1) fitness of the issues raised for judicial review and 2) hardship to the plaintiffs if the Court refuses to hear the case.

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[5] § 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

[6] § 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

[7] *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) and cases cited therein. *See* 5 U.S. C.A. § 701(a).

[8] No opinion is expressed as to the constitutionality of a statute which might deny judicial review.

[9] Both parties agree that the Abbott Laboratories case and the cases of *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, 87 S. Ct. 1520, 18 L.Ed.2d 697 (1967), and *Gardner* v. *Toilet Goods Association*, 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967) constitute the relevant trilogy of Supreme Court opinions on the subject. Little force remains to older statements of the law on pre-enforcement review found in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961), and *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U.S. 160, 47 S.Ct. 553, 71 L.Ed. 978 (1927). *See* Docket 22, pp. 98-99, 137.

[1114] As to fitness of the issues, there are two prime considerations: (1) Are the issues tendered for resolution either purely legal ones or, if not, are the facts readily accessible to this Court? (2) Has there been final agency action within the meaning of Section 10(c) of the APA, 5 U.S.C.A. § 704? With respect to the first consideration, if important facts cannot now be known with certainty or if a judicial appraisal of factors surrounding the controversy would be on a surer footing in the context of a specific enforcement proceeding, then the Court should decline to hear the case.

Not one but several issues are presented for resolution. Plaintiffs allege the Commission exceeded its statutory authority in issuing the controverted order and that in any event it failed to follow appropriate rulemaking procedure under the APA. They also charge that the Comptroller General either exceeded his authority or failed to follow requirements imposed on him by the law. These issues are either purely legal or related to facts already in the record or easily accessible to this Court with the aid of the parties.

Another allegation that the required reports are unduly burdensome may, under plaintiffs' theory, require this Court to balance the burden of compliance with the value of the data collected. Assuming arguendo that the Court is within its proper province to consider the value of the data collected, this also would require facts either now in the record or easily accessible. No facts are now lacking which could best be developed by awaiting agency enforcement.

Plaintiffs also charge that ambiguous and, at times, contradictory reporting instructions, coupled with the requirement of certifying as true all data submitted at risk of criminal sanction, amounts to a violation of plaintiffs' due process rights under the Fifth Amendment. They also urge the reporting requirement constitutes a taking of property without due process because of its cost to plaintiffs and the alleged substantial risk of making confidential material public. Finally, plaintiffs urge the requirement violates their Fourth Amendment right to be free from unwarranted searches and seizures. These constitutional grounds are basically legal issues.

[6] The Court finds the issues presented in this case fit for review at this time, in the sense that little benefit would be gleaned from postponing their judicial resolution.

[7] The second aspect of fitness goes to whether the August 1974 orders and the subsequent denials of all motions to quash constitute final agency action within the meaning of Section 10(c) of the APA, 5 U.S.C.A. § 704. The Court has no problem finding these actions are final. These were not informal agency actions or the rulings of some

subordinate agency official subject to review by a higher agency authority. Rather they were actions taken by the members of the Commission themselves. The August 1974 orders were made effective immediately upon their issuance, and they explicitly state that compliance is expected. They have the effect of law, and violations of the orders are punishable by criminal fines and imprisonment. They were every bit as final as if the Congress itself had enacted the orders and they had been signed into law. The FTC orders constitute final action and are fit for review.

Having found the issues fit for review, attention is now turned to the second prong of the ripeness test, *viz.*, hardship accruing to the plaintiffs if this Court withholds exercise of its jurisdiction.[10] What are the burdens suffered by plaintiffs if there is compliance vis-a-vis the detriments to be incurred by plaintiffs if they should choose noncompliance?

[1115] Four cases provide special guidance to this Court in determining whether the severity of hardship to a plaintiff in the form of costs of compliance versus costs of noncompliance is sufficient to cause a matter to be labeled "ripe" for pre-enforcement jurisdiction. Those cases are *Abbott Laboratories* v. *Gardner*, *supra*, *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967), *Gardner* v. *Toilet Goods Association*, 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967) and *General Motors Corp.* v. *Volpe*, 321 F.Supp. 1112 (D. Del.1970), *aff'd as modified*, 457 F.2d 922 (3d Cir. 1972).

In *Abbott Laboratories* v. *Gardner*, *supra*, the plaintiffs would have been faced with substantial hardship whether they chose to comply or not to comply. If they chose to comply with the regulation there at issue, they would have been required to incur substantial costs in changing their promotional labeling and advertisements, destroying stacks of printed matter, and investing heavily in new supplies. These activities would have had a direct and immediate impact on their day-to-day affairs. If they chose noncompliance they incurred risks of severe criminal and civil penalties and seizure of their goods as "misbranded drugs" with attendant adverse publicity in a sensitive industry. The Court found sufficient hardship. 387 U.S. at 156, 87 S.Ct. 1507.

In *Gardner* v. *Toilet Goods Association*, *supra*, the Court found that plaintiffs would suffer a substantial burden, whether they would choose to comply or not with the regulation in question, in the absence of pre-enforcement review. Failure to comply would pose the same risks of criminal prosecution, civil injunction, or seizure of goods with the accompanying bad publicity found in *Abbott Laboratories*. Compliance would require changing immediately longstanding practices of pre-market testing and clearance to accommodate new items not previously covered by regulation. Great expense would flow from such changes which would have a substantial impact upon day-to-day affairs of these plaintiffs. The Court found ripeness. 387 U.S. at 174, 87 S.Ct. 1526.

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[10] Hardship in the context of irreparable injury for preliminary injunctive relief is discussed *infra* pp. 1117-1118.

The issues were not found sufficiently ripe in *Toilet Goods Association* v. *Gardner*, *supra.* The failure to comply with the regulation at issue would create a risk of the FDA's suspending certification services to the plaintiff. Such suspension was open to immediate administrative review. It would not result in criminal sanctions or seizure of goods. The burden of complying involved no direct and immediate impact on plaintiff's day-to-day affairs and was one sufficiently remote in time and effect to be deemed speculative. At most there would be a possible future request for inspection of plaintiff's plant and facilities at which time certain confidential material might be exposed to agency officials which, in turn, could possibly lead to publication.

In *General Motors Corp.* v. *Volpe*, *supra*, the issue was the hardship to the plaintiff corporation if the Court refused to hear a case involving a National Highway Safety Board order. The order directed the plaintiff to notify owners of certain GM trucks of a safety hazard resulting from use of a particular type of wheel last incorporated in GM trucks five years prior to the date of litigation. The cost of noncompliance was a possible loss of $400,000 in civil penalties. No criminal or other sanctions were possible. The cost of compliance was found to be de minimis being only the cost of mailing the notices, and in no way could compliance affect the day-to-day affairs of the plaintiff because such trucks had not been sold for five years. The Court found no ripeness. 321 F.Supp. at 1131.

[8] Turning to the facts in this case, the risks of noncompliance are evident from the enforcement sections of the Federal Trade Commission Act, 15 U.S. C.A. §§ 49, 50. Plaintiffs would be sub[1116]ject to an enforcement action,[11] criminal sanctions of up to three years imprisonment and $5,000 fine, [12] and civil penalties of $100 per day beginning thirty days after receipt of a notice of default.[13]

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[11] The Federal Trade Commission has expressed to this Court an "intention" to proceed against the plaintiffs for enforcement after February 19, 1975.

[12] In the instant matter, FTC counsel advised the Court at oral argument of the unlikelihood of imposition of criminal sanctions. The Supreme Court has discounted analogous representations noting that the existence of the statutory criminal sanction is the governing criteria. *Cf. Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 154, 87 S.Ct. 1507.

[13] The Court reads the February 7, 1975 letter of counsel for the Commission as the Commission not being prohibited from issuing notices of default if plaintiffs did not prevail on their motion for injunctive relief.

The burden of compliance is also substantial. Significant, time-consuming, and costly[14] efforts will be required to prepare the LB Reports. Initially there is the need to review past transactions to supply data of sufficient quality to satisfy the requirement for certification. Because the Commission has announced its intention that this program will be a continuing one, some companies understandably feel they must take immediate steps to anticipate future reporting requirements to produce consistent results from year to year. Meanwhile the Commission has not specified what those requirements will be in future years, except that they will likely be different than those now incumbent upon affected corporations. In addition there is a necessary diversion and dispersion of executive time and talent which has an indirect impact on the day-to-day affairs of business.

Plaintiffs also allege compliance will redound to their detriment in the form of possible breaches of confidentiality[15] and by misleading the public through publication of false or erroneous material.[16] As to these the burden is too speculative, based upon information now available, for the Court to consider in determining ripeness.

In summary, the risks of noncompliance are substantially greater than that found in *Toilet Goods*, but substantially less than in *Abbott Laboratories* or *Gardner* where seizure and adverse publicity were prominent considerations. Drawing a comparison with the *General Motors* case is less easy since civil penalties per plaintiff would probably be substantially less but there is present in the matter *sub judice* criminal sanctions which were not a factor in *General Motors*. The hardships of compliance are greater than in *Toilet Goods* and *General Motors*, but less than in *Abbott Laboratories* or *Gardner* both as to absolute monetary cost and type of impact on the day-to-day business affairs. In the instant matter the impact is indirect and hence of a less immediate consequential nature than the impact on day-to-day business affairs in *Abbott Laboratories* or *Gardner*. The severity of the hardship of compliance and noncompliance to these plaintiffs falls between that present in those cases used for guidance. On balance, the hardships are viewed as sufficiently great, immediate, and compelling regardless of whether compliance or noncompliance is pursued, to hold this controversy ripe for pre-enforcement review.

Having determined this matter to be ripe, attention is turned to the merits of plaintiffs' request for injunctive relief.

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[14] One plaintiff, W. R. Grace & Co., estimated its cost for compliance for the first year at $400,000. The FTC advised $50,000 per corporation was the median estimated cost of compliance by those corporations who chose to reveal that data to the Commission.

[15] *See Aluminum Co. of America, Inc. et al.* v. *FTC et al.*, 390 F.Supp. 301 (S.D.N.Y., 1975). [p. 1177 herein]

[16] The latter argument goes to plaintiffs' continuing assertion that the data required will be useless to the Commission and, indeed, misleading to those who study it.

IV. MERITS ON APPLICATION OF THE FACTS TO STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION

[1117] [9] The legal standard to be followed in this Circuit in determining whether to issue a preliminary injunction has been recently restated:

> "[A]s a prerequisite to the issuance of a preliminary injunction the moving party must generally show: (1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured *pendente lite* if relief is not granted to prevent a change in the status quo." *A.L.K. Corp.* v. *Columbia Pictures Industries, Inc.*, 440 F.2d 761, 963 (3d Cir. 1971). Moreover, this court has repeatedly stated that the district court, in considering whether to grant a preliminary injunction, should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest. *Delaware River Port Authority* v. *Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919-920 (3d Cir. 1974).

Immediate, Irreparable Injury

[10] An analysis of immediate, irreparable injury must not only encompass the injury allegedly suffered by these plaintiffs, but also whether plaintiffs have an adequate remedy at law. Defendants vigorously contend that plaintiffs do have an adequate remedy at law in that they need only await enforcement proceedings at which time all grounds for relief raised in this proceeding can be raised as legal defenses in the enforcement proceeding to be brought in the Southern District of New York.[17] The Court does not concur. In the first place, there is no absolute assurance that the "present intention" of the Commission to initiate enforcement proceedings in the form of mandamus, 15 U.S.C.A. § 49, will in fact be carried out. Secondly, even if there were such assurances, it is difficult to imagine the Commission not urging upon the enforcement forum that the proceeding is summary in nature thereby depriving plaintiffs of the opportunity to engage in discovery, if necessary, so as to buttress their "undue burden" theory.[18] *Cf. United States* v. *Associated Merchandising Corp.*, 256 F.Supp. 318 (S.D.N.Y. 1966); *see also Donaldson* v. *United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L. Ed.2d 580 (1971); *Federal Maritime Commission* v. *New York Terminal Conference*, 262 F.Supp. 225 (S.D.N.Y.), *aff'd*, 373 F.2d 424 (2d Cir. 1967). For this reason, this Court would be ill-advised to withhold ruling on plaintiffs' Motion for Preliminary Injunction so as to permit the FTC to commence an enforcement proceeding elsewhere. Finally, there appears to be little

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[17] "The Commission agrees not to file notices of default against the plaintiffs pending your decision on the motions to dismiss and for a preliminary injunction. We further agree not to sue any of the seven plaintiffs for enforcement until after February 19, 1975, and to notify you before any such suit is instituted. Our present intention, however, for reasons hereafter noted is to proceed against the plaintiffs for enforcement in the Southern District of New York after February 19, 1975, if they are in default in complying with the orders." Portion of FTC February 7, 1975 letter addressed to the Court.

[18] At oral argument, plaintiffs were unable to represent whether they would need additional discovery.

authority for the proposition that, in a case where plaintiff has no other action available, nonetheless he has an adequate remedy at law by waiting for some anticipated enforcement proceeding, not yet filed. *General Motors Corp.* v. *Volpe*, *supra*, and *Travis* v. *Pennyrile Rural Elec. Co-op.*, 399 F.2d 726 (6th Cir. 1968), are distinguishable not only because all discovery could be fully employed in those enforcement proceedings, but also by reason of the pendency of the enforcement proceeding prior to a ruling on injunctive relief. It is concluded plaintiffs have no adequate remedy at law.

[1118] [11] The alleged injury suffered by plaintiffs goes either to the unrecoverable costs and commitment of diverse business resources including managerial talent with concomitant loss of profits incident to preparation and compliance with the Commission orders plaintiffs assert to be invalid, or in the event of noncompliance, irreparable harm threatened by criminal and civil sanctions. The immediacy of the injury is evident; plaintiff has already incurred some costs incident to compliance and the time constraints placed upon plaintiffs by the FTC are narrow. The Court concludes plaintiffs will suffer immediate, irreparable injury.

The Possibility of Harm To Other Interested Persons

[12] The possibility of harm to other interested persons from the grant or denial of the injunction is non-existent or at best speculative. The Commission has suggested no such harm.

The Public Interest

[13] The Commission presumably represents the public interest. While not specifically appearing in the Commission resolution published in the August 22, 1974 Federal Register, two of the laudable avowed Commission objectives in seeking the LB Reports are to enable it to more intelligently utilize its own enforcement resources and, through publication of aggregated data, encourage improved resource allocation in the nation's economy.

The objective of more intelligent deployment of Commission enforcement resources will not be significantly affected by a delay of these seven corporate plaintiffs[19] in filing their LB Reports. For reasons which follow, the Court cannot say the public interest will be harmed by the issuance of an injunction. In fact, the Court cannot be confident the public interest might not benefit in the long run even if this Commission objective were temporarily frustrated.

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[19] The Court recognizes that while a possibility exists that the benefit of this decision may inure to the six additional plaintiffs who have filed in this district, the issue is not before the Court.

The data to be collected in the initial LB Reports will "be unreliable at best, and may be seriously misleading"[20] because of a "fundamental dilemma[21] with regard to classification and related matters which is not yet fully resolved or compromised." The median cost to industry for collecting the unreliable and perhaps seriously misleading information is, according to reports furnished the FTC, $50,000 per corporation[22] or $17,250,000 for the first year. Five of the nine larger corporations surveyed by the Comptroller General estimated their costs with supporting methodology in excess of one million dollars each.[23]

[1119] The Comptroller General also identified an FTC interest in learning from the initial, "unreliable" information, so that succeeding reports may be improved: "FTC regards this as a very significant benefit, worth the additional burden it imposes. Clearly, the early receipt of 1973 and 1974 reports would afford earlier opportunity for essential face-to-face meetings focused on resolution of problems."[24]

It is also clear that the provision of more accurate data in the future is in everyone's interest—the FTC, the business community, and the public (which, to the extent reporting expenses make business less profitable, suffers either through higher prices or lower tax income from affected companies). A delay in implementation of the LB Program which results in progress in the collective, joint, good-faith efforts of all parties to devise a less burdensome and more effective reporting system certainly would not be adverse to the public interest, even if it resulted in the LB Reports being available at a date later than anticipated. Given the holding *infra* that it is unlikely that plaintiffs' challenge to the FTC's power to implement the program will prevail, it is reasonable to assume that the parties' future efforts will be cooperatively directed toward improving the program's operation. In these circumstances, the public interest in efficiency outweighs any interest in speed.

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[20] The quoted language is taken from the Report to the Comptroller General of the United States on the Evaluation of the Federal Trade Commission's Proposed Annual Line of Business Report (Form LB) p. 15. Complaint Exhibit Folder, Exhibit F. It does not constitute a definitive finding of fact by the Court at this stage in this proceeding.

[21] ". . . On the one hand, individual business firms vary greatly in their organization, financial structure, and product lines. These variations are products of historical accident or the individual preferences of business leadership. To accurately reflect management, financial, and product-line structure of a specific business, therefore, the classifications and allocations must take account of these individualities.

"On the other hand, if information is to be collected from 500 firms and compared and aggregated, the data must be collected on the basis of definitions and specifications sufficiently uniform to make comparison and aggregation possible. Given the variations in business structure, uniform definitions will require most, if not all, responding businesses to report on a basis different than that on which they operate, with consequent impact on management practices and costs. . . ." Report to the Comptroller General of the United States on the Evaluation of the Federal Trade Commission's Proposed Annual Line of Business Report (Form LB) p. 5, Complaint Exhibit Folder, Exhibit F.

[22] Docket 22, p. 143.

[23] Note 21 *supra* at 10. Even assuming these figures are overstated, it is clear the **[1119]** costs of furnishing the requested information will be substantial.

[24] Note 21 *supra* at 14-15.

Probability of Success

[14] Finally, the Court must determine whether, as to any ground urged by plaintiffs, there exists a "reasonable probability of eventual success in the litigation." Delaware River Port Authority, *supra*, 501 F.2d at 920.

Plaintiffs allege the LB Reports constitute an unreasonable search and seizure. Neither side addressed the point with any citations in briefs or at oral arguments. However, in view of cases such as *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 202-08, 66 S.Ct. 494, 90 L.Ed. 614 (1946), there appears at present to be no great likelihood of success on the merits of this claim.

Likewise, arguments based upon the Comptroller General's failure to follow the thrust of recommendations in his own report by rejecting the Commission's proposed program have no substantial probability of success. This applies as well to arguments based on the Commission's failure to resubmit the changed LB form to the Comptroller General for another review. There appears to have been strict compliance with the appropriate statutes, which plaintiffs themselves came very close to conceding if not in fact doing so.[25] In any event, this entire area of the Federal Reports Act and its amendment through Section 409 of P.L. 93-153 does not appear pregnant with possibilities for success on the merits.

Plaintiffs argue that the LB Report, with its burdensome effect on the resources of private business and the threat it poses to confidential secrets of those businesses, constitutes a taking of property without due process of law, in violation of the Fifth Amendment. Neither side referred to the point in brief or argument; accordingly, the Court cannot conclude that it constitutes a ground likely for success on the merits.

Plaintiffs ostensibly argue that the vague instructions in the LB form, as modified by subsequent communication with the Commission, coupled with the permission granted to use estimates and divergent existent records, conflict with the certification requirement as to truthfulness and accuracy of such data. It is believed the plaintiffs argue that the certification requirement carrying with it criminal sanctions renders the criminal statute unduly vague so as to be in violation of the Fifth Amendment. **[1120]** Without further elaboration by the plaintiffs, this Court decision declines to postulate further as to the outcome of such an argument in terms of likelihood of success.

Undue Burden

By far, the overwhelming weight of plaintiffs' argument and evidence presented at the preliminary injunction hearing goes to the allegedly undue burden imposed upon them by the requirements in the Commission's order. The legal underpinning of this argument appears to be *Federal Trade Commission* v. *Baltimore Grain Co.*, 284 F. 886 (D.Md. 1922), *aff'd. per curiam*, 267 U.S. 586, 45 S.Ct. 461, 69 L.Ed. 800 (1925), in which the District Court said that there must be "some reasonable proportion between the public value of the information likely to be obtained and the private annoyance and irritation it will occasion." Plaintiffs attempt to demonstrate the unduly burdensome nature of compliance vis-a-vis the extremely limited public value of the information being gathered.

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[25] Docket 22, pp. 124-26.

The Court is of the opinion that the procedures the FTC followed have not been those which best serve the public interest, *infra*, pp. 1121-1125, and that collection of the best data possible is in the public interest. *Supra*, p. 1119. Nonetheless the Court doubts the propriety of its scouring the record in an effort to evaluate the probable value of the data sought. Courts have tended to limit their inquiry into investigative information requests to a determination only of the possible utility of the materials sought. *See, e.g., United States* v. *Feaster*, 376 F.2d 147 (5th Cir. 1967). Further, the vitality of the *Baltimore Grain* dictum has been, at the least, curtailed by *United States* v. *Morton Salt*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950).[26]

In any event, if it were to engage in such a balancing process, the Court would require a record more fully developed than that now before it. On the basis of the current record, there is no reasonable likelihood that the LB Program would be shown to be unreasonably burdensome in light of its public value.

Statutory Authority

Plaintiffs urge three separate contentions in support of their position on the merits that the Commission exceeded its statutory authority by adoption of the LB Program:

> a) Congress limited the Commission's Section 6 [15 U.S.C.A. § 46] powers to investigations in aid of substantive authority and rejected regulation by publicity
>
> b) Section 6(b) [15 U.S.C.A. § 46(b)] reports are limited to production of information kept in ordinary course of business
>
> c) Congress rejected a uniform system of reports and uniform accounting system which are contemplated by the LB Program. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary injunction—Contents.

A reading of 15 U.S.C.A. § 46(a)[27] effectively disposes of plaintiffs' primary contentions that investigation by the Commission is sanctioned only if made in conjunction with or related to an en[1121]forcement proceeding. There is no limitation in Section 46(a) which limits its applicability to enforcement proceedings.

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[26] It would appear the shift of judicial concern from substantive to procedural due process would direct the force of this argument to procedural requirements where agencies initiate programs of substantial and widespread effect. *See, e.g.*, discussion *infra*, pp. 1121-1125.

[27] The Commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization,

(Continued)

With respect to reports by corporations, 15 U.S.C.A. § 46(b) and *United States* v. *Morton Salt, supra,* effectively dispel plaintiffs' contentions. In *Morton Salt* plaintiffs argued that Section 6(b), 15 U.S.C.A. § 46(b), reports could be used only in support of information-gathering activities and not enforcement under Section 5. The Supreme Court stated:

> While we find a good deal which would warrant our concluding that § 6 was framed with the pre-existing antitrust laws in mind, and in the expectation that the information procured would be chiefly useful in reports to the President, the Congress, or the Attorney General, we find nothing that would deny its use for any purpose within the duties of the Commission, including a § 5 proceeding. 338 U.S. at 649, 70 S.Ct. at 367.

The above-quoted language leaves one with a conviction bordering upon certainty that the Supreme Court does not read 15 U.S.C.A. § 46 as limited in application to use in conjunction with enforcement activity.

Plaintiffs' contention with respect to publicity is effectively disposed of by reference to 15 U.S.C.A. § 46(f) which expressly empowers the Commission . . . "[t]o make public from time to time such portions of the information obtained by it hereunder, . . . as it shall deem expedient in the public interest; . . ."

Plaintiffs' assertion that 15 U.S.C.A. § 46(b) reports are limited to production of information kept in the ordinary course of business is contraindicated by the holding of *Morton Salt.*

Plaintiffs argument predicated upon Congressional rejection of proposals presently sought to be implemented by the LB Program, while ingenious, is nonetheless unconvincing.

All of the above coupled with the broad language of *Morton Salt* cause this Court to find there is no reasonable probability that plaintiffs will prevail on their contention that the Commission exceeded its statutory authority by reason of its adoption of the LB Program.

Compliance With Section 4 of the Administrative Procedure Act

There remains for discussion plaintiffs' contention that the Commission has violated the APA in promulgating the LB Program.

Section 4 of the Administrative Procedure Act, 5 U.S.C.A. § 553, establishes the procedure to be followed when an agency seeks to implement specified types of rules. In essence, it requires the originating agency to publish all proposed rules, with an invitation to

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business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

interested parties to make written comments. After consideration of relevant matters presented, the agency formulates the final rule, incorporating therein a concise general statement of their basis and purpose. The final rules must be published or served, but do not become effective for thirty days thereafter, thus allowing comment to be made to the final version.[28] The described procedure was designed not only to permit the public to participate in the rulemaking process, but "[to enable] the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." *Texaco, Inc.* v. *Federal Power Commission*, 412 F.2d 740, 744 (3d Cir. 1969); *see also NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 777-78, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969) (Douglas, J., dissenting); *National Petroleum Refiners Ass'n* v. *FTC*, 157 U.S.App.D.C. 83, 482 F.2d 672, 682 (1973), *cert. denied*, 415 U.S. 951, 94 S.Ct. 1475, 39 L. Ed.2d 567 (1974).

[1122] In the instant case, the Commission, on August 22, 1974, published in the Federal Register a summary description of the LB Program entitled "Resolution Requiring Annual Line of Business Reporting Program." The "resolution" was nowhere characterized as a proposed Commission rule, nor did it invite comments from the public. It does not appear that comments were, at that point, received or considered, that the resolution was subsequently republished or served as a final rule, or that thirty days elapsed between the date of publication and the effective date of the LB Program.[29]

Defendant has made no attempt to persuade the Court that the Commission complied with the rulemaking provisions of the APA. Rather, the government contends that these procedures are inapplicable to the promulgation and implementation of the LB Reporting Program because the Program is designed solely to gather information; the Program does not entail "an agency statement . . . designed to implement, interpret, or prescribe law or policy."[30] Implicit in this argument is the premise that agency investigation and rulemaking are mutually-exclusive functions and that investigatory activities conducted by an agency relieve it from the need to comply with the rulemaking strictures of the APA. This Court disagrees.

[15] Many federal and state agencies are possessed of broad investigatory and rulemaking powers. The investigatory grant of authority to the Commission is particularly far-reaching, authorizing, among other things, the power to investigate corporations, to require annual and special reports from corporations, and to investigate

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[28] Certain exceptions to this procedure are recognized by the APA; for purposes of the instant case, they are not applicable. *See* 5 U.S.C.A. § 553(b).

[29] Nothing in the record indicates that the FTC had previously published a notice of proposed rulemaking, thereby rendering the August 22, 1974 publication its final statement of a proposed rule.

[30] Commission Brief p. 31; *see* 5 U.S.C.A. § 551(4).

compliance with antitrust statutes and decrees. 15 U.S. C.A. § 46. However, it does not follow that because the Commission seeks disclosure of information under the broad authority granted by the Federal Trade Commission Act, it is relieved of the necessity to proceed in the manner prescribed by the APA when its action, whatever the Commission may label it, constitutes "rulemaking." Section 6(g) of the FTC Act, 15 U.S.C.A. § 46(g), provides:

The Commission shall also have power—

> (g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of sections 41 to 46 and 47 to 58 of this title.

Congress specifically intended in Section 6(g) to authorize the promulgation and implementation of rules relating to the Commission's investigatory powers. *National Petroleum Refiners Ass'n* v. *FTC*, 340 F.Supp. 1343, 1348-49 (D.D.C. 1972), *rev'd* on other grounds, 157 U.S. App.D.C. 83, 482 F.2d 672 (1973), *cert. denied*, 415 U.S. 951, 94 S.Ct. 1475, 39 L.Ed.2d 567 (1974).[31] *See also FTC* v. *Scientific Living, Inc.*, 150 F.Supp. 495, 498-99 (M.D.Pa.1957), *aff'd*. 254 F.2d 598 (3d Cir.), *cert. denied*, 355 U.S. 940, 78 S.Ct. 429, 2 L.Ed.2d 421 (1958), *reh. denied*, 358 U.S. 867, 79 S.Ct. 98, 3 L. Ed.2d 99 (1958). In the latter case, the court stated:

> Section 9 [of the FTC Act] specifically provides that the Commission . . . shall have access to any documentary evidence of any corporation *being investigated or proceeded against* (emphasis in original) . . . . *Having such power the Commission could make rules under* § *6(g), Id.* § *46(g) regulating the procedure in connection therewith.* (emphasis supplied).

[1123] [16,17] The investigatory and rule-making powers contemplated by the Federal Trade Commission Act are thus not mutually-exclusive, but complementary. The fact that the Commission's LB Program was instituted pursuant to its broad statutory powers of investigation does not *ipso facto* compel the conclusion that the LB Program could involve no elements of rulemaking. The Court must now determine whether rulemaking of the type contemplated by the Administrative Procedure Act did in fact occur.

Most commentators and courts have attempted to determine the earmarks of the rulemaking process by comparing it with the adjudicatory process. *See, e. g.*, K. Davis, Administrative Law Treatise § 5.01, at 285-90 (1958); *Hoffman-LaRoche, Inc.* v. *Kleindienst*, 478 F.2d 1, 13 (3d Cir. 1973). So juxtaposed, the salient characteristics of rulemaking appear to be two: (1) rules apply in an across-the-board manner to classes of persons, independent of special circumstances or equities peculiar to individuals within those classes; and (2) rules are primarily of prospective application. *See Hoffman-LaRoche, Inc.* v. *Kleindienst, supra* at 13.

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[31] In reversing, the Circuit Court of Appeals held that the rulemaking powers conferred by Section 6(g) encompassed not only rules relating to FTC procedure and investigation, but substantive trade regulations as well.

[18] Judged by these criteria, the FTC LB Program arguably possesses the earmarks of rulemaking. The reporting and recordkeeping requirements of the Program have generalized, across-the-board applicability to a large number of industrial concerns; moreover, the requirements are entirely prospective in effect, requiring compliance on or before specified future dates.

However, the utility of these traditional criteria in the case at bar is dubious because these criteria were developed in the context of cases seeking to distinguish rulemaking from the adjudicatory process. In the instant case, we are compelled to distinguish rulemaking from the purely investigatory process. The dubious value of the traditional indicia of rulemaking in this context is readily apparent when it is realized that many purely investigatory acts by an agency entail across-the-board orders affecting large classes of persons which are entirely prospective in effect.

This does not mean that the rulemaking and investigative functions are conceptually indistinct. An order directing the mere production of existing books and business records does not necessarily entail a "statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." Administrative Procedure Act § 2(c), 5 U.S.C.A. § 551(4). Where, however, in conjunction with its investigatory functions, an agency promulgates far-reaching directives which effectively prescribe the manner in which business records are to be kept for reporting purposes and which affect a substantial number of business enterprises, the agency has gone beyond a mere order to produce books and business records. In such a case, the agency has also prescribed law and/or policy.[32]

While the foregoing distinction is couched in terms of polar extremes, for purposes of the instant case, a narrower conceptual differentiation is not required. In implementing the LB Program, the FTC has directed businesses subject thereto not only to produce for inspection books and business records, but to compile and tabulate business data according to a complex classification system. Much of the data is not now maintained in the ordinary course of business and its value, in terms of the objectives of the LB Program, is uncertain. The effects of the program are pervasive, imposing new and unexpected liabilities of no small magnitude, yet the classification methods utilized by the [1124] Program are relatively untested. Under the circumstances, it appears that the FTC has transcended its purely investigatory function.

Professor Davis has suggested that difficulties in classifying hybrid administrative functions should be resolved with due regard to the desirable or undesirable consequences which a given classification will produce. K. Davis, Administrative Law Treatise § 5.01, at 293 (1958). Given the probable impact of the LB Program on American industry, the fact that compliance with its accounting and reporting requirements will require no small expenditure of industry time and money, and the uncertain value of the accounting and reporting methods utilized, it would seem highly desirable to allow all affected parties to make known their constructive suggestions and views on improving the LB Program. Inasmuch as the rulemaking procedures established by the Administrative Procedure Act were designed to secure this salutary objective, it appears that implementation of the LB Program should be deemed an instance of agency rulemaking.

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[32] That agency statements affecting business accounting practices may be the subject of "rulemaking" is made apparent by the APA: "[R]ule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . and *includes the approval or prescription for the future of accounting, or practices bearing* [*thereon*]. 5 U.S.C.A. § 551(4) (emphasis supplied).

[19] Upon the present record and for reasons previously discussed, it does not appear that the rulemaking procedures of the APA were adhered to in the implementation of the LB Program. The government has suggested substantial compliance with the APA procedure, alluding to the fact that the Office of Management and Budget as well as the General Accounting Office have solicited comments from interested parties concerning the LB Program and that further opportunity for comment was afforded in the context of motions to quash directed at the FTC compliance orders.

Preliminary research discloses no cases which recognize the sufficiency of "substantial compliance" for purposes of Section 4 of the APA. In any event, the Court cannot at this point conclude that the procedures utilized by the government constitute "substantial compliance." While it is true that the OMB and the GAO conducted extensive inquiries into the feasibility of the LB Program and received written and oral comments from many quarters, the Court doubts that these procedures are an adequate substitute for the procedures established under the APA. First, the proposals before the OMB in August 1973 were not in final form; indeed, the OMB had no opportunity to receive comments on two subsequent revisions of the Program which incorporated substantial changes.[33] Second, while the GAO did comprehensively review the later LB proposals, that agency was statutorily authorized to evaluate the Program solely in terms of its burdensomeness and the duplicative nature of its reporting requirements; the GAO was not charged with a determination of the advisability or necessity of the Program itself.[34]

The fact that affected businesses were allowed to file motions to quash the FTC compliance orders is also unpersuasive. At the time the motions were filed, the Program was a *fait accompli;* there is little reason to believe that the FTC would afford the same plenary consideration to plaintiffs' arguments that it might have if the Program were yet at the incipient rulemaking stage.

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[33] The review of the OMB was transferred, in substantially modified form, to the Comptroller General, prior to the promulgation of subsequent LB proposals by the FTC. *See* P.L. 93-153, 44 U.S.C.A. § 3512 (1975 Supp.), amending 44 U.S.C.A. § 3501 et seq.

[34] *See* 44 U.S.C.A. § 3512 (1975 Supp.).

For the foregoing reasons, the Court does not at this juncture feel that the procedures urged by the government constitute an adequate substitute for the rulemaking procedures established by the Administrative Procedure Act. Accordingly, with respect to this limited issue, the Court concludes plaintiffs have established a sufficient probability of [1125] success on the merits to warrant issuance of a preliminary injunction.

Order

It is ordered and adjudged that:

(1) Defendants, their agents, officers, servants, and employees, and all persons in active concert or participation with them are herewith enjoined and restrained during the pendency of this litigation and until further order of this Court from:

(a) Giving notice of default to plaintiffs for failure to file Form LB as required by the resolution of the Federal Trade Commission dated August 2, 1974, and its special orders entered pursuant thereto; and

(b) Enforcement of or causing to be enforced civil penalties and all other forms of judicial and administrative relief, including but not limited to mandamus, for plaintiffs' failure to file the aforesaid Form LB.

(2) Defendants' motion to dismiss plaintiffs' complaint for want of jurisdiction is herewith denied.

JOHN BODNER, JR., et al. v. F.T.C., et al.*

Civ. A. No. 74-1189. F.T.C. File No. 99-187.

(United States District Court, District of Columbia, February 24, 1975)

On motion for summary judgment, court held that, under the Freedom of Information Act, certain portions of the staff report to the Commission on the trade regulation rule proceedings dealing with octane posting were not exempt from disclosure under exemption 5 of the Freedom of Information Act because they contained factual material which was severable from any analysis or opinion. Further, court held that the search and copy fees were reasonable and proper.

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* Not reported in Federal Reporter. Reported Trade Reg. Rep. ¶60,171 at 65,551 (1975-1 Trade Cases). See also pp. 1122 and 1161 herein.

William Simon, Washington, D.C. for plaintiffs.

Michael J. Ryan, Washington, D.C., for defendants.

Before FLANNERY, *District Judge*.

MEMORANDUM

This matter currently is before the court on defendants' motion for summary judgment and plaintiffs' opposition thereto. This action is brought pursuant to the Freedom of Information Act, 5 U. S. C. § 552, under which plaintiffs seek to compel Federal Trade Commission (FTC) disclosure of three documents which relate, in whole or in part, to the FTC's concern with environmental matters while enacting the trade regulation rule requiring posting of octane ratings on gasoline pumps. Defendants have claimed exemption from disclosure under 5 U. S. C. § 552(b)(5). Pursuant to this court's order, defendants have filed a detailed index regarding each document, *Vaughn* v. *Rosen*, 484 F.2d 820 (D. C. Cir. 1973), *cert. denied*, 415 U. S. 977 (1974), and the court has examined the documents *in camera*.[1] Plaintiffs also contest the Commission's imposition of search and copying fees for documents the agency agrees to release. The court will consider first the exemption 5 issues as regards the three withheld documents and then will consider the fee question.

Document A(1).

Document A(1) is a nine-page memorandum, prepared by the FTC General Counsel's Office, which discusses litigation strategies in *National Petroleum Refiners Association* v. *FTC*, Civil Action No. 1180-71 (D. D. C.) and whether the Commission should file an environmental impact statement in connection with the Commission's previous promulgation of the gasoline octane posting rule. Specifically, the memorandum, without advocating a firm position on various legal issues, discusses the alternatives open to the Commission and makes recommendations as to the advantages and disadvantages of each.[2]

Defendants, on order of the court, investigated FTC records to find what use was made of this document by the Commission. The agency files are not altogether clear, as evidenced by the affidavits and the index. It appears in all likelihood that, although the memorandum was intended to be used by the General Counsel's Office and by the

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[1] With the exception noted in footnote 6, *infra*, the court finds that defendants have complied with *Vaughn* and have provided a detailed justification for application of the exemption to the specific documents in dispute. See *Pacific Architects & Engineers, Inc.* v. *Renegotiation Bd.*, No. 73-2093 (D. C. Cir. October 8, 1974) (slip at 4).

[2] Further description and details regarding this document are found in the indexes and affidavits which have been filed by defendants.

Commission itself, neither the General Counsel nor the Commission actually used the document. This conclusion is shaken only by the fact that one former FTC staffer, Harold D. Rhynedance, Jr., believes the document may have been shown to the Commission chairman. It is without dispute, however, that the document never was approved by the General Counsel and that there is no record of the Commission ever having been forwarded the document.

Plaintiffs, relying heavily on the fact that the document may have been shown informally to one member of the Commission, argue that under *American Mail Line Ltd.* v. *Gulick*, 411 F.2d 696 (D. C. Cir. 1969), the document may have to be disclosed and that, at a minimum, a genuine issue of material fact exists concerning the use made of the document which bars summary judgment. Plaintiffs argue:

> [T]he Chairman of the Commission may have reviewed this document, in which case he would have undoubtedly relied upon it in making the decision not to issue an environmental impact statement and probably have conveyed the substance of the contents to the other Commissioners, thus creating a situation where this document constituted the sole basis for the Commission's decision.

Plaintiffs' Supplementary Memorandum in Response to Defendants' "Revised Index" and in Further Opposition to Defendants' Motion For Summary Judgment, at 5, filed January 23, 1975.

First, absent correctness of plaintiffs' arguments, document A(1) appears clearly to fall within the exemption of 5 U. S. C. § 552(b)(5). Document A(1) contains the legal analysis and recommendations of the FTC staff, information developed originally to assist the Commission in its decision-making process. The document specifically was designed to offer alternatives and analysis to the Commission so that the Commissioners could decide whether a decision had to be made and if so what decision to make. See *Sterling Drug, Inc.* v. *FTC*, 450 F.2d 698 (D. C. Cir. 1971); *Soucie* v. *David*, 448 F.2d 1067, 1077 (D. C. Cir. 1971). This type of internal memorandum is the sort of frank agency communication that exemption 5 seeks to protect.

There appears to be several answers to the contentions raised by plaintiffs concerning document A(1). First, although plaintiffs argue that factual issues remain which preclude summary judgment, the court concludes that there exists no genuine issue of material fact. See Fed. R. Civ. P. 56(c). Plaintiffs' theory, quoted earlier, regarding the possible use made of document A(1), is a matter of sheer speculation[3]

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[3] For example, it appears doubtful but possible that the FTC chairman might have seen document A(1). From this plaintiffs argue he "undoubtedly relied upon it" and that he "probably conveyed the substance of its contents to the other Commissioners." This represents mere guesswork on plaintiffs' part, and still further guesswork to then conclude that the document was the sole basis for a decision. Further, to find what the FTC chairman may have discussed with other Commissioners clearly would constitute an unwarranted invasion of the Commission's decision-making process. Hence, even if discovery were reopened, the court would not permit discovery into these matters. The FTC has in good faith supplied all information reasonably available concerning use made of document A(1), and in the court's opinion has met its burden justifying the exemption. See 5 U. S. C. § 552(a)(3). Such information indicates overwhelmingly that the

(*Continued*)

which, in light of the overwhelming evidence negating such theory, does not present a genuine issue of material fact.

Even assuming that plaintiffs are correct in their speculation—that the FTC chairman reviewed document A(1), relied upon it, and later conveyed the contents to the other Commissioners—plaintiffs would not be entitled to relief. There still would be no solid reason to believe that the Commission as a whole considered the document as the basis for its decision. See *Grumman Aircraft Eng. Corp.* v. *Renegotiation Bd.*, 482 F.2d 710, 719-720 n. 29 (D. C. Cir. 1973), *cert. granted*, 417 U. S. 907 (1974). There is no evidence that the entire Commission saw or reviewed document A(1). At the very most other Commissioners received a summary of the contents from the chairman and thereafter decided not to issue an environmental impact statement. Under similar circumstances the Court of Appeals for the District of Columbia Circuit stated:

> The staff memoranda submitted to the Commission prior to the Miles-S. O. S. decision undoubtedly contain ideas which affected that decision to some extent. However, our experience with the decision-making process leads us to believe that the material in these memoranda was probably filtered and refined by the Commission, with the result that its ultimate decision was something more than, or at least different from, the sum of its "parts." Consequently, we doubt that examination of the "parts" would give a very accurate picture of the decision.

Sterling Drug, Inc. v. *FTC*, *supra* at 706. Similarly, this court, at best, concludes that document A(1) constitutes an inaccurate picture of the agency's alleged decision in this matter. Where there is no evidence that the memorandum is adopted as policy and where there are dangers of misleading the public and embarrassing predecision communications between staff and decision-maker, the documents may properly be withheld under exemption 5. See *id.* at 706-08; *Grumman Aircraft Eng. Corp.* v. *Renegotiation Bd.*, *supra* at 719 n. 29.[4]

Finally, the court concludes that document A(1) contains no

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document was not "adopted" by the Commission. See generally *Pacific Architects & Engineers, Inc.* v. *Renegotiation Bd.*, *supra*. In rejecting a similar claim the court in *Sterling Drug, Inc.* v. *FTC*, *supra* at 706, stated:

"Here the Commission has not indicated publicly that staff memoranda contained the rationale for this decision, and we do not agree with Sterling's assertion that this must of necessity be the case." (footnote omitted). Further, there are no Commission memoranda which indicate that document A(1) contains a statement of Commission policy or interpretation. See *id.* n. 8. Under these circumstances, no further discovery is necessary.

[4] The court perceives what may be an underlying misperception on plaintiffs' part. In its octane rule the FTC cited environmental concerns as one reason justifying the rule. The FTC never issued an environmental impact statement and never stated publicly why it did not. Plaintiffs conclude that the Commission must have deliberated on this matter and have decided in secret not to issue such a statement. Plaintiffs then conclude that a statement of policy or interpretation exists under 5 U. S. C. § 552(a)(2)(B) and that such statement, presumably embodied in document A(1), must be made public. In *Sterling Drug Inc.* v. *FTC*, *supra*, the court stated at page 707:

"Agencies are required to issue opinions with many of their orders, but it is completely unreasonable to suppose that every agency order can be accompanied by an opinion. The probable effect of a decision requiring disclosure of the staff memoranda would thus be to inhibit 'a full and frank exchange of opinions' at least in that class of cases where opinions are not, and as a practical matter cannot be, issued." (footnote omitted). In the instant case the Commission may, in a sense, have issued an order by not filing an environmental impact statement. Such an order may even constitute Commission policy. However, there does not necessarily exist a statement embodying the reasons for the FTC decision. The court has concluded that document A(1) does not constitute such a statement which can be compelled under the *Gulick* rationale. The court also concludes that document A(1) does not reflect policy already made and

(Continued)

severable factual material. "Factual information may be protected only if it is inextricably intertwined with policy-making processes." *Soucie* v. *David, supra* at 1077-78; see *Montrose Chemical Corp.* v. *Train*, 491 F.2d 63 (D. C. Cir. 1974). The largest part of this document consists purely of staff legal analysis presenting various alternatives to the Commission. From the bottom of page one to the top of page three the memorandum selectively summarizes parts of the Commission's previously published statement of basis and purpose. This selective summary then serves as a focus upon which later legal analysis is made. All of these facts are in the publicly disclosed statement of basis and purpose. See *id.* at 70-71. See also *Washington Research Project* v. *H. E. W.*, No. 74-1027 (D. C. Cir. September 12, 1974) (Slip 18-22). Since this summary is selective in nature and becomes intertwined with the staff's legal analysis, the court finds that it is part of the deliberative process and hence should be exempt from disclosure. See *Montrose Chemical Corp.* v. *Train, supra* at 70-71.

Document A(2).

Document A(2) consists primarily of a staff report to the FTC which "summarizes the evidence presented during the Trade Regulation Rule Proceeding concerning the posting of octane ratings, analyzes this evidence, and makes recommendations concerning possible action by the Commission." Revised Index at 3.[5] There is also a transmission memorandum and seven appendices, all of which have been described in the indexes.[6] Great portions of this document do not pertain in any way to plaintiffs' request for "each and every item of material" relating to environmental matters. Those portions of course need not be disclosed since no request was made for them.[7] The court will not, at this time,

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announced. See *Schwartz* v. *IRS*, No. 74-1392, (D. C. Cir. Feb. 14, 1975). The court, of course, expresses no view concerning the issue of whether such an environmental impact statement should have been filed; such an issue properly would be the subject of a separate action.

[5] The court, after *in camera* inspection, finds this description accurate. While the report by nature must reflect the accumulated knowledge and expertise of a staff which worked extensively on the octane rule proceedings, the report itself does not reflect independent staff investigation but rather primarily is a staff summary of evidence presented during the octane rule proceedings. Of course, whether the staff's summary is accurate and unbiased is not a matter of concern to this court. See *Montrose Chem. Corp.* v. *Train, supra* at 71.

[6] The court notes one misleading, though probably inadvertent, indexing error. See Revised Index at 3. Subsection (f) of the report, labeled "Getting the Lead Out," consists of pages 81-82, not 81-92 as presently indexed. Pages 82-92 properly are labeled "Legal Aspects" and pertain solely to an analysis of the Commission's power to promulgate a trade regulation rule. While this omission does not appear serious, the court feels obliged to caution the Commission to take extreme care in complying with the disclosure requirements of the FOIA. Such errors cast doubt over the care with which an agency claim of exemption is made and further indicate the necessity of careful and detailed indexing. If a large number of documents were involved making thorough *in camera* review impossible, such errors might go unnoticed, possibly frustrating the successful functioning of the Act.

[7] The court is mindful, however, to construe plaintiffs' material request broadly and not to separate artificially environmental factors from non-environmental factors. Thus, the court is of the view that if any item within a subdivision of the report is within the document request and is disclosable (the subdivisions are enunciated on page 3 of the revised index as corrected by footnote 6 of this Memorandum), then the entire subdivision should be disclosed unless within an exemption.

deal with disclosure of the appendices.[8]

Both the subdivision labeled "Background," pages 1-9 and one-half of page 10, and the part labeled "Getting the Lead Out," pages 81-82, relate in varying degree to environmental matters and thus are within plaintiffs' document request. Regardless of whether the rest of document A(2) is exempt, the court finds that both these sections represent severable factual material which must be disclosed. *Soucie* v. *David, supra* at 1077-78; *Montrose Chem. Corp.* v. *Train, supra* at 67. Neither section represents the kind of summary of evidence which is necessarily a part of the deliberative process. See *id.* Rather, each section presents an objective, factual presentation whose disclosure would not in any way imperil the frank communications between Commission and staff.[9] Only where disclosure would be "injurious to the consultative functions of government," should material be exempted under exemption 5. See *EPA* v. *Mink*, 410 U. S. 73, 88-90 (1973). As regards these two sections the Commission, on whom the burden rests, 5 U. S. C. § 552(a)(3), has failed to sustain its action. See *Soucie* v. *David, supra* at 1078.

The only other references in document A(2) to environmental matters appear in subsections (b) and (c). These sections contain the staff's summaries of evidence in favor of the octane rule and in opposition to it.[10] As stated by defendants, this summary of evidence later became the substance of the Commission's statement of basis and purpose which was issued with the octane rule. The staff sought in this summary to present the arguments of those parties participating in the octane rule proceeding so that the Commission could better reach a decision on whether to issue the rule. As such this summary appears to fall squarely within the holding of *Montrose Chemical Corp.* v. *Train, supra*, that exemption 5 seeks to protect the deliberative process, not just deliberative materials. See 491 F.2d at 69.

> To probe the summaries of record evidence would be the same as probing the decision-making process itself. To require disclosure of the summaries would result in publication of the evaluation and analysis of the multitudinous facts made by the Administrator's aides and in turn studied by him in making his decision. Whether he weighed the correct factors, whether his judgmental scales were finely adjusted and delicately operated, disappointed litigants may not probe his deliberative process.

Id. at 68 (footnote omitted). Plaintiffs also assert that this summary "reflects policy already made and announced" and thus must be disclosed. See *Grumman Aircraft Eng. Corp.* v. *Renegotiation Bd., supra* at 719. After review of the index and the documents *in camera* the court can find no substantial basis for plaintiffs' contention and accordingly rejects it. If plaintiffs were given access to this summary of evidence, they would then know both what advice the commissioners received and how much of this advice they accepted. See *id.* at 70. Disclosure of such information is not warranted by the facts of this case. "[W]here an alternative source of the facts is available to the public, what the litigants may be seeking are not really facts, but evaluation of the facts or advice, which should not be subject to disclosure." *Id.* at 42. All factual materials concerning environmental matters which have been disclosed to the court have been or will be made available to plaintiffs. The staff's summary and analysis of this factual material need not be disclosed.[11]

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[8] Defendants are willing to disclose those appendices dealing with environmental factors, subject to payment of search and copy fees. See Original Index at 2. The propriety of such fees is dealt with later in this Memorandum.

[9] The section labeled "Background" first outlines the procedures and events that occurred during the octane rule proceedings. Then, in largest part, it consists of a subsection which discusses what octane is, what it is not, and why it is important. Broad claims that disclosure of such information would impinge upon the deliberative process simply cannot sustain scrutiny. The section labeled "Getting the Lead Out" reports to the Commission on the problem of reducing lead in gasoline. It does not reflect the staff's or the Commission's administrative reasoning process.

[10] There are several references to non-record evidence concerning environmental matters in the staff report. See Revised Index at 5. The Commission is willing to make this factual material available. See *Montrose Chemical Corp.* v. *Train, supra* at 71.

Document A(3).

Document A(3) consists of a transmittal memorandum, to which are attached several items. The items include two draft versions of an addendum to the rule's statement of basis and purpose, and a copy of the proposed revised rule with a proposed revised statement of basis and purpose. See Revised Index. The addendum concerns R + M/2 method of octane measurement. The only references to environmental matters occur in the longer proposed addendum and in the proposed statement of basis and purpose. As defendants point out, the factual material relating to environmental matters either is contained in the public record or remains unaltered in the published version of the statement of basis and purpose. Hence, as relates to environmental factors which are the only things relevant in this case, there is no danger that the basis for the rule is based upon a secret record. See *Montrose Chemical Corp.* v. *Train, supra* at 70-71. See also footnote 11, *supra.*

Defendants in their revised index refer to the documents as draft versions of documents eventually issued by the Commission. Plaintiffs question such a characterization but the court, after *in camera* examination and review of the Indexes, concurs with defendants' description. The FTC in 1971 reopened the octane rule proceedings to consider the proper method of octane measurement. Later, the FTC issued a revised rule and statement of basis and purpose, incorporating in an addendum data received upon the reopening of the proceedings. One draft addendum was prepared by the Commission's Bureau of Consumer Protection. The second addendum was prepared by the General Counsel's Office with the assistance of the Consumer Protection Bureau. The Commission finally incorporated most of the latter addendum in a revised statement of basis and purpose and at the same time revised the trade regulation rule. As part of document A(3) there is a proposed revision of the trade regulation rule and of its statement of basis and purpose.

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[11] Throughout this litigation, plaintiffs have emphasized their theory that defendants have utilized a secret record, consisting primarily of *ex parte* conferences, and thus entire documents should be revealed so that such "secret law" can be exposed. It is mainly on this basis that plaintiffs seek to distinguish *Montrose Chemical Corp.* v. *Train, supra,* where the court emphasized that the staff summaries contained only record evidence. However, *Montrose* was a case in which the rule-making was required to be "on the record" and accordingly had to adhere to those stricter provisions. See 7 U. S. C. § 135b(c); 5 U. S. C. §§ 553(c), 556, 557. The rule-making in the instant case proceeded under 5 U. S. C. § 553, which, as Judge Robinson pointed out in *National Petroleum Refiners Association* v. *FTC*, is much less formal. See Memorandum, *National Petroleum, Refiners Ass'n* v. *FTC* [1974-1 trade cases ¶ 75,119], Civil Action No. 1180-71 (D. D. C. filed June 17, 1974). Under these circumstances, the court finds *Montrose* to be even more compelling precedent and even if the summaries prepared by the staff included non-record information, the court would not necessarily compel agency disclosure. The agency has set forth the basis for its decision in its lengthy and detailed statement of basis and purpose. Under 5 U.S.C. § 553 the Commission has complied fully with the Administrative Procedure Act and the validity of the rule itself eventually will be decided upon that statement of reasons. Hence, the court finds plaintiffs' repeated references to *ex parte* conferences largely irrelevant in the context of this proceeding.

Such draft documents, prepared by the staff and designed to be used by the Commission in revising the octane rule, clearly constitute a part of the deliberative process that is designed to be protected by exemption 5. Cf. Memorandum Opinion at 4, *Astro Communications Laboratory* v. *Renegotiation Bd.*, Civil Action No. 2403-70 (D. D. C. filed May 16, 1974). Such a draft version, subject to change upon review by the Commission, is not likely to reflect accurately the Commission's deliberations or final decision. Further, where as in this case, the agency subsequently has set forth its statement of basis and purpose for its decision, there is no reason to probe for the memoranda it has considered in reaching its final decision. See *Montrose Chemical Corp.* v. *Train*, *supra* at 70 n. 42.[12]

Search and Copy Fees

The parties finally contest defendants' imposition of $223.50 in search and copy fees for documents that defendants have all along been willing to disclose to plaintiffs. Original Index at 3. Of course, when an agency produces identifiable records under 5 U. S. C. § 552(a)(3), it may require the party requesting the documents to pay a reasonable fee.

On April 24, 1974, plaintiff Bodner requested the FTC to produce any materials relating to the environment and considered by the Commission in the octane rule proceedings. Exhibit D to Complaint. In this request "Commission" was defined as "the staff, all employees of the Commission and all other persons assisting directly or indirectly in the work of the Commission." *Id.* Shortly thereafter defendants began an extensive search of Commission files to locate material within plaintiffs' request. Affidavit of Charles A. Tobin, filed September 20, 1974. On July 30, 1974, the Commission notified plaintiffs that it had completed its search and that certain documents could be obtained upon payment of the fee. Exhibit J to Complaint. Plaintiffs object to the fee primarily on two grounds: first, that all the documents that were found should have been part of the public record of the octane rule proceedings and, second, that the search was poorly run and much more extensive than necessary. Even if plaintiffs are correct on the first point, defendants, given the broad definition of "Commission," and the fact that the documents sought were not precisely identified, were justified in the extensive search they undertook. Further, while perhaps the search could have proceeded more economically or in a more organized fashion, this appears mostly to be a matter of hindsight. Under all of the circumstances and considering the extensive search that was undertaken, the court finds the fees reasonable and proper.

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[12] Where, as regards document A(3), the material in question constitutes draft versions of materials later published by the agency, the court questions whether there ever would be severable factual material subject to disclosure. It appears that any factual material in a draft document used by the agency clearly would be part of the deliberative process and protected from disclosure. See *Montrose Chem. Corp.* v. *Train*, *supra*. If that were not the case, the court would find that the only severable factual material relevant to plaintiffs' request is the Background section to the draft trade regulation rule's statement of basis and purpose. However, that section appeared unchanged in the subsequently published version and thus would not have to be ordered disclosed.

Conclusion

The court concludes that defendants are entitled to summary judgment on all issues except with respect to two subdivisions of document A(2). Those two subdivisions, discussed earlier in this Memorandum, are not exempt and should be disclosed to plaintiffs. Had plaintiffs made an appropriate motion, they would have been entitled to summary judgment as to those two subdivisions. Under the circumstances such a motion is not necessary. *Robbins* v. *Kleindienst*, 383 F. Supp. 239, 250 (D. D. C. 1974). An appropriate judgment accompanies this Memorandum.

AVNET, INC. v. FEDERAL TRADE COMMISSION*

No. 73-1399. F.T.C. Docket No. 8775.

(United States Court of Appeals, Seventh Circuit, February 28, 1975)

1. CORPORATION WAS NOT DENIED RIGHT TO DEVELOP EVIDENCE ON QUESTION WHERE F.T.C. ASSERTED, EARLY IN HEARING, THAT RELEVANT MARKET WAS LIMITED TO PRODUCTION LINE REBUILDERS, EXCLUDING CUSTOM REBUILDERS.

[71] In Federal Trade Commission hearing concerning possible antitrust violation in corporation's acquisition of two competing manufacturers of parts which were sold to rebuilders of automotive electrical units, where early in hearing Commission asserted that relevant market was limited to production line rebuilders and excluded custom rebuilders, corporation was not denied right to develop

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* Reported in 511 F.2d 70 (1975). *Cert. denied*, 423 U.S. 833 (1975). For case before the Commission, see 82 F.T.C. 391.

evidence on question, notwithstanding fact that complaint did not specify limitation of relevant market.

2. F.T.C. DID NOT ERR IN CONCLUDING THAT RELEVANT MARKET FOR MANUFACTURERS OF NEW PARTS WAS LIMITED TO SALES OF NEW PARTS: PRICES BETWEEN NEW PARTS AND RECONDITIONED USED PARTS VARIED BETWEEN 25% AND 50%.

Where prices for rebuilt or reconditioned used parts for automotive electrical units varied from 25% to 50% below the prices for comparable new parts, and there was no substantial interaction in price between the two lines, Federal Trade Commission did not err in concluding that relevant market for manufacturers of new parts was limited to sales of new parts for purpose of determining whether acquisition of two manufacturers of new parts by corporation violated antitrust laws and there was no substantial interaction in price between the two lines.

3. IN DETERMINING POSSIBLE VIOLATION OF ANTITRUST LAW, F.T.C. HAS INITIAL BURDEN OF EXPLAINING WHY PARTICULAR GROUP SHOULD NOT BE INCLUDED WITHIN RELEVANT MARKET.

Federal Trade Commission has initial burden of explaining why a particular group of buyers or sellers should not be included within relevant market in determining possible violation of antitrust law.

4. F.T.C. PROPERLY LIMITED RELEVANT MARKET TO PARTS SOLD TO PRODUCTION LINE REBUILDERS WHERE CUSTOM REBUILDERS OF AUTOMOTIVE ELECTRICAL UNITS WERE PRIMARILY RETAILERS OF SERVICE.

Where custom rebuilders of automotive electrical units were primarily retailers of services, while production line rebuilders were manufacturers of products which were sold largely to jobbers and retailers as well, in determining whether acquisition by corporation of two competing manufacturers of parts sold to rebuilders violated antitrust law, Federal Trade Commission properly limited relevant market for parts sold to production line rebuilders.

5. IN FASHIONING APPROPRIATE REMEDIES, DEFERENCE MUST BE ACCORDED TO F.T.C.

Deference must be accorded to Federal Trade Commission in fashioning appropriate remedies.

6. SINCE IT WAS ACQUISITION OF SECOND MANUFACTURER WHICH WAS HEAVILY ENGAGED IN MANUFACTURE OF PARTS SOLD TO REBUILDERS OF AUTOMOTIVE ELECTRICAL UNITS THAT RESULTED IN VIOLATION OF THE LAW, F.T.C. DID NOT ABUSE ITS DISCRETION BY REQUIRING DIVESTITURE OF THE SECOND MANUFACTURER RATHER THAN THE FIRST MANUFACTURER ACQUIRED.

Where it was acquisition of second manufacturer of parts which were sold to rebuilders of automotive electrical units which resulted in violation of antitrust law, and second manufacturer was more heavily engaged in manufacture of such parts, Federal Trade Commission order requiring divestiture of second manufacturer acquired rather than first manufacturer acquired was not abuse of discretion.

7. EVEN THOUGH COMPETITION BETWEEN USED/REBUILT PARTS AND NEW PARTS WAS NOT SUFFICIENTLY INTENSE TO REQUIRE TREATMENT AS PART OF RELEVANT MARKET IN ANTITRUST VIOLATION, F.T.C. DID NOT ERR IN REQUIRING COMMISSION APPROVAL OF ANY ACQUISITION OF SUPPLIERS OF USED OR REBUILT PARTS FOR 10 YEARS.

Where corporation had violated antitrust law in acquiring two competing manufacturers of units which were sold to rebuilders of automotive electrical units, Federal Trade Commission did not err in requiring Commission approval of any acquisition by corporation of supplier of used or rebuilt parts during subse[72]quent ten years, even though competition between used or rebuilt parts and new parts was not sufficiently intense to require former to be treated as part of relevant market for purposes of determining whether antitrust violation had occurred.

(Syllabus, with substituted captions, taken from 511 F.2d 70.)

On petition to review, court held that (1) the Commission did not fail to give adequate notice of limitations to relevant market; (2) the Commission did not err by excluding sales to custom rebuilders in determining relevant market; (3) the Commission did not err in the exclusion of sales of used and rebuilt parts in determining relevant market; (4) decision to require divestiture of manufacturer most substantially engaged in production of parts and prior Commission approval of acquisition of a supplier of used or rebuilt parts during ten-year period was within Commission's discretion.

Affirmed; judgment of enforcement entered.

Howard P. Willens, Washington, D.C., for petitioner.

Gerald Harwood, Acting Asst. Gen. Counsel, F.T.C., Washington, D.C., for respondent.

Before FAIRCHILD, *Chief Judge*, and PELL and STEVENS, *Circuit Judges*.

STEVENS, *Circuit Judge*.

The Commission held that the acquisition by Avnet of two competing manufacturers of parts which are sold to rebuilders of automotive electrical units violated § 7 of the Clayton Act, as amended.[1] Avnet argues that it did not have a fair opportunity to meet the Commission's prima facie case because it did not anticipate the Commission's narrow definition of the relevant product market, and, in any event, that the evidence is insufficient to satisfy the Commission's initial burden on the relevant market issue. We find no unfairness in the way the case was tried and have no difficulty in concluding that the evidence adequately supports the Commission's findings.

As a preface to our discussion of Avnet's principal contentions, we shall briefly summarize the Commission's description of the industry, review the history of the proceedings, and identify the evidence which, according to Avnet, it was unable to present.

I.

Among the automobile parts which may need to be replaced or repaired as a car ages are electrical units, such as generators, alternators, starters and voltage regulators. These "automotive electrical units," ("AEU's") are made by original equipment manufacturers ("OEM's") and by rebuilders. OEM's include the major automobile companies and other firms that produce equipment for installation on new vehicles. They sell replacement units to warehouse distributors ("WD's"), who in turn resell individual units, as well as components of such units, to retailers such as repair shops, service stations, garages and car dealers.

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[1] The pertinent portion of Section 7 of the amended Clayton Act, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1970), provides:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." The Commission's decision is reported at 82 F.T.C. 444 (1973).

The record in this case demonstrates that the prices at which WD's sell new AEU's are significantly higher than the prices at which comparable AEU's can be rebuilt and sold at a profit. A used unit may be dismantled, cleaned and reassembled with such substitute components as may be needed.[2] Such rebuilding may take place in repair shops where one unit at a time is put back in working order for an individual customer ("custom rebuilding"), or in a production-line operation where units are rebuilt in large quantities and then sold to jobbers for distribution to the retail trade ("production-line rebuilding"). There are about 150 or 200 production-line rebuilders in the entire country.[3]

The "rebuilders supply industry" includes the firms which sell new components to rebuilders of AEU's. Counsel for the Commission consistently contended that the industry is composed of only 16 or 17 principal manufacturers with aggregate annual sales of about $20 mil[73]lion.[4] The alleged violation resulted from the combination of IPM, the largest, and Valley Forge, the third largest, of these firms. Before the combination, IPM had sales of over $11 million and Valley

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[2] The substitute components may themselves be either new or used or rebuilt.

[3] The parties agree that the relevant geographic market in this case is nationwide.

[4] [73] The following table lists the firms in complaint counsel's market with their sales to rebuilders. It will be noted that the Hearing Examiner has included 17 firms, although complaint counsel initially contended that only 16 were sufficiently significant to be relevant.

Company	Sales ($000)	Market Share (%)
IPM	11,353	57.4
Ace	2,200	11.1
Valley Forge	1,856	9.4
Vulcan Motor Products	750-1,000	5.0
VMC & Rebuilders Supply Co.	1,000	5.0
Carwin Sales	511	2.6
Butts Electric Supply Co.	438	2.2
American Starter Drive Service	425	2.1
Ennis Automotive, Inc.	167	.8
Preferred Electric & Wire Corporation	100-150	.8
Lincoln Bearing Co.	138-150	.8
Starter Service Company, Inc.	128	.6
Los Angeles Commutator	122	.6
Precision Field Coil Co.	95	.5
Jamison Parts	less than 70	.4
Hubert Products	55	.3
Rich Engineering Co.	46	.2
TOTAL	19,781	100.00

82 F.T.C. at 414.

In addition, the Hearing Examiner and the Commission both noted that in 1964, Ford, Chrysler and General Motors had sales to authorized rebuilders which amounted to about 3% of the foregoing total.

Forge's were almost $2 million. Avnet acquired the assets of Valley Forge as of July 31, 1964, and those of IPM as of January 31, 1965. After the second acquisition, Avnet's sales represented about two-thirds of the total in the market as viewed by the Commission.

II.

Both the complaint, which issued on April 1, 1969, and the amended complaint of December 1, 1969,[5] alleged that 16 firms, of which IPM and Valley Forge were the largest and third largest, supplied virtually the total value of equipment and parts furnished to rebuilders.

The evidentiary hearing commenced on February 1, 1971. During the preceding 16 months, the parties conducted pretrial discovery, argued about the adequacy of Avnet's compliance with discovery orders, stipulated about certain facts and issues, and agreed that, in advance of trial, each would provide the other with a list of witnesses and copies of proposed exhibits.

From the outset Avnet disputed the Commission's position that the market was composed of 16 principal firms.[6] It attempted, in three different ways, to develop evidence that the 16 firms have so many competitors that their sales do not comprise a relevant market or submarket. First, Avnet requested the Hearing Examiner to issue subpoenas to the 14 competitors of IPM and Valley Forge calling for disclosure of their customer lists, and thereafter to subpoena all those customers to learn their sources of supply. The Hearing Examiner quite properly rejected this request[7] and directed Avnet, at least as an initial matter, to make its own inquiries of the customers of IPM and Valley Forge. Second, according to Avnet's counsel, Avnet did attempt to develop evidence by a study of its own records and by interviewing its customers; presumably the results of those efforts were later incorporated in Avnet's presentation of evidence at the trial. Third, well after the trial was under way, through conver[74]sations with its sales personnel and through an independent market research study, Avnet sought to prove that the volume of business handled by custom rebuilders was so enormous that, by inference, there must be such a significant total volume of sales by rebuilder suppliers that the statistics relating to the 16 firms identified by the Commission should be disregarded as essentially meaningless. The Hearing Examiner excluded the market study for procedural reasons.[8]

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[5] The amendment excluded from the relevant line of commerce (1) the supply of used (as opposed to new) parts for rebuilt AEU's, and (2) the sale of parts by OEM's to "authorized rebuilders." An "authorized rebuilder" is one, who, pursuant to specific agreement with an OEM, is authorized to rebuild that firm's units. Although Avnet challenged the latter exclusion, the Commission noted that it related to only about 3% of total industry sales.

[6] Avnet's answer denied the allegations in paragraph 15 of the complaint. Moreover, Avnet stipulated that one of the contested issues was: "Whether sixteen firms supplied virtually the total volume of equipment and new parts furnished to rebuilders in 1964?"

[7] *See Papercraft Corp.* v. *F.T.C.*, 472 F.2d 927, 930 (7th Cir. 1973).

On the basis of the voluminous evidence in the record, the Hearing Examiner concluded that the acquisition violated § 7 of the Clayton Act and recommended an order requiring Avnet to divest IPM. He found that the relevant market included the sale of new components by rebuilder suppliers to rebuilders and that the contours of the market were fairly delineated by the sales of the 16 principal suppliers to 150 to 200 production-line rebuilders. In so finding, he resolved the "sharp disagreement between the parties over the meaning of the term 'rebuilder' as used in paragraph 1(b) of the complaint."[9] His market analysis and conclusion summarizing competitive impact of the acquisition were corroborated in large part by an opinion expressed by a Valley Forge executive in memoranda outlining the advantages to Avnet of the acquisition of IPM.

In a carefully prepared opinion by Chairman Kirkpatrick, the Commission approved the findings and order proposed by the Hearing Examiner. Commissioner Dennison dissented on the ground that complaint counsel had not met their burden of demonstrating the size and dimensions of the relevant line of commerce.

III.

The record contains a great deal of testimony by rebuilder suppliers and by production-line rebuilders. It is clear that the production-line rebuilders could not survive without an adequate source of supply of new parts. Because the prices charged by OEM's and WD's are so high, the production-line rebuilders must obtain such parts from rebuilder suppliers. The testimony indicates that they relied primarily on IPM, Valley Forge and two other suppliers for these parts.

Unlike production-line rebuilders, who operate at a manufacturing level and sell largely to jobbers, custom rebuilders operate at the retail level dealing directly with consumers. At that level, particularly since their charges cover their labor and specialized expertise, they can afford to purchase OEM parts from WD's. They may, of course, also purchase new, used, or rebuilt components from other sources, including rebuilder suppliers. We know that some of the rebuilder suppliers sell either nothing, or at most very little, to custom rebuilders,[10] and we also know that IPM makes some sales to custom rebuilders.[11] [75] But the record does not tell us what portion of the rebuilder suppliers' total sales, or even what portion of IPM's or Valley Forge's total sales, were to custom rebuilders rather than production-line rebuilders.

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[8] The pretrial order required Avnet to list its exhibits by January 25, 1971. The Commission completed its case on February 25, 1971, and the trial was then recessed until May 6, 1971, to give Avnet time for additional discovery and preparation. On April 19, 1971, Avnet employed United States Testing Company, Inc. to conduct a survey, but made no disclosure of that fact until July 9, 1971, when it moved to amend its list of proposed exhibits. The Hearing Examiner denied the motion as untimely, emphasizing Avnet's past failure to act with appropriate diligence and candor in the preparation of the matter for trial.

[9] *See* findings 18-40, 82 F.T.C. at 402-407, where the Examiner substantially equates the terms "rebuilder" and "production-line rebuilders," on the one hand, and "repair shops" and "custom rebuilders," on the other, to exclude custom rebuilders from the demand side of the market.

Avnet contends that such information is of critical importance in appraising the Commission's definition of the relevant market, and that it was prevented from developing such evidence as well as any other evidence identifying the dimension of the business of supplying custom rebuilders throughout the country, by the Commission's failure to give it adequate notice that the Hearing Examiner, and ultimately the Commission, would decide that the term "rebuilders" includes only production-line operators and excludes custom rebuilders. As we understand Avnet's principal argument, which is phrased in terms of a "denial of administrative due process," if its counsel had understood the theory of complaint counsel's case they would have proved (a) that for the purposes of this case, any distinction between production-line rebuilders and custom rebuilders is invalid,[12] and (b) that the inclusion of sales to custom rebuilders would so enlarge the relevant market as to undermine completely the Commission's prima facie case. Specifically, Avnet contends that it would not have waited so long (1) to develop evidence from its own sales personnel describing the 3,300 customers of

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[10] The testimony of some representatives of the rebuilder suppliers made it quite clear that their sales to custom rebuilders were not significant. *See*, for example, the testimony of the witnesses Flynn (App. 591-592, 593-594), Kamber (App. 617), Green (App. 602), Winters (App. 663), and McCullough (App. 686).

[11] Since IPM has a list of 3,500 customers and since there are only 150 or 200 production-line rebuilders in the country, it is fair to infer that at least some of IPM's customers were custom rebuilders. Of course, the number of customers tells us little about their volume of purchases. There is a stipulation in the record describing IPM's sales to 49 [75] customers with individual annual purchases ranging from $23.25 to $5,165.44. These figures are to be contrasted with IPM's total sales of over $11 million. We have not found any evidence, or any offer of proof, by either party establishing the dollar value of sales by IPM or Valley Forge to production-line and custom rebuilders, respectively.

[12] In its brief at page 28 and footnote 22, Avnet states:

"First, because Avnet lacked adequate notice, it was unable to develop and present vital evidence to support its contention that sales to all the kinds of rebuilders reflected on IPM's list of 3,500 active customers should be included in the relevant market. If the Commission's Amended Complaint had charged that only sales to a definite class of 'production-line rebuilders' were to be included in the market, Avnet would have had the opportunity to survey its active customers to ascertain which among them fit the Commission's definition of production-line rebuilders, to ascertain its sales to such rebuilders, to elicit evidence regarding their other suppliers, to demonstrate that these rebuilders compete directly with other kinds of rebuilders, and to conduct those additional inquiries which would be reasonably expected to yield relevant evidence regarding the validity of the Commission's restrictive definition of the term 'rebuilder.'[22] No such discovery efforts were undertaken by Avnet—for the sole reason that it was not given fair notice by the Commission that such inquiries were either required or relevant.

> [22] Fragmentary evidence on many of these issues is contained in the record. Avnet maintains, for example, that the record demonstrates the existence of real competition for the ultimate consumer's dollar between custom rebuilt and production-line rebuilt electrical units. (*see, e.g.*, RPF 215-22, App. Vol. IV, and the transcript references contained therein.) The point in the text, however, is that Avnet was denied any opportunity during the prehearing stages of this proceeding to develop the kind of comprehensive evidence necessary to demonstrate the invalidity of the arbitrary definition of rebuilder subsequently adopted by the Hearing Examiner and the Commission."

IPM who are not production-line rebuilders, and (2) to obtain a market study delineating the volume done by custom rebuilders.[13]

IV.

[76] [1] We find Avnet's "administrative due process" argument unpersuasive. It relies largely on the fact that both the amended complaint and a trade practice rule[14] promulgated by the Commission contain a functional definition of the term "rebuilder" which can be read to include custom rebuilding as well as production-line rebuilding, and on the further fact that the amended complaint described the demand side of the market as "highly fragmented," and referred to IPM's sales "to over 5,000 independent distributors and rebuilders."

Avnet had no reason to rely on the trade practice rule as significant in this proceeding. The rule relates to the manner in which rebuilt units must be labeled when they are sold. Since, by hypothesis, custom rebuilding does not involve the sale of any such unit but rather the reconstruction of the customer's property, the rule is, in terms, inapplicable to the issue here.

Avnet's reading of the complaint was, however, reasonable. The reference to "over 5,000" customers of IPM certainly implied that all of IPM's sales were intended to be treated as within the relevant market; since presumably some of those sales were to custom rebuilders, one might well infer that the market was intended to include all custom rebuilders. But even if Avnet's counsel did originally assume that complaint counsel intended to treat all sales to custom rebuilders as part of the relevant market, it soon became manifest that the critical question in the case was whether or not counsel was correct in using the list of 16 firms to outline a relevant market. Arguably, but by no means necessarily, the answer to that question would be affected by the definition of the term "rebuilder" and, more narrowly, by whether sales to custom rebuilders would be treated as relevant. For that reason, as the Examiner found, a "sharp dispute" between the parties developed over the proper definition of that term. The portions of the record which are before us do not indicate precisely when that dispute developed. We are not at all persuaded, however, that the dispute arose so late in the proceeding that Avnet was powerless to muster evidence or argument to meet complaint counsel's case.

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[13] Avnet contends that its survey would have shown a market for new, rebuilt and used parts of more than $300 million and, if admitted, would have rebutted the Commission's evidence tending to prove a relevant market of only about $20 million. We have examined the study identified as Respondent's Exhibit 88 (Rejected); we find no offer of supplementary expert oral testimony. For at least three reasons, the rejected exhibit does not appear to us to be inconsistent with the Commission's analysis of the market. First, it apparently includes sales of rebuilt AEU's which include used and rebuilt, as well as new, components; second, it apparently includes sales of custom rebuilt units which include components purchased from WD's and, therefore, indirectly from OEM's; and third, its price analysis is directed to the retail market, whereas IPM, Valley Forge, and [76] their competitors were selling to companies engaged in the manufacturing business who sold largely to jobbers, who in turn would resell to retailers. We find nothing in the study shedding any light on the magnitude of sales *at the level at which IPM and Valley Forge sold*. We are inclined to attach greater significance to Avnet's failure to make a timely offer of a breakdown of its own sales to custom rebuilders and production-line rebuilders than to any extrapolation suggested by the rejected offer.

[14] The FTC rule provides that a product cannot be identified as "rebuilt" or "remanufactured" unless it has been

> "dismantled and reconstructed as necessary, all of its internal and external parts cleaned and made free from rust and corrosion, all impaired, defective or substantially worn parts restored to a sound condition or replaced with new, rebuilt or unimpaired used parts, all missing parts replaced with new, rebuilt or unimpaired used parts, and such rewinding or machining and other operations performed as are necessary to put the industry product in sound working condition." 16 C.F.R. § 62.3(b) (1974) (footnotes omitted).

The rule also provides that units can be sold as "rebuilt" only after they have undergone this process and are labeled as rebuilt. Units which are not sold, or are not sold "to the trade," need not be labeled if it is "clearly understood by all purchasers . . . that the products, or parts thereof . . . have been used." 16 C.F.R. § 62.1(b)(1).

We note that Avnet's argument before the Hearing Examiner anticipated complaint counsel's position that only sales to production-line rebuilders were relevant.[15] We also find no discussion in Chairman Kirkpatrick's opinion for the Commission of any claim that Avnet was surprised by the definition of the term "rebuilder." The Commission did explain in detail its agreement with the Examiner's exclusion of custom rebuilding from the demand side of the market[16] and with his procedural and [77] evidentiary rulings.[17] But Chairman Kirkpatrick's opinion does not even mention the inadequate notice argument that Avent advances in this court.

Without further belaboring the point, we merely state that our review of the record convinces us that Avnet's counsel had sufficient understanding of the issues, and sufficient time to prepare Avnet's defense, to require rejection of the argument that they were denied administrative due process when the Hearing Examiner accepted complaint counsel's definition of the term "rebuilder." The test of fairness as stated in *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016, 74 S.Ct. 864, 98 L.Ed. 1138, and *L. G. Balfour Company* v. *F.T.C.*, 442 F.2d 1, 17-19 (7th Cir. 1971), was easily met.[18]

V.

We also find no merit in the argument that the Commission relieved complaint counsel of the burden of proving the size of the relevant market and thereby deprived Avnet of administrative due process. The Examiner did not purport to make any such ruling. On the contrary, he found that the census data, the industry witnesses' testimony, the sales data for the 16 principal rebuilder suppliers, and the corroborating expressions of opinion in memoranda prepared by the witness Fischer, an executive of Valley Forge, constituted sufficient evidence on which to predicate the conclusion that complaint counsel had met their burden of proof.[19]

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[15] *See* App. 220.

[16] *See* 82 F.T.C. at 448 et seq. The Commission stated:

> "*Throughout the proceeding below and on appeal*, respondent has contended that [77] the term 'rebuilder' refers to all firms that engage in the physical operation of disassembling a unit, cleaning, testing, replacing or reconditioning defective or worn parts, and reassembling and testing the finished product." 82 F.T.C. at 449 (Emphasis added).

This statement provides a sufficient basis for distinguishing *Rodale Press, Inc.* v. *F.T.C.*, 132 U.S.App.D.C. 317, 407 F.2d 1252, 1255-6 (1968), and *Bendix Corporation* v. *F.T.C.*, 450 F.2d 534 (6th Cir. 1971), both of which involved a complete change in theory at the Commission level.

[17] *See* 82 F.T.C. at 468-473.

[18] In *Cella* we stated:

> "In an administrative proceeding it is only necessary that the one proceeded against be reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was misled."

In *Balfour* we stated:

> "As the Commission case against petitioners unfolded, there was a 'reasonable opportunity to know the claims of the opposing party and to meet them.' " 442 F.2d at 19.

VI.

At pages 42-57 of its brief, Avnet argues that the Commission erred on the merits by artificially limiting the relevant market in two respects: first, by excluding sales to customer rebuilders, and second, by excluding sales of used and rebuilt parts.

[2] The second exclusion was manifestly correct. The Commission found that prices for rebuilt or reconditioned used components varied from 25% to 50% below the prices for comparable new items.[20] Moreover, it noted the absence of any substantial interaction in price between the two lines. These factors are sufficient to support the finding that they should be placed in different submarkets. See *Brown Shoe Co., Inc.* v. *United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510; *United States* v. *Aluminum Company of America*, 377 U.S. 271, 276, 84 S.Ct. 1283, 12 L.Ed.2d 314; *cf. United States* v. *Aluminum Company of America*, 148 F.2d 416, 425 (2d Cir. 1945).

[78] [3,4] We are also persuaded that the omission of sales to custom rebuilders was not error. The Commission, of course, has the initial burden of explaining why a particular group of buyers or sellers should not be included within the relevant market. In this case the Commission met that burden by proving that custom rebuilders and production-line rebuilders perform significantly different functions and operate at significantly different levels of distribution within the overall market for the repair or replacement of AEU's. The custom rebuilder is primarly a retailer of services; the production-line rebuilder is a manufacturer of products which are sold largely to jobbers, and presumably to retailers as well.[21] In our opinion, the clear

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[19] In *United States* v. *Connecticut National Bank*, 418 U.S. 656, 94 S.Ct. 2788, 41 L.Ed.2d 1016 (1974), the Supreme Court characterized the quality of the government's burden of proving the contours of the relevant geographic market as its "role to come forward with evidence delineating the rough approximation of localized banking markets . . ." 418 U.S. at 669, 94 S.Ct. at 279. Presumably a similar "rough approximation" may be sufficient to make out a prima facie case on the relevant product market issue.

[20] Respondent is incorrect in its statement that the Commission ignored the fact that the commonly quoted "exchange price" for rebuilt parts includes a used core as part of the purchase price. Avnet's brief at page 55. *See* Commission opinion at 82 F.T.C. 457-458.

[21] As the Commission noted in its opinion: "The facts found by the judge demonstrate that production-line rebuilders sell a product, not a service, to entirely different classes of customers at different distribution levels using completely different pricing methods." 82 F.T.C. at 450.

functional difference between the two groups of rebuilders provides an adequate prima facie basis for placing them in different submarkets.[22]

It is, of course, entirely possible that the rebuilder suppliers may sell sufficient quantities of parts to custom rebuilders at prices comparable to those charged to production-line rebuilders to support the conclusion that such sales should be treated as part of the relevant market. If that be the fact, however, since the Commission satisfied its initial burden it was incumbent upon Avnet to prove that the custom rebuilders made purchases from competitors of IPM and Valley Forge in significant volume. That burden could not be discharged by evidence concerning purchases of used or rebuilt parts, or by evidence of purchases of OEM parts from WD's. The testimony of the industry witnesses indicated that the volume of purchases by custom rebuilders from the principal rebuilder suppliers was not significant.[23] It therefore seems improbable that detailed evidence concerning the volume of sales of new parts to custom rebuilders by rebuilder suppliers would be significant. But even assuming that it might be, Avnet did not make a timely, or a complete, offer of proof showing the amount of its own, or of any of its competitors', sales to custom rebuilders. Quite clearly, Avnet did not overcome the Commission's prima facie showing that purchases by custom rebuilders were not part of the relevant market.

The Commission's analysis of this aspect of the case is corroborated by statements made by a vice-president and director of Avnet in a pre-acquisition memorandum. That memorandum states, in part:

> [79] The acquisition of IPM would serve chiefly to remove our most major competitor from the scene. This would reduce to an overwhelming extent the price competition that is a major factor in the industry. In many cases severe competition has held profit margins on key items to a reduced level owing to the ability of two firms to offer substantially the same item at the same price. IPM has been very active in offering preferential discounts to large customers which Valley Forge has been obliged to meet. It is recognized by both Valley Forge and IPM that we must retain a reasonable share of the business from the larger users for they represent the primary target of any substantial tooling. We both recognize that large customers are necessary for our continued growth. This has produced a situation where the large customer has used his

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[22] This conclusion is buttressed by the fact, as stated by the Commission, that "while production-line rebuilders could not operate without a supply of new parts from rebuilder suppliers, custom rebuilders buy their new parts primarily from OEM wholesale distributors at prices 20-40 percent higher than those charged by the rebuilder suppliers." 82 F.T.C. at 450. The Commission added the following footnote at this point in its opinion:

> [13] Although the judge in his initial decision made no finding as to the differential between the prices charged to rebuilders by wholesalers and those charged by rebuilder suppliers, the testimony cited by the judge demonstrates that WD prices to rebuilders were at least 20-40 percent higher than rebuilder supplier prices. For example, the President of Precision Field Coil noted that WD prices for General Motors' field coils were $4.41 while Precision sold to rebuilders at $2.76. (Tr. 538-39). One of the nation's largest rebuilders testified that IPM's prices were at least 20 percent cheaper than WD prices. (Tr. 843). The President of Valley Forge indicated that Valley Forge and IPM generally sold at a price 70 percent off OEM list price while jobbers sold at a 50 percent discount. (CX 37e). Thus, jobbers sold at prices over 60 percent greater than those of rebuilder suppliers."

Unquestionably the substantial price differentials make it appropriate to exclude the sales by OEM distributors to custom rebuilders from the market under study in this case. It necessarily follows, therefore, that it would have been inappropriate to include all sales to custom rebuilders in the relevant market.

[23] *See, e.g.*, App. 591-592, 594, 602, 617, 663, 686.

> position to play off one against the other. In this situation Maremont has been the chief offender and has used their purchasing power in the most effective manner.

Quite plainly this comment supports the inference that competition for the patronage of the production-line rebuilders was of paramount importance to the rebuilder suppliers and tends to justify discounting the significance of their sales to custom rebuilders.

VII.

Finally, Avnet objects to the portions of the order which require (1) divestiture of IPM rather than Valley Forge, and (2) Commission approval of any acquisition by Avnet of a supplier of used or rebuilt parts during the next 10 years.

[5,6] Deference must be accorded to the Commission in fashioning the appropriate remedy. *See Papercraft Corp.* v. *F.T.C.*, 472 F.2d 927 (7th Cir. 1973), and cases cited at 933 n. 17. Since it was the acquisition of IPM, rather than the earlier acquisition of Valley Forge, which violated the statute,[24] and since the record indicates that Avnet has caused Valley Forge to emphasize expansion in its ignition parts business rather than the rebuilders supply business, it was manifestly appropriate for the Commission to order divestiture of IPM.

[7] We are also persuaded that even though the competition between used or rebuilt parts and new parts is not sufficiently intense to require the former to be treated as part of the relevant market for purposes of determining whether a violation occurred, it was nevertheless permissible for the Commission to consider the significance of that competition, together with Avnet's past history of acquisitions, in defining the scope of Avnet's obligation to obtain Commission approval of future acquisitions. We are unwilling to say that this portion of the remedy does not have a "reasonable relation to the unlawful practices found to exist." *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 429, 77 S.Ct. 502, 1 L.Ed.2d 438.

Accordingly, we affirm and enter judgment enforcing the order of the Commission.

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[24] Accordingly, the IPM assets have been "held . . . contrary to the provisions of [§ 7 of the Clayton Act]." *See United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 95 S.Ct. 926, and cases cited therein.

FEDERAL TRADE COMMISSION v. MANAGER, RETAIL CREDIT COMPANY, MIAMI BRANCH OFFICE*

No. 73-1844. F.T.C. File No. 99-131.

(United States Court of Appeals, District of Columbia Circuit, February 28, 1975)

1. INFORMATION BEARING ON AUTHORIZED AGENCY INQUIRIES IS WITHIN F.T.C.'S PLENARY POWER TO OBTAIN SUCH INFORMATION.

Federal Trade Commission has plenary power to secure information bearing on authorized agency inquiries.

2. AGENCY MAY TAKE STEPS TO INFORM ITSELF ABOUT PROBABLE VIOLATION OF LAW WHEN THE DUTY TO DO SO IS DELEGATED BY STATUTE TO THAT AGENCY.

When investigative and accusatory duties are delegated by statute to administrative body, it may take steps to inform itself as to whether there is probable violation of law.

3. GENERAL PROVISIONS ARE SUBORDINATE TO SPECIFIC STATUTORY PROVISIONS.

Specific statutory provision prevails over a more general provision.

4. INTERPRETING STATUTE IN WAY WHICH RENDERS IT INEFFECTIVE IS PRESUMED AGAINST.

Presumption against interpreting a statute in a way which renders it ineffective is rudimentary law.

5. STATUTE SHOULD BE READ AND CONSTRUED AS A WHOLE.

Statute should be read and construed as a whole.

6. RESOLUTION OF AMBIGUITY NOT ITS CREATION, IS A PROPER FUNCTION OF LEGISLATIVE HISTORY.

Proper function of legislative history is to resolve ambiguity and not to create it.

7. WHERE LANGUAGE OF ENACTMENT IS CLEAR AND CONSTRUCTION DOES NOT LEAD TO ABSURD OR IMPRACTICABLE CONSEQUENCES, WORDS ARE TO BE TAKEN AS FINAL EXPRESSION OF INTENDED MEANING.

Where doubt exists and construction is permissible, reports of committees of Congress and statements by those in charge of measure and other like extraneous matter may be considered to aid in ascertaining true legislative intent, but where language of enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, words employed are to be taken as final expression of meaning intended.

8. FAIR CREDIT REPORTING ACT ENFORCEMENT IS MANDATED TO F.T.C.; THEREFORE, F.T.C. IS NOT COMPELLED TO OBTAIN COURT ORDER TO COMPEL DISCLOSURES FOR INVESTIGATIVE PURPOSES.

Federal Trade Commission charged with enforcement of Fair Credit Reporting Act is not compelled to obtain a court order or permission of affected consumers in order to compel disclosures of consumer credit reports from credit-reporting agency for purpose of Commission investigation, since Commission had special statutory power incident to its role as enforcer of the Act.

9. PARTIES NOT IN PURVIEW OF FAIR CREDIT REPORTING ACT ARE NOT BARRED FROM DISCLOSING INFORMATION TO F.T.C. BY STRICTURES OF THE ACT.

Since Federal Trade Commission could obtain consumer credit reports from credit-reporting agencies without regard to strictures of the Fair Credit Reporting Act, strictures of Act do not bar disclosure to Commission by customers of the credit-reporting agencies which are not parties within purview of Act.

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* Reported in 515 F.2d 988 (1975). For judgment of district court, 357 F.Supp. 347, see page 629 herein.

10. **F.T.C. IS PROHIBITED BY FAIR CREDIT REPORTING ACT FROM USING DISCLOSED INFORMATION FOR ANY PURPOSE OTHER THAN CARRYING OUT ITS ENFORCEMENT DUTIES UNDER THE ACT.**

[989] It is implicit in statutory scheme of Fair Credit Reporting Act that the Federal Trade Commission in securing consumer reports from credit-reporting agencies for purpose of investigation is prohibited from using the information in those reports for any purpose other than carrying out its enforcement duties under the Act.

(Syllabus, with substituted captions, taken from 515 F.2d 988.)

On appeal from district court judgment requiring F.T.C. to obtain court order to obtain disclosure of information under the Fair Credit Reporting Act, appellate court held that F.T.C. did not need to obtain court order compelling disclosures because of its role as enforcer of the Act.

Reversed.

James P. Timony, Atty., F.T.C., with whom *Harold H. Titus, Jr.*, U.S. Atty., at the time the brief was filed, and *Harold D. Rhynedance, Jr.*, Asst. Gen. Counsel, F.T.C., were on the brief for appellant.

Edward J. Schmuck, Washington, D.C., with whom *Francis M. Gregory, Jr.*, and *Stephen S. Cowen*, Washington, D.C., were on the brief, for appellee.

Before Bazelon, *Chief Judge*, and Robinson and MacKinnon, *Circuit Judges*.

MacKinnon, *Circuit Judge:*

The Federal Trade Commission (FTC) applied to the District Court for enforcement of an administrative subpoena *duces tecum* requiring the Retail Credit Company (Retail) to produce documentary evidence for a Commission investigation of the practices of certain consumer reporting agencies under the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 et seq. Following a trial the District Court ruled that the FTC, like other Government agencies seeking consumer credit reports regulated by the FCRA, must obtain a court order or the permission of affected consumers in order to compel disclosure of the documents.[1] Because we conclude that the FTC has special statutory power incident to its role as enforcer of the FCRA, we reverse.

I

In 1970 Congress appended to the Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq., a number of provisions collectively known as the Fair Credit Reporting Act. Section 602 of the FCRA recognized that "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers" and affirmed the "need to insure that [such] agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." The congressional prescription was a comprehensive series of restrictions on the disclosure and use of credit information assembled by consumer reporting agencies. Section 604 identifies three instances in which reporting agencies may furnish credit reports: (1) in response to an appropriate court order; (2) by permission of consumers whose credit ratings are documented in the reports sought; and (3) to a person with a legitimate business interest in the information.[2] Section 608 **[990]** allows disclosure of limited portions of the reports—essentially identifying information—to governmental agencies unable to qualify under any of the subsections of section 604.[3] The Act attaches special restrictions to the preparation and disclosure of investigative consumer reports[4] and requires that an agency apprise a consumer who makes an appropriate request of the nature and substance of information in his file, the sources of the data, and the identity of parties to whom it is released.[5]

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[1] 357 F.Supp. 347 (D.D.C.1973).

Section 621 sets forth an elaborate scheme for administrative enforcement of the FCRA. Subsection (a) imposes upon the Federal Trade Commission the responsibility for enforcing compliance with the requirements of the FCRA with respect to the preponderance of consumer reporting agencies and affirms the Commission's right to use its customary procedural, investigative and enforcement powers.[6]

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[2] § 604. *Permissible purposes of consumer reports*

A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

[990] (D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

Act § 604, 15 U.S.C. § 1681b.

[3] § 608. *Disclosures to governmental agencies*

Notwithstanding the provisions of section 604, a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency.

Act § 608, 15 U.S.C. § 1681f.

[4] Act §§ 606, 614, 15 U.S.C. §§ 1681d, 1681l.

[5] Act §§ 606, 609, 610, 15 U.S.C. §§ 1681d, 1681g, 1681h.

[6] § 621. *Administrative enforcement*

(a) Compliance with the requirements imposed under this title shall be enforced under the Federal Trade Commission Act by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other government agency under subsection (b) hereof. For the purpose of the exercise by the

(*Continued*)

Subsection (b) commits enforcement obligations to specified Government agencies where enumerated institutions or statutes are involved.[7] Though each of the agencies listed in (b) is authorized to use all authority conferred on it by law to enforce the FCRA [991] in its respective province, none wields powers as comprehensive as that of the FTC.

On April 1, 1972, as part of an ongoing investigation of the practices of certain consumer reporting agencies, the FTC issued a subpoena *duces tecum* to the Manager of the Miami Branch Office of the Retail Credit Company.[8] The company assembles and sells data bearing on [992] an individual's credit rating, fitness for employment, and

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Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this title shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act and shall be subject to enforcement by the Federal Trade Commission under section 5(b) thereof with respect to any consumer reporting agency or person subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act. *The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this title and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title.* Any person violating any of the provisions of this title shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions thereof were part of this title.

Act § 621(a), 15 U.S.C. § 1681s(a) (emphasis added).

[7] (b) Compliance with the requirements imposed under this title with respect to consumer reporting agencies and persons who use consumer reports from such agencies shall be enforced under—

(1) section 8 of the Federal Deposit Insurance Act, in the case of:

(A) national banks, by the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), by the Federal Reserve Board; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation.

[991] (2) section 5(d) of the Home Owners Loan Act of 1933, section 407 of the National Housing Act, and sections 6(i) and 17 of the Federal Home Loan Bank Act, by the Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions;

(3) the Federal Credit Union Act, by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(4) the Acts to regulate commerce, by the Interstate Commerce Commission with respect to any common carrier subject to those Acts;

(5) the Federal Aviation Act of 1958, by the Civil Aeronautics Board with respect to any air carrier or foreign air carrier subject to that Act; and

(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

Act § 621(b), 15 U.S.C. § 1681s(b).

SUBPOENA DUCES TECUM UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION

To Manager, Retail Credit Company, Miami Branch Office—1313 S.W. 27th Ave., Miami, Florida

You are hereby required to appear before Robert W. Russell, Attorney, and David F. Bragg, Investigator *of the Federal Trade Commission, at* Retail Credit Company, Miami Branch Office, 1313 S.W. 27th Ave. *in the City of* Miami, Florida *on the* 20th *day* of April, 1972, at 2:00 p.m., *to testify*, or in lieu thereof, to furnish the documents and information required. (See attached specifications).

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

See attached specifications.

Fail not at your peril.

In testimony whereof, the undersigned, an authorized official of the Federal Trade Commission, has caused the seal of said Federal Trade Commission to be affixed, and has hereunto set his hand at Washington, D.C., this 1st day of April, 1972.

/s/ Illegible

(Continued)

qualifications for insurance, including personal information on character, reputation, and life style. Specification 7 of the subpoena requested production of the complete files of all consumers who since January 1 had directed the Miami Branch Office to release information in their files. Specification 9 sought the complete files of all individuals investigated by four named credit investigators during certain periods of time. Retail complied with the entirety of the subpoena save specifications 7 and 9; in a letter dated May 8, 1972, the company explained that the disclosures requested in those paragraphs would violate both section 604 of the Fair Credit Reporting Act and the rights of privacy of those consumers whose reports the Commission was seeking.[9]

The FTC petitioned the District Court for an order compelling compliance with its subpoena and for a declaration, pursuant to 28 U.S.C. § 2201 (1959), that section 621 of the FCRA permits voluntary compliance with Commission requests for the production of consumer reports. Retail Credit counterclaimed for a declaration that the Act forbids distribution of consumer reports unless the request is supported by court order or consumer authorization. Because the FTC

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SPECIFICATIONS

1. The originals or in lieu thereof, clear, accurate and legible copies of the Field Representative Performance Control Records (Form 930-9-70 or its successor form) for all Field Representatives in your Office for the months of January, February and March 1972;

2. The originals, or in lieu thereof, clear, accurate and legible copies of Field Representative's Record (Form 105-1-71 or its successor form) for all Field Representatives in your office for 1971 and 1972;

3. The originals, or in lieu thereof, clear, accurate and legible copies of all other forms relating to evaluation of personnel performance, for the most recent time period completed;

4. The originals, or in lieu thereof, clear, accurate and legible copies of all records, documents and memoranda, from whatever source, relating to or discussing any of the following:

a. Field Representative and/or Office quotas for significant, adverse, decline or protective information.

b. Performance of any and/or all Field Representatives, past or presently employed.

c. Competitor trials with any other consumer reporting agency or agencies.

d. Performance of your Office in its capacity as a Branch Office of the Retail Credit Company.

5. The originals, or in lieu thereof, clear, accurate and legible copies of all "records" on all consumers who have contacted your Office (whether in person or over the telephone) for disclosure of the information in their files since January 1, 1972 pursuant to Section 689 of said Act;

6. The originals, or in lieu thereof, clear, accurate and legible copies of the receipts or other records of payment for disclosure relating to any of the consumers referred to in # 5 above;

7. The originals, or in lieu thereof, clear, accurate and legible copies of the complete files, regardless of how stored, of the consumers specified in # 5 above;

8. A complete list of the names and addresses of all individuals formerly employed at your Branch Office, including any sub-office within the territory served by your Branch Office, since January 1, 1971. This list shall include the title, or in lieu thereof, a complete and accurate job description, and [992] the exact dates of employment for each person contained therein.

9. The originals, or in lieu thereof, clear, accurate and legible copies of the complete files, regardless of how stored, of all individuals investigated by * * * during the month of March, 1972; * * * during the period March 12 through March 18, 1972; * * * during the period March 5 through March 11, 1972; and * * * during the period February 27 through March 4, 1972. J.A. 8, 10-11.

[9] Subsection (a)(4) of § 602 of the Act, entitled "Findings and purpose," states:

> There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

15 U.S.C. § 1681(a)(4).

managed to obtain some of Retail's consumer reports distributed to insurance companies after the initial pleadings were filed, Retail amended its counterclaim to include a request for a declaration that no person or organization could release its reports unless the requirements of section 604 were followed.

At trial Commission witnesses testified to the need for prompt access to consumer reports in investigations of reporting agencies' compliance with the FCRA. Retail responded that the language of the statute did not allow disclosure by administrative subpoena, that the procedures which the Act specified were adequate for the Commission's task, and that the privacy considerations which had prompted passage of the FCRA militated against any unauthorized or unnecessary disclosure. On April 23, 1973, the District Court entered an order denying the Commission's power to compel production of Retail's consumer reports by administrative subpoena. Instead the court treated the FTC petition as an application for a court order under section 604 of the FCRA and proceeded to grant the application, subject to Commission notification, by mail and publication, of the consumers whose reports were sought, in order to afford them an opportunity to refuse disclosure. Because the court denied the FTC direct access to Retail's consumer reports, it similarly disapproved the agency's efforts to secure the reports from third parties who had purchased them for legitimate business purposes, and forbad that line of attack in the future.

II

The Fair Credit Reporting Act speaks with apparent ambiguity of the FTC's power to obtain consumer reports from reporting agencies. Section 604 establishes a seemingly exclusive catalogue of the instances in which reports may be disclosed—"A consumer reporting agency [993] may furnish a consumer report under the following circumstances and no other"—and includes in the list disclosure by court order, with consumer permission, and for a legitimate business purpose. Section 608 also specifically authorizes disclosure of limited identifying information to Government agencies and thus creates no real exception to the general prohibition of section 604.

[1,2] On the other hand, section 621(a), the provision for administrative enforcement of the FCRA, grants the Commission "such procedural, investigative, and enforcement powers, including the power . . . to require . . . the production of documents, and the appearance of witnesses *as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title.*" (Emphasis added.) The inclusive language of the relevant portion of the Federal Trade Commission Act, 15 U.S.C. § 49, applicable to enforcement of the

FCRA *mutatis mutandis*, indicates that the investigative powers of the Commission are broad enough to include the subpoena of consumer reports:

> [F]or the purposes of this Act the Commission . . . shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and *the commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.* * * * (Emphasis added.)

The Commission's plenary power to secure information bearing on authorized agency inquiries is well established by judicial decision. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-53, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 199-201, 216-17, 66 S.Ct. 494, 90 L.Ed. 614 (1946); *Adams* v. *FTC*, 296 F.2d 861, 866 (8th Cir. 1961), *cert. denied*, 369 U.S. 864, 82 S.Ct. 1029, 8 L.Ed.2d 83 (1962); *FTC* v. *Green*, 252 F.Supp. 153 (S.D.N.Y.1966). Cf. *FTC* v. *Browning*, 140 U.S.App.D.C. 292, 295 n. 7, 435 F.2d 96, 99 n. 7 (1970). Claims of secrecy of subpoenaed information have generally proved no barrier to discovery by the FTC. *FTC* v. *Tuttle*, 244 F.2d 605 (2d Cir.), *cert. denied*, 354 U.S. 925, 77 S.Ct. 1379, 1 L.Ed.2d 1436 (1957); *FTC* v. *Cooper*, CCH 1962 Trade Cases, ¶ 70, 353 (S.D.N.Y.). As Justice Jackson remarked in *Morton Salt*, *supra*, interpreting the precise statute that is here incorporated by reference, "[w]hen investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law." 338 U.S. at 643, 70 S.Ct. at 364. "The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so." 338 U.S. at 642, 70 S.Ct. at 364.

To interpret correctly the powers which Congress conferred on the FTC we must resort to various tools of interpretation. The District Court employed two distinct analytic methods—legislative history and traditional canons of statutory construction—both of which led it to the determination that sections 604 and 608 define the limits of FTC power to obtain consumer credit reports. We find the latter method dispositive, and mention the legislative history of the FCRA only to demonstrate that it neither supports nor undermines our conclusion, but is in fact mute on the issue involved in this case.

[3] The principle that a specific statutory provision prevails over a more general provision is established beyond question. *Clifford F.*

MacEvoy Co. v. *United States*, 322 U.S. 102, 107, 64 S.Ct. 890, 88 L.Ed. 1163 (1944)[10]; *D. Ginsberg & Sons* **[994]** v. *Popkin*, 285 U.S. 204, 208, 52 S.Ct. 322, 76 L.Ed. 704 (1932); *United States* v. *City of Chester*, 144 F.2d 415, 421 (3d Cir. 1944). The District Court applied this rule and found that sections 604 and 608 deal more specifically with disclosure of consumer reports than section 621, a general statement of FTC powers and responsibilities. Because disclosure was identified as the pertinent subject, the Act's general statement of disclosure requirements, section 604, the most thorough treatment of the topic, was accorded priority. Of course a topic can always be isolated which is treated more precisely in one paragraph than in the next. But this controversy revolves around FTC power to compel production of reports in aid of its duty to enforce the Act, not around reporting agencies' responsibilities in voluntarily releasing data in their daily operations. The proposition can scarcely be stated in terms which do not answer the question this case presents, that section 621 deals more specifically with FTC authority to obtain consumer reports for enforcement purposes than do sections 604 and 608, which outline the general requirements of confidentiality imposed on reporting agencies vis-a-vis consumers and clients.

Section 608, "Disclosure to Governmental Agencies," specifically allows disclosure of "identifying information respecting any consumer . . . to a government agency." Clearly agencies in need of greater detail must pursue it according to the strictures of section 604, absent some other statutory basis for access to consumer reports. Retail reasoned, and the trial court ruled, that section 608 creates "no special exception . . . for the Federal Trade Commission."[11] This conclusion is predicated on the faulty premise that section 608 is the sole provision in the Act creating an exception from section 604 for governmental agencies. Section 608 confers additional power on agencies, but without restrictive language of the sort used in section 604. Section 621, like section 608, constitutes an exception to the general rule of section 604—in fact, it is the precise "special exception . . . for the Federal Trade Commission" which the trial court overlooked. To the general rule for governmental agencies, section 621 adds additional authority: in fulfilling its duty of administrative enforcement, the FTC shall have "the power . . . to require . . . the production of documents . . . as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title." As noted, in the absence of a statutory directive to the contrary FTC power to subpoena documents is not circumscribed by claims of confidentiality. It is difficult to imagine a more specific grant of enforcement powers under the FCRA or a more explicit articulation of FTC authority to compel production of consumer reports than the language of section 621.

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[10] However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be con[994]trolling." *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208 [52 S.Ct. 322, 323, 76 L.Ed. 704]. 322 U.S. 107, 64 S.Ct. at 894.

[11] 357 F.Supp. at 352.

[4] Another canon of construction might be invoked to yield the same conclusion. The presumption against interpreting a statute in a way which renders it ineffective is hornbook law. *General Motors Acceptance Corp.* v. *Whisnant*, 387 F.2d 774, 778 (5th Cir. 1968); *Uptagrafft* v. *United States*, 315 F.2d 200, 204 (4th Cir. 1963); *Abbot* v. *Bralove*, 85 U.S.App.D.C. 189, 190-91, 176 F.2d 64, 65-66 (1949). We perceive no way to read that part of section 621 which vests investigatory power in the FTC as subordinate to sections 604 and 608 without stripping the former provision of all significance. Such a construction would make all language in section 621 affirming Commission power to use its administrative subpoena to compel the production of relevant documents either redundant or an utter nullity.[12] In the face of **[995]** a perfectly plausible and consistent alternative construction of the statute, this position is untenable. *See generally Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307-08, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961); *United States* v. *Menasche*, 348 U.S. 528, 538-39, 75 S.Ct. 513, 99 L.Ed. 615 (1955); *Abbot* v. *Bralove, supra; Ruiz* v. *Morton*, 462 F.2d 818, 819-20 (9th Cir. 1972).

[5] The principle that a statute should be read and construed as a whole is also germane to this situation. *See United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 542-43, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940); *Smither & Co.* v. *Coles*, 100 U.S.App.D.C. 68, 70, 242 F.2d 220, 222, *cert. denied*, 354 U.S. 914, 77 S.Ct. 1299, 1 L.Ed.2d 1129 (1957). Had sections 604 and 608 not contained generalized statements on the disclosure and discoverability of consumer reports, the FTC would have enjoyed its customary enforcement powers, including the power to obtain documents by administrative subpoena, without any express declaration to that effect.[13] Because the broad language of sections 604 and 608 might call the FTC's investigatory powers into question,

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[12] Under the construction advanced by Retail the statement in § 621 that "The Federal Trade Commission shall have . . . the . . . power . . . to require . . . the production of documents" is merely repetitive of the Commission's power to obtain reports under the three conditions set forth in [995] § 604, and to discover identifying information absent those circumstances under § 608. That portion of § 621 which authorizes the FTC to use its customary enforcement powers—notably its administrative subpoena—to enforce the FCRA becomes meaningless by this reading, for the Commission would be prohibited from issuing a subpoena without the prior judicial approval required by § 604. Such a construction would severely restrict the FTC in carrying out its statutory duty to enforce the Act in all its particulars.

[13] Section 621 provides in part that a violation of the FCRA shall constitute "an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act and shall be subject to enforcement by the Federal Trade Commission under Section 5(b) thereof . . . ." This declaration of FTC jurisdiction over violations of the Act implies the availability of the Commission's statutory investigative powers in proceedings enforcing the FCRA. *See generally Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 79, 73 S.Ct. 1017, 1027, 97 L.Ed. 1454 (1953), acknowledging that the Commission had a "broad power of investigation and subpoena" under the Robinson-Patman Act, 15 U.S.C. § 13, though in conferring upon the FTC authority to enforce that act Congress did not mention subpoena powers. *FTC* v. *Tuttle*, 244 F.2d 605 (2d Cir. 1957), similarly upholds the power of the FTC to issue subpoenas in proceedings under the Clayton Act, 15 U.S.C. § 18.

section 621 specifically authorizes the Commission by administrative subpoena to compel the production of documents in enforcement proceedings. The significance of this latter provision is highlighted when it is read in conjunction with sections 604 and 608; it is the specific exception to the more general statements limiting the disclosure of consumer reports which the District Court sought.

III

[6-8] The proper function of legislative history is to resolve ambiguity, not to create it. *United States* v. *Missouri Pac. R. Co.*, 278 U.S. 269, 278, 49 S.Ct. 133, 73 L.Ed. 322 (1929)[14]; *Montgomery Charter Service, Inc.* v. *Washington Metropolitan Area Transit Commission*, 117 U.S.App.D.C. 34, 37, 325 F.2d 230, 233 (1963). When the FCRA is read as an integrated whole it does not speak ambiguously of the FTC's power to compel the production of consumer reports; on the contrary, the specific language of section 621 affirms that power. We examine the legislative history of the Act to demonstrate that it does not contra[**996**]dict our interpretation of provisions of the statute.

Retail argued, and the District Court ruled, that the Senate meant unequivocally to require that information disclosed to *any* governmental agency be limited to identifying data, unless the requirements of section 604 were met. The Senate Committee Report on S. 823, passed by the Senate on November 6, 1969, states:

> *Section 608.—Disclosure to Governmental Agencies—*
>
> The disclosure of information to governmental agencies is limited to identifying type information . . . unless the governmental agency has obtained a court order or is a bona fide creditor, insurer, employer, or licensor.[15]

We find the impact of this "unequivocal legislative history" mitigated substantially by the Senate Committee's equally concise explanation of the provision enacted as section 621. The Committee report states that to supplement judicial enforcement of the Act through civil actions brought by consumers,

> [c]ompliance would be further enforced by the Federal Trade Commission with respect to consumer reporting agencies and users of reports who are not regulated by another Federal agency. *The FTC can use the cease and desist authorities and other procedural,*

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[14] Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed.

278 U.S. at 278, 49 S.Ct. at 136 (citations omitted).

[15] [996] S.Rep.No. 91-517, 91st Cong., 1st Sess. 6 (1969).

> *investigative and enforcement powers which it has under the FTC Act to secure compliance.*[16]

No more explicit affirmation of the availability of the full panoply of FTC investigative powers was necessary to indicate that the Commission's statutory role as guardian of the FCRA excepted it from the strictures of sections 604 and 608 in fulfilling that role. That the specific should prevail over the general is not merely a technical canon of statutory construction, but also, to borrow Justice Holmes' phrase, an axiom of experience.[17] Logic, experience and the law dictate that the item of legislative history which speaks most particularly of the FTC's power to require the production of documents in a given situation should be given the greatest weight.

During congressional deliberation of the FCRA other agencies whose statutory functions would be aided by access to the reports and whose use of the documents would be to the consumers' advantage requested the power to obtain consumer reports without securing a court order or consumer permission. Because Congress did not act upon these claims of need and benign purpose, Retail argues that the FTC should not be accorded a preferred position on the ground that prompt access to the reports is essential to enforcement of the Act and the protection of consumers' interests. But the legislative decision to ignore pleas for outright exemptions from sections 604 and 608 advanced by the Federal Reserve Board and the Office of the Comptroller of the Currency are of negligible significance. Both agencies are given specific authority to enforce compliance with the FCRA in section 621(b) of the Act, according to the terms of their respective organic statutes. Those bodies appealed to Congress for new statutory authority, the power to obtain confidential reports by administrative subpoena; the FTC seeks only to maintain an investigative tool which has traditionally been part of its hegemony, and which is specifically incorporated into the FCRA by the language of section 621(a). Moreover, the significance of congressional inaction in these circumstances cannot be equated with the force of the explicit phrasing of section 621.

The legislative history of the Act, particularly the Senate Committee's broad affirmation of the FTC's investigative enforcement powers, is consistent with [997] specific language in section 621 outlining the Commission's unique role in supervising the conduct of reporting agencies. In that supervisory capacity the FTC is distinct from the general class of governmental agencies to which section 608 refers; its duty to enforce the FCRA creates a particular and continuous need for access to consumer reports, a need of a different order from that of any other governmental agency.

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[16] *Id.* at 7 (emphasis added).

[17] *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48, 49 S.Ct. 52, 73 L.Ed. 170 (1928).

IV

The District Court also ruled that the limitations of section 604 governed the FTC's attempts to obtain consumer credit reports from Retail's customers—in particular, from certain insurance companies which on several occasions had furnished the Commission with the documents in the absence of an appropriate court order. That ruling was predicated on two conclusions: that the Commission could not pursue by indirection a course specifically forbidden by the FCRA; and implicitly, that the Act was intended to cover disclosure of confidential credit information by parties other than reporting agencies. Because we disagree with its premises, we must disapprove this ancillary holding as well.

By its terms section 604 regulates disclosure by "consumer reporting agencies" and no other parties. Passage of the FCRA was prompted by concern over the power of those agencies and the potential for abuse it presented, not the lesser risk of subsequent disclosures or distortions by the more fragmented group of customers of reporting agencies.[18] The sole manifestation of congressional attention to the latter problem is section 615, which imposes upon users of consumer reports the duty to disclose to individuals whose credit is impaired the identity of reporting agencies which compiled the damaging information, and which allows a consumer to discover the nature of data which adversely affects his credit standing regardless of whether it is disseminated by a reporting agency. A number of other consumer safeguards[19] help to create a substantial likelihood that a consumer will be aware that information potentially damaging to his credit standing is in circulation. Because at that point the consumer may discover and challenge the information, regulation of disclosure by users to third parties is a less essential aspect of the protection of the confidentiality of personal information used in the determination of credit standing.

[9] Since the Commission may obtain reports from reporting agencies without regard to sections 604 or 608 in enforcing the FCRA,

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[18] Section 602 of the Act provides:

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of customers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

15 U.S.C. § 1681(a)(2)-(4).

[19] Section 607 imposes upon the agencies a duty to verify the identity of prospective users of reports and to ascertain that the reports will serve purposes permissible under the statute. Sections 609, 610 and 611 afford the consumer an opportunity to discover the nature, substance, and in some cases the sources of information in his file, and outline a procedure for reexamining data of disputed accuracy. Section 613 provides that consumers shall be apprised of the identity of recipients of any potentially damaging information which is of public record. As noted, each of these provisions is reinforced by the civil penalties established in sections 616 and 617.

a fortiori those provisions should not bar disclosure to the FTC by the customers of the agencies, parties not within the purview of the Act.

V

[10] Our determination that third parties may obtain consumer reports from customers of reporting agencies is founded on the language of the FCRA; it does not evidence disagreement with the congressional conclusion that unlim[998]ited disclosure of information bearing on personal financial affairs, lifestyle and character will do harm both to individuals involved and to the banking system. Though we rule that the FTC may obtain consumer reports by administrative subpoena in enforcing the Act, we find implicit in the statutory scheme of the FCRA the caveat that the Commission is prohibited from using information which it obtains under section 621 for any purpose other than carrying out its enforcement duties under the Act.[20]

This qualification imposes on the FTC a burden not shared by individuals or organizations who obtain consumer reports under section 604. But those users of reporting agencies' data have either made a showing sufficient to secure a court order compelling disclosure, or they have purchased the information to fulfill a presumably legitimate business need. As users of credit reports they are specifically made liable to the civil penalties imposed by sections 616 and 617 for failure to comply with the notification requirements of section 615. Certain natural forces may induce these users to keep credit reports confidential. For example, a potential employer or business associate whose reputation is essential to financial success will be chary of indiscriminate disclosures of personal material when to make those disclosures could harm his esteem and thus his competitive position in a given business community.

The FTC stands in an altogether different posture. Congress afforded it a means of quick access to consumer reports for a solitary and limited purpose: enforcement of the FCRA. The Commission's interest lies not in evaluating the details of consumers' financial positions or character analyses, but rather in protecting consumers from certain proscribed reporting practices. Because section 621 gives the FTC a specific and exclusive province of administrative enforcement, subsequent disclosure of data the Commission subpoenas cannot, in the ordinary case, serve the limited purpose for which the subpoena is authorized. Thus we conclude that the FTC, to the maximum extent consistent with its enforcement duties, must safeguard the confidentiality of any information in consumer reports it obtains by administrative subpoena under section 621 of the FCRA.

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[20] We leave to an appropriate case those questions which might arise when private citizens claim the right to the disclosure of such information under the Freedom of Information Act, 5 U.S.C. § 552.

The judgment of the District Court is
Reversed.

FEDERAL TRADE COMMISSION v. JUNIPERWOOD RANCH, INC.*

Civ. A. No. CV-74-3575-LTL. F.T.C. File No. 99-194.

FEDERAL TRADE COMMISSION v. WORLD LEISURE TIME, INC.*

Civ. A. No. CV-74-3576-LTL. F.T.C. File No. 99-195.

(United States District Court, Central District of California,
March 3, 1975)

Before LYDICK, *District Judge*.

MEMORANDUM AND ORDER

Petitioner in each of the above cases has commenced an investigation to determine whether respondents as well as other unnamed corporations or individuals are acting in violation of 15 U.S.C. §45.

In accordance with applicable statutes and regulations issued pursuant thereto, the subpoenas duces tecum here in issue were issued by the Federal Trade Commission acting through an Assistant Director. A motion to quash the subpoenas was heard and denied by the Federal Trade Commission and thereafter respondents refused to comply with the subpoenas. The Federal Trade Commission is now here on its petition to enforce the subpoenas. Jurisdiction in this Court to hear the petitions to enforce lies under 15 U.S.C. §49.

The law provides that the Federal Trade Commission is empowered to use subpoenas to gain access to evidence and documents in control of corporations under investigation and it is well established that investigative subpoenas of this nature are properly issued. *See United States* v. *Morton Salt Co.*, 338 U.S. 632 (1949). 15 U.S.C. §49 is a proper vehicle by which an agency may compel compliance. *See United States* v. *Litton Industries*, 462 F.2d 14 (9th Cir. 1972); *F.T.C.* v. *Scientific Living, Inc.*, 150 F.Supp. 495, *aff'd* 254 F.2d 598 (3rd Cir. 1958), *cert. denied* 355 U.S. 940 (1958).

The proceeding to enforce compliance is summary in nature and this Court's inquiry is limited to determining: (1) is the inquiry within the authority of the petitioning agency; (2) is the demand for information sufficiently definite; and (3) is the information sought reasonably relevant to the inquiry being made.

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* Not otherwise reported. Appeal denied, April 25, 1975 (9 Cir. 1975); motion to dismiss granted, January 16, 1976 (9 Cir. 1976).

Respondents raise a variety of arguments to resist enforcement of the subpoenas. Respondents argue, among other things, that the first of the three *Morton Salt* criteria requires that we determine whether the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1701 and, in the case of Juniperwood, Arizona statutory law, have ousted petitioner of jurisdiction. That position is incorrect and the cases cited for it do not support it. It is a position similar to that taken in this Circuit in *Crafts* v. *F.T.C.*, 244 F.2d 882 (9th Cir. 1957) and summarily reversed in *F.T.C.* v. *Crafts*, 355 U.S. 9 (1957). We are confined to an examination of the pleadings; a statement by the petitioner therein that there is reason to believe that the respondents and the subject matter of the investigation are covered by the statute authorizing the investigation is sufficient; and we may not take evidence on the question of coverage. See 1 Davis, Administrative Law Treatise, at p. 219 and *Flothill Products, Inc.* v. *F.T.C.*, 278 F.2d 850 (9th Cir. 1960), *cert. denied* 364 U.S. 920 (1960). The allegations of the petitions here found are in our view sufficient in this regard. Issues of coverage raised by respondents should be first decided in an adjudicative proceeding, if one is brought by the Federal Trade Commission, with direct review by the Court of Appeals thereafter.

Respondents' argument that they have been denied due process by the refusal of the Federal Trade Commission to disclose a staff memorandum is also short on merit. *See Genuine Parts Co.* v. *F.T.C.*, 445 F.2d 1382 and *United States* v. *Litton, supra.*

We accordingly find and conclude on the record before us that the subject inquiry is within the authority of the petitioning agency.

Our next inquiry is whether or not the demand for information contained in the subpoenas is sufficiently definite or, as here claimed, unduly burdensome and is reasonably relevant to the inquiry being made.

The burden is on respondents to show any failure of the demand in these regards, and in our view that burden has not been met. *See F.T.C.* v. *Gibson*, 460 F.2d 605 (5th Cir. 1972).

From the record we accordingly find and conclude that the subject subpoenas are not indefinite or oppressive and do seek information reasonably relevant to the inquiry being made.

The petition to enforce subpoenas in each case is granted and respondents in each case ordered to appear before a duly appointed examiner of the Federal Trade Commission at Room 1309, Federal Building, 11,000 Wilshire Boulevard, Los Angeles, California, at a date and time to be set and noticed by petitioner then and there to testify and produce documents in response to the subpoena duces tecum issued by the Federal Trade Commission on March 8, 1974.

Let respondents be here advised and put on notice that failure to comply with this Order is punishable as a contempt of this Court.

The Clerk of this Court shall serve a copy of this Memorandum and Order by United States mail on counsel of record for the parties.

UNITED STATES v. PAPERCRAFT CORPORATION*

Civ. A. No. 74-816 F.T.C. Docket 8779

(United States District Court, Western District of Pennsylvania, March 11, 1975)

1. DISTRICT COURT COULD RESERVE ISSUE OF APPROPRIATE RELIEF AND RENDER A PARTIAL SUMMARY JUDGMENT ON ISSUE OF CORPORATION'S LIABILITY IN F.T.C.'S INJUNCTIVE RELIEF AND CIVIL PENALTIES ACTION FOR VIOLATIONS OF A FINAL CORPORATE DIVESTITURE ORDER.

In action by Federal Trade Commission for injunctive relief and civil penalties for violations of final order requiring corporation to divest itself of subsidiary, district court could render partial summary judgment on issue of corporation's liability and reserve issue of appropriate relief.

2. IT IS PROPER FOR COURT TO APPLY LAW TO UNDISPUTED FACTS AND GIVE SUMMARY JUDGMENT WHERE THERE IS NO ISSUE OF MATERIAL FACT TO BE TRIED.

Where there is no issue of material fact to be tried, it is proper for court to apply law to undisputed facts and render summary judgment.

3. CORPORATION'S ARGUMENTS ALLEGING DIFFICULTY OR IMPOSSIBILITY OF DIVESTITURE WERE NO DEFENSE TO CIVIL PENALTIES AND INJUNCTIVE RELIEF ACTION FOR FAILURE TO COMPLY, WHERE F.T.C.'S DIVESTITURE ORDER HAD BEEN AFFIRMED AS MODIFIED BY COURT OF APPEALS AND HAD BECOME FINAL.

Where Federal Trade Commission order requiring corporation to divest itself of subsidiary had been affirmed as modified by Court of Appeals, and order had become final by operation of law, corporation's arguments as to alleged difficulty of impossibility of divestiture were not defense to action for injunctive relief and civil penalties for failure to comply.

4. IN DENYING REQUEST FOR EXTENSION OF TIME TO COMPLY WITH DIVESTITURE ORDER, F.T.C. WAS NOT REQUIRED TO GIVE REASONS FOR DENIAL.

Federal Trade Commission was not required to give reasons for denial of corporation's request for extension of time to comply with final order requiring corporation to divest itself of subsidiary.

5. DENIAL OF EXTENSION OF TIME RESTED IN F.T.C.'S DISCRETION AND WAS NOT REVIEWABLE BY DISTRICT COURT.

Right to extension of time to comply with Federal Trade Commission's final order requiring corporation to divest itself of subsidiary rested in discretion of F.T.C. and was not reviewable by district court in proceeding brought by F.T.C. for injunction and civil penalties for violation of divestiture order.

6. LACKING FORMAL PETITION TO REOPEN PROCEEDINGS, MOTIONS FILED FOR

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* Reported in 393 F.Supp. 408 (1975). See also pp. 530 and 1329 herein. For case before Commission, see 78 F.T.C. 1353; *modified* 79 F.T.C. 420, *further modified* 82 F.T.C. 1781.

EXTENSION OF TIME WOULD NOT BE TREATED AS MOTIONS TO REOPEN FOR PURPOSE OF COURT REVIEW.

Where corporation subject to final Federal Trade Commission order to divest itself of subsidiary filed two motions for extension of time, and did not formally petition to reopen proceedings, motions for extension of time would not be treated as petitions to reopen for purpose of district court review of Commission's denial of motions, notwithstanding reference in motion requesting that order be "modified to extend the time for divestiture."

(Syllabus, with substituted captions, taken from 393 F.Supp. 408.)

On motion for summary judgment, court held that claim of difficulty or impossibility of complying with divestiture order was not a defense where appellate court affirmed the order as modified; that F.T.C. was not required to give reasons for denial of request for extension of time to comply; and, since right to deny was at F.T.C. discretion, the action was not reviewable by court.

David Atkins, Asst. U.S. Atty., Pittsburgh, Pa., for plaintiff.

J. Tomlinson Fort, Reed, Smith, Shaw & McClay, Pittsburgh, Pa., for defendant.

Before SNYDER, *District Judge*.

OPINION AND ORDER

[409] This is a proceeding for civil penalties instituted by the United States on behalf of the Federal Trade Commission (FTC) for violations of a final order requiring Papercraft Corporation (Papercraft), to divest itself of CPS Industries, Inc. (CPS). This action was brought under § 16(b) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 56(b), pursuant to § 11(l) of the Clayton Act, as amended, 15 U.S.C. § 21(l), and §§ 5(l) and (m) of the Federal Trade Commission Act, as amended, 15 U.S.C. §§ 45(l) and 45(m).

On April 10, 1969, the Federal Trade Commission issued its Complaint against Papercraft challenging Papercraft's acquisition, on or about December 27, 1967 of CPS, as a violation of § 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The proceeding resulted in a Commission order on June 30, 1971 requiring the divestiture. Upon review, the United States Court of Appeals for the Seventh Circuit on February 22, 1973 ordered modification in part the Commission's order, but affirmed the order of divestiture. *Papercraft Corporation* v. *F.T.C.*, 472 F.2d 927 (7th Cir. 1973).

In accordance with the mandate of the Seventh Circuit, the Commission's modified order was issued on June 6, 1973, and was duly served on the Defendant on June 16, 1973. It read in pertinent part as follows:

> IT IS ORDERED that respondent, The Papercraft Corporation, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within six (6) months from the date of service upon it of this Order, shall divest, absolutely and in good faith, subject to the approval of the Federal Trade

> Commission, all assets, properties, rights and privileges, tangible and intangible, including, but not limited to, all plants, equipment, machinery, inventory, customer lists, trade names, trademarks and goodwill, acquired by The Papercraft Corporation as a result of its acquisition of CPS Industries, Inc., together with all additions and improvements thereto, of whatever description, made since the acquisition. [F.T.C. Docket No. 8779].

Neither party filed a petition for certiorari in the Supreme Court of the United States and the Commission's order became final by operation of law on July 6, 1973, as provided in § 11(i) of the Clayton Act, as amended, 15 U.S.C. § 21(i), and in § 5(i) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45(i).

Notwithstanding the final order of the Commission to divest itself of CPS within six months of June 16, 1973, the date of service of the order, or by no later than December 16, 1973, the Defendant failed to comply and continued in its failure to divest itself of CPS, or to submit a proposed plan for divestiture of CPS to the Commission for its approval. The Complaint asked for a mandatory injunction directing compliance with the modified order and for judgment to be entered against the Defendant in the sum of $10,000 per day [410] for each day of continuing violation, together with costs.[1]

Papercraft filed an Answer admitting the failure to divest, and in a Counterclaim alleged that FTC acted in excess of its statutory authority in denying Papercraft the right to a hearing on a Request for an Extension of Time, and acted arbitrarily and capriciously in failing to properly review Papercraft's petitions for modification of the deadline provisions of the Order. Papercraft also filed a Motion to Join Additional Parties, i.e., the Federal Trade Commission and the individual members of the Commission as Counterclaim Defendants, allegedly in accordance with Rules 13 and 19 of the Federal Rules of Civil Procedure. After briefing and argument, on December 15, 1974, this Court denied the defendant's Motion to Join Additional Parties finding that complete relief could be accorded the defendant on its Counterclaim in the instant proceedings, rendering unnecessary any further claim for relief against the Commission or its members. We held at that time: "While not necessary for the disposition of the Motion, it is noted that the Commission's denial of the Request for Extension has been considered to be a matter of the exercise of the discretion of the Commission and not the Court. *United States* v.

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[1] Section 5(l) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45(l) provides in pertinent part as follows:

"(l) Any . . . corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission."

Beatrice Foods Co., 344 F.Supp. 104, 117 (D.Minn.1972), *aff'd.*, 493 F.2d 1259 (8th Cir. 1974), pet. for cert. pending in the U.S.Sup.Ct; *United States* v. *Swingline, Inc.*, 371 F.Supp. 37, 45 (E.D.N.Y.1974)."

On November 15, 1974, the United States filed a Motion for Partial Summary Judgment, interlocutory in nature on the issue of whether or not defendant Papercraft was in violation of the Federal Trade Commission's order based on an affidavit of Charles A. Tobin, together with exhibits, reserving for later hearing the consideration of the appropriate penalty and other relief. In addition, the United States seeks to have summary judgment dismissing defendant Papercraft's Counterclaim. It was contended that the Counterclaim raised no issues of fact concerning Papercraft's violation of the order, and was thus not a defense in any way to the instant proceedings. The motions of the United States will be granted.

ADMINISTRATIVE HISTORY

This proceeding was initiated by the Federal Trade Commission on April 10, 1969 (In The Matter of The Papercraft Corporation, FTC Docket No. 8779), challenging, as violation of § 7 of the Clayton Act, as amended, 15 U.S.C. § 18, Papercraft's acquisition on or about December 27, 1967 of CPS Industries, Inc. Hearings were held and on June 30, 1971, the Commission issued an Order requiring Papercraft to divest itself of CPS. As noted, United States Court of Appeals for the Seventh Circuit entered a final Order on February 22, 1973, modifying in part the Commission's order by deleting Paragraph IX (which concerned Papercraft's post-divestiture relationship with CPS customers) and affirming and enforcing the order as modified.

The Commission then modified its order and issued the same on June 6, 1973 [411] in accordance with the mandate of the Seventh Circuit which was served upon Papercraft on June 16, 1973. The Commission's final Order has not been modified or set aside.

Papercraft twice filed requests for nine month extensions of time in which to divest CPS. The first request was filed December 3, 1973, and the Commission rejected this request by letter dated January 16, 1974. Papercraft's second request was filed March 4, 1974, and rejected by the Commission on March 29, 1974.

Papercraft has not presented to the Commission a plan for divestiture of CPS by sale or spin-off nor has it divested CPS. Thus, on August 6, 1974, the Commission, pursuant to Section 16 of the Federal Trade Commission Act, certified the facts in this proceeding to the Attorney General (Exhibit 1 to Tobin affidavit), and the Attorney General thereafter directed a suit be instituted seeking civil penalties for Papercraft's continuing failure to comply with the Commission's Order, and for enforcement.

Papercraft's Answer admits all of the above matters except that it asserts that the Commission's errors in the handling of its requests for extensions were such that they constitute a defense to the enforcement of the Order, and thus, Defendant rather obliquely challenges the Commission's certification to the Attorney General.

DISCUSSION

Under Rule 56 of the Federal Rules of Civil Procedure, it is provided in pertinent part:

> (a) *For Claimant.* "A party seeking to recover upon a claim . . . may, at any time after the expiration of 20 days from the commencement of the action . . . move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

[1] It is noted that the question of appropriate relief, which is a matter solely within the Court's discretion, need not interfere with the disposition of defendant's liability by the granting of partial judgment. *United States* v. *Beatrice Foods Co.*, 344 F.Supp. 104, 118 (D.Minn.1972), *aff'd.*, 493 F.2d 1259 (8th Cir. 1974), *cert. denied*, 95 S.Ct. 1350, 43 L.Ed.2d 438. As stated in Rule 56(c) of the Federal Rules of Civil Procedure:

> . . . A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

[2] Thus, where there is no issue of a material fact to be tried, it is proper for the court to apply the law to the undisputed facts and to render summary judgment. *Securities and Exchange Commission* v. *Geyser Minerals Corp.*, 452 F.2d 876 (10th Cir. 1971); *Dale Hilton, Inc.* v. *Triangle Publications, Inc.*, 27 F.R.D. 468 (S.D.N.Y.1961) and *Securities and Exchange Commission* v. *Payne*, 35 F.Supp. 873 (S.D.N.Y.1940). While we are aware, as stated by Judge Coleman in *Abraham* v. *United States*, 465 F.2d 881 at 883 (5th Cir., 1972) that "experience shows that summary judgments suffer a rather high rate of mortality," in this instance the affidavits indicate that there is no genuine issue for trial on the matter of liability. *Ward* v. *United States*, 471 F.2d 667 (3rd Cir. 1973).

THE ISSUE OF IMPOSSIBILITY

In its Answer, Papercraft sets forth that it has made a "good faith" effort to comply with the Commission's Order but, that compliance has been "impossible". Papercraft argues that if summary judgment is to be granted in this situation it will be denied the opportunity to defend by showing that it was impossible to comply within the time period set by the Commission: "In other words, Papercraft is solely at the mercy of the FTC and may offer no defenses in this Court except to the extent of requesting the Court to moderate the im[412]position of penalty." (Defendant's Brief, p. 3). Papercraft then submits that this is unfair, unreasonable and inconsistent with these applicable laws and the Constitution of the United States.

As to the Commission's denial of Papercraft's request for a hearing, Papercraft contends that this is a violation of Rule 3.72(b)(3) of the FTC Rules of Practice (¶¶ 38, 42 and 45 of the Counterclaim). Carefully looking at the defense of Papercraft, it does not allege that it is actually "impossible" for it to comply, but rather that "changed economic conditions" (Answer at ¶ 15) have made it "impossible" [for Papercraft] "to sell CPS for a reasonable or fair price in light of the value of its assets, its record of earnings during the past several years, the substantial improvement in its marketing practices by reasons of decisions taken under Papercraft management, and its prospects for the future." (Answer at ¶ 14). It must be noted at this point that the Commission's Order did not require that Papercraft's divestiture of CPS be by sale, for the Order specifically provided for divestiture as well by such non-sale methods as spin-off (Commission's Order at ¶¶ 1 and 3). However, it is a clearly established principle of law as set forth in a previous Beatrice Foods Order (*United States* v. *Beatrice Foods Company*, 52 F.R.D. 14, at p. 18 (D.Minn.1971)) that:

> . . . While good faith is not a defense to such an action, it is clearly relevant to the court's discretionary determination of the extent of civil penalties to be assessed under that provision. *United States* v. *H. M. Prince Textiles, Inc.*, 262 F.Supp. 383, 388-389 (S.D.N.Y.1966); *United States* v. *Vitasafe Corp.*, 212 F.Supp. 397 (S.D.N.Y.1962), *aff'd.* 352 F.2d 62 (2nd Cir. 1965). . . .

[3] Thus, Defendant's arguments as to the alleged difficulty or impossibility of divestiture may have carried weight in the request to modify the Order; but, regardless of this fact, they are not a defense to the action here. The Order suggests nothing to indicate that Papercraft's divestiture was to be affected by the price it would receive, and its position, in being "forced" to sell, is not a defense. The Defendant's bargaining position may well have been weakened by virtue of the Order, but its position was the product of Defendant's earlier violations of the anti-trust laws. The Order itself is not under attack in this Court. *United States* v. *Vitasafe Corporation*, 212 F.Supp. 397 (S.D.N.Y. 1962) and *United States Bio-Genics Corp.* v. *Christenberry*, 173 F.Supp. 645 (S.D.N.Y.1959), *aff'd.*, 278 F.2d 561 (2nd Cir. 1960).

What was said by Judge Lay in *United States* v. *Beatrice Foods Company*, *supra*, 493 F.2d at page 1272, is particularly applicable here:

> Finally, we note that the underlying statutory basis for an FTC cease and desist order is § 7 of the Clayton Act. Apropos to our discussion is the Supreme Court's discussion of that section in *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 328-331, 81 S.Ct. 1243, 1251-1253, 6 L.Ed.2d 318 (1961):
>
> It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7. That statute is specific and "narrowly directed," . . . The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations

> whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when § 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved. Of the very few litigated § 7 cases which have been reported, most decreed divestiture as a matter of course. *Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the fore*[413]*front of a court's mind when a violation of § 7 has been found.* (Emphasis added). [Footnote omitted]

ALLEGED COMMISSION ERRORS IN HANDLING PAPERCRAFT'S REQUESTS FOR EXTENSIONS OF TIME

[4] Papercraft argues that the Commission's failure to "provid[e] an articulated reasoned basis" for its denial of Papercraft's request for extension of the divestiture deadline violated the Commission's Rules, the Administrative Procedure Act, and the Due Process Clause of the Constitution and was arbitrary, capricious, and punitive in nature (Answer ¶¶ 22 and 24).

The Defendant's arguments are primarily related to § 3.2 of the Commission's Rules of Practice. 16 CFR § 3.2, however, specifically excludes compliance proceedings from the requirements established for adjudicative proceedings, and the courts have consistently recognized that compliance procedures of the Federal Trade Commission are *nonadjudicative* in nature. *Robertson* v. *FTC*, 415 F.2d 49, 54 (4th Cir. 1969). In *Robertson*, Judge Butzner stated the following which is a clear guide to the instant situation (at pp. 51-52):

> Section 5(b) of the Federal Trade Commission Act [15 U.S.C. § 45(b)] grants the Commission adjudicative authority. This section and the Administrative Procedure Act [5 U.S.C. §§ 554(b) and 556] provide for the right to notice, hearing, the opportunity to present evidence and to conduct cross-examination. The Administrative Procedure Act [5 U.S.C. § 557] and the Commission's rules [16 C.F.R. § 3.54(b)] require the Commission's decisions to include findings of fact, conclusions of law, and the reasons that support them. If the Commission finds the law has been violated, the adjudicative proceedings culminate in an order to cease and desist from using unfair methods of competition. The requirements of procedural due process found in these statutes and rules apply not only to adjudication of fault, *Morgan* v. *United States*, 304 U.S. 1, 58 S.Ct. 999, 82 L.Ed. 1129 (1938), but also to formulation of remedies in cease and desist orders. *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 66 S.Ct. 758, 90 L.Ed. 888 (1946).
>
> Section 6 of the Act [15 U.S.C. § 46] authorizes the Commission to require compliance reports to aid in enforcement of cease and desist orders. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950). The Commission's rules furnish a detailed guide for reporting compliance [16 C.F.R. § 3.61] and expressly provide that these proceedings are not adjudicative [16 C.F.R. § 3.2]. Neither the Federal Trade Commission Act nor the Commission's rules require formal hearings at the compliance stage. Moreover, the absence of such a requirement in the Federal Trade Commission Act makes the hearing provisions of the Administrative Procedure Act inapplicable to compliance proceedings. See *LaRue* v. *Udall*, 116 U.S.App.D.C. 396, 324 F.2d 428, 432 (1963), *cert. denied*, 376 U.S. 907, 84 S.Ct. 660, 11 L.Ed.2d 606 (1964). [Footnotes omitted]

The granting of extensions of time for compliance with Orders of the

Commission is governed by § 4.3(b) of the Commission's Rules of Practice, which states in pertinent part (16 C.F.R. § 4.3(b)):

> (b) *Extensions*. . . . the Commission, for good cause shown, may extend any time limit prescribed by the rules in this chapter or by order of the Commission or an Administrative Law Judge . . .

The language of this section is discretionary and there is no requirement that the Commission give reasons for the denial of a request for an extension. *United States* v. *Swingline*, *supra*, 371 F.Supp. at p. 45.

[5] From the foregoing, it is obvious that one method for altering the time for compliance is through a request for extension of time. Such a request [414] is governed by § 4.3, and the Commission's response is "agency action . . . committed to agency discretion by law" under section 10 of the Administrative Procedure Act, 5 U.S.C. § 701; and it is not reviewable except as permitted by the Act under section 10(e), 5 U.S.C. § 706. Therefore, the right to an extension of time to comply with the Order rests in the discretion of the Federal Trade Commission, and under the facts in this case, is not reviewable. See, *United States* v. *Swingline*, *supra*, at p. 45.

[6] The second method by which a Federal Trade Commission Compliance Order may be altered requires a formal petition to reopen the order pursuant to § 3.72 of the FTC's Rules which reads in part as follows (16 C.F.R. § 3.72(b)):

> (2) Whenever any person subject to a decision containing a rule or order which has become effective, or an order to cease and desist which has become final, is of the opinion that changed conditions of fact or law require that said rule or order be altered, modified, or set aside, or that the public interest so requires, such person may file with the Commission a petition requesting a reopening of the proceeding for that purpose. The petition shall state the changes desired, the grounds therefor, and shall include, when available, such supporting evidence and argument as will in the absence of a contest provide the basis for a Commission decision on the petition. Within thirty (30) days after service of such a petition, the Director of the appropriate bureau of the Commission shall file an answer.
>
> (3) Whenever an order to show cause or petition to reopen is not opposed, or if opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause or petition and answer thereto, or it may serve upon the parties (in the case of proceedings instituted under § 3.13, such service may be by publication in the Federal Register) a notice of hearing, setting forth the date when the cause will be heard. In such a case, the hearing will be limited to the filing of briefs and may include oral argument when deemed necessary by the Commission. When the pleadings raise substantial factual issues, the Commission will direct such hearings as it deems appropriate, including hearings for the receipt of evidence by it or by an administrative law judge . . .

The Defendant here did not formally petition to reopen the proceedings and it can not now complain of the Commission's discretionary action denying its request.

Papercraft apparently recognized that § 4.3 decisions were not reviewable by this Court for it set forth in its Counterclaim that its requests were Rule 3.72 petitions to reopen this proceeding (Counterclaim ¶¶ 38 to 49). However, this contention is without merit.

It is noted that Defendant's first request for an extension of time was made by letter dated December 3, 1973, and there is no statement which could even arguably indicate that the request was intended to be a formal petition to reopen. The letter, dated January 16, 1974, from the Commission denying this request, clearly stated that the letter had been treated as a request for an extension of time.

Papercraft's second request (filed February 27, 1974) which was denied on March 29, 1974, was entitled a "Motion for Extension of Time" and began as follows:

> Papercraft Corporation ("Papercraft"), by its attorneys, respectfully requests an extension of time within which to complete the divestiture of CPS Industries, Inc. ("CPS") under Paragraph I of the Commission's Final Order.

The true intent of this document is indicated by the following statement (at p. 10 of the document):

> . . . In the circumstances, a denial of the request for extension of [415] time will not further the Commission's ultimate objective of restoring competition in the giftwrap market.

* * * * * * *

> An extension of time within which to complete divestiture is a matter addressed to the exercise of the Commission's sound discretion. . . .

In its February 27, 1974 request, Papercraft states (at p.2):

> It is respectfully requested that the Commission's Order *be modified to extend the time* for divestiture for a period of nine months from the date originally specified for compliance, or until September 15, 1974. (Thus, a 6-1/2 month extension from the date of this petition is requested). If the Commission believes it necessary, although we do not, Papercraft will not object to the imposition of a condition pursuant to which such extension would be revocable by the Commission following 21 days' notice to Papercraft if the Federal Trade Commission should find that Papercraft is not proceeding in good faith with divestiture efforts. . . . (Emphasis added).

And at Page 11 of the same request, Papercraft states:

> For these reasons, Papercraft respectfully requests that Paragraph I of the Commission's Final Order *be modified to extend the time* for divestiture for a period of nine months, until September 15, 1974. Although Papercraft considers it unnecessary, it will not object to the imposition of a condition upon such extension pursuant to which the extension would be revocable following 21 days' notice to Papercraft if the Federal Trade Commission should find that Papercraft is not proceeding in good faith with divestiture efforts. (Emphasis added).

Defendant Papercraft now apparently argues that these two passing references in its second submission to the Order being "modified to extend the time for divestiture", turns both of its requests into formal petitions to reopen pursuant to Rule 3.72.

From the above, it seems clear to the Court that the Defendant's two requests for extensions of time were just that and nothing more. They were treated as such by the Commission, and the Defendant was so informed. This discretionary action pursuant to Rule 4.3 is clearly not reviewable.

It is the conclusion of the Court that the Defendant in this action is in violation of the Final Order of the Federal Trade Commission, and the Plaintiff should be granted its request for partial summary judgment, interlocutory in nature on the issue of the Order violation. Further, since the Defendant's Counterclaim raises no issue of any material fact, the Plaintiff is entitled to judgment as a matter of law on the Counterclaim.

An appropriate order will be entered.

FEDERAL TRADE COMMISSION v. SIMEON MANAGEMENT CORPORATION, ET AL.*

Civ. A. No. C-74-2226 WHO. F.T.C. Docket No. 8996.

(United States District Court, Northern District of California, March 11, 1975)

1. TRADITIONAL EQUITY STANDARDS OF JUDICIAL REVIEW ARE NOT APPLIED BY COURT IN EVALUATING MOTION FOR PRELIMINARY INJUNCTION UNDER F.T.C. ACT.

[697] In evaluating a motion for a preliminary injunction under the Federal Trade Commission Act, the Court does not apply the traditional equity standards of judicial review.

2. IN SEEKING RESTRAINT OF DISSEMINATION OF ADVERTISING, F.T.C. DOES NOT HAVE TO SHOW TRADITIONAL EQUITY OF IRREPARABLE HARM.

Federal Trade Commission, in seeking a preliminary injunction restraining the dissemination of advertisements, is excused from making traditional equity showing of irreparable injury.

3. DISTRICT COURT MUST LOOK TO FTC'S REASONABLE CAUSE THAT A VIOLATION OF FTC ACT HAS OCCURRED AS WELL AS WEIGHING FACTOR OF EQUITIES IN FAVOR OF GRANTING OR DENYING THE INJUNCTION.

Reasonable belief of a violation of Federal Trade Commission Act is enough to justify the Federal Trade Commission in seeking a preliminary injunction, but in evaluating the motion for preliminary injunction the district court must look to the Commission's reasonable cause to believe that a violation [698] has taken place, and must also as a separate factor weigh the equities in favor of granting or denying the injunction.

4. UNDER THE F.T.C. ACT, "FALSE ADVERTISEMENT" CAN REFER TO BOTH WHAT AN ADVERTISEMENT STATES AND WHAT IT FAILS TO STATE.

Under Federal Trade Commission Act, an advertisement may be a "false advertisement" both for the statements or representations it actually makes, and for the statements or representations it fails to make.

5. ADVERTISEMENTS WERE SUFFICIENTLY INVOLVED IN OR AFFECTING COMMERCE TO INVOKE JURISDICTION UNDER FTC ACT.

Even though respondents' California weight reduction clinics had never offered

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*Reported in 391 F. Supp. 697 (1975), *aff'd.* 532 F. 2d 708, (9th Cir., 1976). For case before the Commission, see 87 F.T.C. 1184.

weight reduction treatments to out-of-state residents, even though the clinics were located at least four hours' drive from the state borders, and even though the method of weight reduction required daily clinic visits, respondents' advertisements, which were placed in newspapers, magazines, and on television with out-of-state circulation and broadcasting ranges, were sufficiently involved in or affecting commerce to invoke jurisdiction of the Federal Trade Commission Act.

6. DISSEMINATION OF FALSE ADVERTISING, NOT ACTUAL SALES FLOWING FROM THE PUBLICITY IS THE AIM OF THE F.T.C. ACT.

Federal Trade Commission Act is aimed at prohibiting dissemination of false advertising, not towards prohibiting the actual sales that may flow from the publicity.

7. DISSEMINATION OF ADVERTISING PUBLISHING A DRUG-BASED TREATMENT WAS ENOUGH TO MEET F.T.C. ACT REQUIREMENTS THAT ADVERTISEMENT WAS LIKELY TO INDUCE PURCHASE OF A DRUG.

Even though advertisements of operators of weight reduction clinics did not specifically mention that daily injections of an endocrine drug which were a crucial component in the treatment program, and even though the injections were administered by a physician or nurse and the drug was never directly placed in hands of the purchaser, dissemination of advertisements publishing this drug-based treatment was enough to meet requirement of Federal Trade Commission Act that the advertisement in or affecting commerce is likely to induce the purchase of a drug.

8. IN ORDER TO ASCERTAIN THE NET IMPRESSION WHICH THE ADVERTISEMENT WAS TO MAKE ON THE GENERAL PUBLIC, DISTRICT COURT WOULD ANALYZE THE AD IN ITS ENTIRETY.

District court, in ruling on Federal Trade Commission's application for a preliminary injunction restraining operators of weight reduction clinics from advertising their drug-based treatment, would analyze the advertisement of operators in their entirety in order to ascertain the net impression which the advertisement was likely to make upon the general public.

9. DIRECT CONTROL OF MEDICAL PRACTICE IS BEYOND THE POWER OF THE FEDERAL GOVERNMENT AND HAS BEEN LEFT TO THE STATES.

Direct control of medical practice has been left to the states and is beyond the power of the federal government.

10. RESPONDENTS WERE NOT REQUIRED TO SEEK F.D.A. APPROVAL FOR USE OF ENDOCRINE DRUG IN TREATMENTS ADMINISTERED BY PHYSICIANS.

Whether or not endocrine drug was a "new drug," operators of weight reduction clinics were not required to seek FDA approval for use of the drug in treatments administered by licensed physicians.

11. REGULATION OF DRUG ADMINISTRATION BY PHYSICIANS IS BEYOND THE JURISDICTION OF F.D.A.

FDA does not have jurisdiction to regulate the administration of a drug by a physician.

12. PROPER SHOWING WAS NOT MADE TO WARRANT PRELIMINARY INJUNCTION.

Showing was insufficient to warrant preliminary injunction restraining operators of weight reduction clinics from advertising their obesity and weight control treatments as long as they used the drug human chorionic gonadotropin or any other drug in their treatment and as long as such drug or such other drug had not been approved by the FDA for use in weight reduction.

(Syllabus, with substituted captions, taken from 391 F.Supp. 697.)

On motion seeking preliminary injunction restraining operators of weight reduction clinics from advertising their treatments, court held that showing was insufficient to warrant injunction requested.

Motion denied.

Calvin J. Collier, Gen. Counsel, *Gerald Harwood*, Asst. Gen. Counsel, *James P. Timony*, Atty., F.T.C., Washington, D.C., for petitioner; *Raymond J. Lloyd*, Regional Director, *Alfred Lindeman*, San Francisco Regional Office, F.T.C., San Francisco, California, of counsel.

Melvin K. Najarian, Josef D. Cooper, Cooper & Scarpulla, San Francisco, Calif., *Marvin Gross*, Los Angeles, Calif., *Darrel P. Simpson*, Medical Weight Loss, Inc., Los Angeles, Calif., *Leo Shaw, Asaro & Keagy*, San Diego, Calif., for respondents.

Memorandum Opinion and Order

ORRICK, *District Judge.*

[699] Sections 13(a) and (b) of the Federal Trade Commission Act (the Act), 15 U.S.C. § 53(a) and (b),[1] provide that the Federal Trade Commission (the FTC) may seek a preliminary injunction restraining the dissemination of advertisements whenever the FTC has reason to believe (1) that a person, partnership, or corporation is disseminating false or misleading advertisements or is violating or about to violate any provision of law enforced by the FTC and (2) that it would be in the public interest to enjoin the dissemination of such advertisements pending the issuance of an administrative complaint by the FTC and until there is a final administrative or court ruling on the complaint.

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[1] Statutory references to the Act are to the applicable sections of Title 15, United States Code. 15 U.S.C. § 53 provides:

"(a) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public, the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

(b) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

The FTC is entitled to preliminary injunctive relief upon a proper showing that, *weighing the equities* and *considering the FTC's likelihood of ultimate success*, the granting of the injunction would be in the public interest.

[700] In the case at bar, petitioner, the FTC, issued an administrative complaint against respondents on October 15, 1974.[2] In the administrative complaint, the FTC alleged that respondents were violating Sections 45 and 52 of the Act by disseminating false and misleading advertisements. The FTC now seeks a preliminary injunction restraining respondents from advertising their obesity and weight control treatments as long as respondents use the drug Human Chorionic Gonadotropin (HCG), or any other drug, in their treatment, and as long as HCG or such other drug has not been approved by the Food and Drug Administration (FDA) for use in weight reduction.

Respondents are corporations and individuals in the business of setting up, operating and promoting weight reduction clinics within (and in some instances outside of) the State of California. They provide management and support services to the licensed physicians and nurses who administer the treatments offered by the weight loss clinics. Respondents place advertisements for their clinics in newspapers, magazines, and on television.

The matter came on regularly for hearing on December 9, 1974. The Court having considered the pleadings, affidavits and briefs on file in this action and all the evidence, both oral and documentary as well as extensive oral argument, and good cause appearing, the motion for a temporary injunction is denied for the reasons hereinafter set forth. It is to be emphasized that nothing in this Memorandum Opinion and Order is to be taken as affecting in any wise the decision on the merits of the administrative complaint filed by the FTC. No doubt much more evidence from both sides will be presented at the hearings on the administrative complaint. Everything stated herein refers solely to the motion for a temporary injunction.

I. STANDARD FOR INJUNCTIVE RELIEF

[1,2] In evaluating a motion for a preliminary injunction under the Act, the Court does not apply the traditional equity standards of judicial review. Section 53 of the Act permits the issuance of a preliminary injunction upon a proper showing that weighing the equities, and considering the FTC's likelihood of ultimate success, such action would be in the public interest. The statute does not define "proper showing" and there is sparse judicial interpretation of the requisites of a "proper showing". The legislative history of Section 53

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[2] The complaint was issued by a split vote of the Commission. Two of the five Commissioners voted against the issuance of the complaint.

makes it clear that since the FTC is a public agency, suing on behalf of the public, it is excused from making the traditional equity showing of irreparable injury. Joint Statement of the Committee Conference, H.R.Rep.No.93-617, 93d Cong., 2d Sess. (1973), page 31.

[3] There is a split in judicial opinion whether the Court, in evaluating the motion for a preliminary injunction, need only determine that the FTC has reason to believe that the alleged violation has taken place (*Federal Trade Commission* v. *Rhodes Pharmacal Co.*, 191 F.2d 744 (7th Cir. 1971) or whether the Court must also balance the equities. *FTC* v. *National Health Aids*, 108 F.Supp. 340 (D.C.Md.1952). Considering that the statute specifically directs the Court to weigh the equities and considering the extraordinary and important nature of injunctive relief, I am of the view that the District Court must do more than determine if the administrative agency had reasonable cause to believe that the alleged violation had taken place. Reasonable belief of a violation is enough to justify the FTC seeking a preliminary injunction, but in evaluating the motion for preliminary injunction the District Court must look to the FTC's reasonable cause to believe that a violation has taken place, *and* must also as a separate factor weigh the equities **[701]** in favor of granting or denying the preliminary injunction. *FTC* v. *National Health Aides*, *supra*.

II. THE FACTS

The following facts are adduced from the evidence, both oral and documentary, taken at the hearing. They are generally applicable to all respondents and are pertinent for the purpose of deciding this motion for preliminary injunction. The operation of the clinics owned by the individual respondents vary in certain details from others, but such details are not significant in deciding this motion.

A. *The Treatment Program*

Respondents' weight reduction clinics utilize the "Simeons" or "Simeon's" method for weight loss. The method consists of a four to six week treatment program of a 500 calorie diet, continuous medical counseling, and daily injection of HCG in a 125 I.U. dosage. HCG is a hormone or endocrine drug derived from the urine of pregnant women. HCG is marketed by a number of pharmaceutical houses and has been approved for the treatment of several conditions other than weight loss. For example, HCG is labeled for, and FDA approved for, use in the treatment of sterility due to anovulation, sterility due to hypogonadism, and for delayed onset of puberty. HCG has not been certified by the FDA for use in the treatment of obesity. However, HCG has been used for many years by physicians throughout the United States in the treatment of obesity.

Prospective patients of the clinics are sometimes given other drugs which are not approved by the FDA for weight reduction such as diuretics. The patients are not told that HCG or the other drugs employed lack FDA approval for the treatment of obesity or weight control.

The weight reduction treatment is administered by licensed physicians and nurses. Respondents only manage the clinics, they do not administer the treatments. On the initial visit to the clinic, a prospective patient is examined by a physician and given diagnostic tests to determine if the individual is eligible for the treatment program. Individuals suffering from diseases for which HCG is contraindicated are rejected from the program. If accepted into the program, the patient is placed on the diet and injection regimen. Dosages and frequency of injections are sometimes varied to suit the individual patient's needs.

The cost of the clinics' programs ranges from $100 to $300 for a course of treatment. Simeons Weight Clinics Foundation charges from $188 to $368 or more for their obesity treatment. Medical Weight Loss, Inc. charges $245 for their average obesity treatment. Bariatric Medical Clinics Management Corporation charges from $135 to $185 for their obesity treatment. Weight Reduction Medical Clinic charges from $170 to $240 for their obesity treatment. HCG Weight Clinics Foundation charges between $200 and $300 on the average for their obesity treatment. These average charges include the cost of various laboratory tests, a medical history, and the HCG injections.

The cost of respondents' obesity treatments is comparable to, or less than, charges by other private physicians or by university clinics for weight reduction treatments. Assuming a treatment program based on daily visits were available at other private or university clinics, the cost would be about $400 to $500.

B. *The Advertisements*

Respondents advertise their weight loss clinics in magazines, newspapers, and on television. The advertisements suggest that the treatment method is safe, effective, and medically approved. The following are illustrative of the advertisements disseminated by respondents:

1. Simeon Weight Clinics Foundation:

Simeon Weight Clinics Foundation Declares War on Weight.

Medically Su[702]pervised Weight Loss. Lose weight safely, quickly and effortlessly through our proven weight reduction program.

2. Medical Weight Loss, Inc.:

Losing Weight is a Doctor's Business. Now You Can Lose Weight . . . Through a Proven Method—Fast . . . using the safe and practical Dr. A. T. W. Simeons method of weight reduction.

3. Bariatic Medical Clinics Management Corporation:

Medical Weight Reduction. Bariatrics individual program is a safe and practical method for the entire family to lose weight . . . .

4. Weight Reduction Medical Clinic:

Look At Me Now. I Lost 26 lbs. in 6 weeks! I didn't sign any contracts or take any pills!

5. HCG Weight Clinics Foundation:

Lose Weight Now—to look better—to feel better—to perform better.

Featuring Dr. A. T. W. Simeon's "Pounds & Inches" Method. HCG Weight Clinics Foundation can improve your appearance and attractiveness—and help you stay that way.

III. THE ISSUES

A. *Alleged Violations of the Act*

The FTC contends that respondents have violated Sections 45 and 52 of the Act. As amended by the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act which became effective January 4, 1975 (P.L. 93-637, 93d Cong., 2d Sess. (1974)), Section 45 provides in pertinent part:

> (a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

Section 52 as amended by the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act provides:

> (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—
>
> (1) By United States mails, or in or having an effect upon commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or
>
> (2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, or cosmetics.

[4] Section 15 of the FTC Act, 15 U.S.C. § 55, in pertinent part, defines "false advertisement" to mean:

> An advertisement * * * which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account [among other things] * * * the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

Thus, an advertisement may be a "false advertisement" both for the statements or representations it actually makes, and for the statements or representations it fails to make.

Since respondents' clinics are registered with the State of California as a pre-paid health plan under the Knox-Mills Health Plan Act (California Government Code § 12530 et seq.), the clinics have the right to advertise their availability. The FTC does not take issue with the fact that the clinics advertise, but rather with the type of advertisements respondents use. Specifically, [703] the FTC contends that respondents' advertisements are false and deceptive because:

1. The advertisements represent that the weight reduction treatment is safe, effective, and medically approved, when in fact it is not;

2. The advertisements fail to mention the material facts that:

(a) The treatments are based upon the injection of a hormone drug;

(b) That the drug is not recognized by experts as safe and/or effective for use;

(c) That there is no valid scientific evidence that the drug promotes weight loss that could not be achieved by diet alone; and

(d) That the drug is not approved for use in weight reduction by the FDA and, on the basis of current evidence, could not be approved if its manufacturers attempted to obtain a license; and

3. The advertisements contravene the spirit of the Food, Drug and Cosmetic Act (21 U.S.C. § 301 et seq.) by promoting a weight reduction treatment based on a drug that has not been FDA approved for weight control.

B. *Commerce*

Respondents contend that Section 45 of the Act does not apply to them since their advertisements are not "in or affecting" commerce. Respondents base this contention on the fact that their California clinics have never offered weight reduction treatments to out-of-state residents. Since all of their California clinics are located at least four hours' drive from the state borders and since the Simeons method requires daily clinic visits, respondents claim there is no feasible way they could ever service out-of-state customers.

[5,6] I find that respondents' advertisements are sufficiently involved in or affecting commerce to invoke the jurisdiction of Section

45 of the Act. It is undisputed that the respondents place their advertisements in newspapers, magazines, and on television with out-of-state circulations and broadcasting ranges. The Act is aimed at prohibiting the dissemination of false advertising, not with prohibiting the actual sales that may flow from the publicity. Even without an out-of-state sale, the fact that respondents cause their advertisements to be disseminated out of state is enough to fulfill the commerce requirements of the Act. *Shafe* v. *Federal Trade Commission*, 256 F.2d 661 (6th Cir. 1958).

Furthermore, several of the respondents operate weight reduction clinics outside of California. Although a prospective out-of-state patient may not be able to make the four-hour trip to one of the California clinics, the advertisement published in California and circulated out of state may well cause an out-of-state customer to visit a more conveniently located clinic outside of California.

Respondents further contend that Section 52 of the Act does not apply to them since they offer and advertise a treatment program, not the sale of a drug, device, or cosmetic. I find that respondents' advertisements are sufficiently likely to induce the purchase of a drug to invoke the jurisdiction of Section 52 of the Act.

[7] Respondents' claim that their advertisements are not aimed at inducing the purchase of a drug, but rather deal with a treatment program is a distinction without a difference in this case. Although respondents' advertisements do not specifically mention HCG or the injection regimen, HCG injections are a crucial component in the treatment program. Anyone accepted into the program is placed on daily HCG injections and a portion of the treatment fee goes toward the cost of these injections. The hypodermic injection of HCG legally constitutes a sale transaction although the injection is administered by a physician or nurse and the drug is never directly placed in the hands of the purchaser. *Ratigan* v. *United States*, 88 F.**[704]**2d 919 (9th Cir. 1937). Therefore, anyone responding to the advertised treatment program will, in fact, purchase the drug HCG. Dissemination of advertisements publicizing this drug-based treatment is enough to meet the requirement of Section 52 that the advertisement in or affecting commerce is likely to induce the purchase of a drug. *Mueller* v. *United States*, 262 F.2d 443 (5th Cir. 1958).

C. *Likelihood of Success on the Merits*

1. Misrepresentations

[8] I find that the FTC does not have a strong likelihood of establishing at the administrative proceedings on their complaint before the Commission that the respondents' advertisements are false

and misleading either on account of material misstatements or material omissions. The Court must analyze the advertisements of respondents in their entirety in order to ascertain the net impression which the advertisement is likely to make upon the general public. *FTC* v. *Sterling Drug Inc.*, 317 F.2d 669 (2d Cir. 1963). Taken as a whole, I find that respondents' advertisements indicate that they offer a safe, effective, medically approved weight loss program. I find there is a strong likelihood that the Commission will ultimately determine that in truth this is just what respondents do offer. The advertisements do not mention HCG, but rather publicize the treatment program as a whole. Respondents', the FTC's and the Court's medical experts all agree that the six week, 500 calorie, restricted diet that is part of the treatment program will produce weight loss. Although general medical consensus does not consider HCG effective in physiologically producing weight loss, the HCG component of the program may make it psychologically easier for the overweight patient to maintain the strict diet. Whether or not HCG actually has a physiological or psychological effect, there is substantial evidence indicating that the treatment program as a whole does result in weight loss. This is what respondents' advertisements claim.

I find there is a strong likelihood that the Commission will ultimately determine that respondents' treatment is safe. There is no evidence to show that HCG is unsafe in the 125 I.U. dosages used in the Simeons method. The pharmacological effect of the drug HCG has not been extensively reported in the medical literature. There have been no totally adequate and well-controlled studies establishing either the safety or the lack of safety of HCG in weight reduction treatments. The FDA has not yet conducted hearings on this matter. The FDA has, however, found HCG safe when used in much larger dosages for other purposes. There is no reason to believe these findings, based upon adequate and well-controlled studies of HCG for other uses, do not also demonstrate the safety of HCG in the treatment of obesity. Several studies that are less than totally adequate and well controlled indicate that HCG is safe for use in the treatment of obesity.

Nor has clinical experience with the drug suggested a safety problem. HCG was first used for the treatment of obesity in the United States in 1954. The Physicians' Desk Reference (a compendium of package inserts for various drugs) for the years 1958–1967 inclusive approved the use of HCG in the treatment of obesity. Thousands of patients over the past 20 to 25 years have been treated for obesity with the 125 I.U. dosages given in the Simeons method. These years of clinical experience with HCG have not indicated that the drug is unsafe.

It is true that an individual following the Simeons 500 calorie diet does experience some protein loss due to the restricted food intake. However, there has been no showing that the short-term diet is actually "unsafe". When one considers the health hazards involved in obesity and the resulting health benefits from the weight loss achieved from the short-term restricted diet, there is a strong likelihood that the Simeons method will ultimately be determined to be safe.

[705] I also find that it is unlikely that the Commission will determine that the advertisements misrepresent the fact that the weight reduction program is medically approved. Although HCG has not been approved by the FDA for use in weight loss, this does not mean that the treatment program does not have the approval of the medical community. Although the majority of physicians do not believe that HCG physiologically promotes weight loss, many physicians with extensive practices in weight control do believe that HCG has a psychological or placebo[3] effect that is beneficial in the weight treatment program. For example, the Court-appointed expert witness, Dr. John Karam, the Associate Director of the Metabolic Research Unit for the University of California, indicated that he thought the program as a whole was effective and that in the context of the counseling program and the diet, the HCG injections might be "functionally effective".

2. Material Omissions

I find that the FTC does not have a strong likelihood of establishing that respondents have violated the Act by failing to include the material facts that the treatments are based upon the injection of a hormone drug; that the drug is not recognized by experts as safe and/or effective for use; that there is no valid scientific evidence that the drug promotes weight loss that could not be achieved by diet alone; and that the drug is not approved for use in weight reduction by the FDA and, on the basis of current evidence, could not be approved for such a use.

(a). Failure to Inform Patient of Use of Unapproved Drug

[9] Both respondents' and the FTC's experts agree that it is not general medical practice to inform a patient whether or not a drug is FDA approved. Respondents manage the clinics and advertise the availability of the treatment program. Licensed physicians and nurses prescribe and administer the actual treatment. Although it is perfectly proper for a prepaid health plan to advertise under the Knox-Hill Act (California Government Code § 12530 et seq.), under the medical canons of ethics, the individual doctor is precluded from advertising. Since the individual doctors are responsible for the treatment, the FTC,

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[3] A placebo is a substance having no pharmacological effect, but which is given to a patient who supposes it to be an effective medicine for the condition for which it is prescribed. Because of the patient's belief in the drug, the substance will often prove to be an effective medicine.

by insisting on the inclusion of what the treatment will entail in the advertisements, is asking the individual physicians to advertise what it is they, not the respondents, will do. Not only would this be contrary to medical ethics, it is beyond the scope of the FTC's powers. The direct control of medical practice has been left to the states and is beyond the power of the federal government. *Linder* v. *United States*, 268 U.S. 5, 45 S.Ct. 446, 69 L.Ed. 819 (1925).

Furthermore, forcing respondents to advertise that HCG was no more effective than diet alone, would destroy a valuable psychological component of the program. Although there is no scientific evidence to indicate that HCG physiologically promotes weight loss, there is medical consensus that HCG has a psychological or placebo effect that makes it easier for a patient to maintain the strict, 500 calorie diet. Placebos are widely used in medical practice. Their benefits are derived from the fact that the patient believes the drug will work. A physician does not normally inform a patient that a placebo is being used since this would destroy the effectiveness of the drug. If respondents were forced to advertise that the HCG was not any more effective than diet alone, they would be forced to destroy the patient's belief in the drug and the medically acknowledged beneficial placebo effects that result from this belief. Rather than protecting the public, this disclosure might actually harm the overweight and obese individuals who have heretofore **[706]** been able to stick to the Simeons method and lose weight precisely because they believed that HCG was helping them.

(b). Use of "New Drug"

I find that the FTC does not have a good likelihood of ultimately establishing that respondents violate Sections 45 and 52 of the Act because their advertisements fail to state that their treatment program is based on a drug that has not been approved by the FDA for weight loss. The Federal Food, Drug and Cosmetic Act (21 U.S.C. § 355) authorizes the FDA to restrain the introduction into interstate commerce of any new drug unless the drug has been approved by the FDA.

Under the Food, Drug and Cosmetic Act (21 U.S.C. § 301 et seq.), it is illegal to market and label a "new drug" for a use that is not FDA approved. As defined by the Food, Drug and Cosmetic Act (21 U.S.C. § 321(p)), a new drug is a drug that has not been "generally recognized among experts * * * as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof". The FTC argues that HCG is a "new drug" within the meaning of the FDA Act and has not been FDA approved for weight loss. The FTC contends that it is, therefore, unfair and false to permit the dissemination of advertisements for a treatment which is based on this unapproved "new drug" within the meaning of the Food, Drug and Cosmetic Act.

[10] The Court need not reach the question of whether or not HCG is a "new drug". Even assuming *arguendo* that HCG were a "new drug", it would not be a violation of Sections 45 or 52 of the Act to advertise a treatment program that utilized this unapproved "new drug". Whether or not HCG is a "new A "NEW drug", respondents are not required to seek FDA approval for the use of HCG in treatments administered by licensed physicians. The FDA has stated that the 1938 Food, Drug and Cosmetic Act and the 1962 amendments to that Act did not intend to interfere in or to regulate the practice of medicine between the physician and the patient. The FDA has stated that if a drug that has FDA approval for specific uses is used by a treating and prescribing physician for an unapproved use, this is not considered a "new drug" use that would require the physician to file an investigational new drug plan or to submit a new drug application:

> * * * the physician may, as part of the practice of medicine, lawfully prescribe a different dosage for his patient, or may otherwise vary the conditions of use from those approved in the package insert, without informing or obtaining the approval of the Food and Drug Administration.
>
> This interpretation of the Act is consistent with congressional intent as indicated in the legislative history of the 1938 Act and the drug amendments of 1962. Throughout the debate leading to inactment, there were repeated statements that Congress did not intend the Food and Drug Administration to interfere with medical practice and references to the understanding that the bill did not purport to regulate the practice of medicine as between the physician and the patient. 37 Fed.Reg. 16503 (1972).

Therefore, whether or not HCG is a new drug, the FDA does not require these respondents to seek FDA approval prior to its prescription in their weight-control treatments.

[11] Furthermore, the FDA does not have jurisdiction to regulate the administration of a drug by a physician. In order to invoke the jurisdiction of the FDA, 21 U.S.C. § 355(a), requires a person to:

> * * * introduce or deliver * * * into interstate commerce any new drug * * *.

Even assuming *arguendo* that HCG is a new drug under the definition of new drug (21 U.S.C. § 321(p)), the California physician in his private treatment of a California patient with HCG is engag[707]ing in a manifestly different quantitative and qualitative act than introducing or delivering for introduction into interstate commerce. The FDA interpretation of the 1938 Act and its 1962 Amendments does not treat the use of HCG by a treating and prescribing physician as being in interstate commerce. The FDA has stated:

> If an approved new drug is shipped in interstate commerce with the approved package inserts, and neither the shipper nor the recipient intend that it be used for an unapproved purpose, the requirements of section 505 of the Act are satisfied. Once the new drug is in a local pharmacy after interstate shipment, the physician may, as part of the practice of medicine, lawfully prescribe a different dosage for his patient, or may otherwise vary the conditions of use from those approved in the package insert, without informing or obtaining the approval of the Food and Drug Administration. 37 Fed.Reg. 16503 (1972).

Since it is not illegal for respondents' clinics to use HCG for weight control, it is unlikely that the Commission will ultimately determine that it is illegal for respondents to advertise this legally permissible treatment plan.

D. *Balancing the Equities*

In deciding whether the FTC has made a proper showing that equitable relief should be granted, the Court must also balance all of the equities. The respondents argue that an injunction prohibiting their advertising as long as they use HCG or any other unapproved drug, in their treatment would be financially ruinous. Balanced against this, the Court must consider the possible harm to consumers which may result from the use of the unapproved drug. The Court must also consider the cost to the consumers.

I find that the equities weigh against granting the requested relief. HCG has been widely used in clinical medicine both for weight reduction and for other treatment purposes. There is no evidence that HCG administered in the 125 I.U. dosages prescribed in the Simeons method is unsafe. Although HCG is contraindicated for use in individuals with diabetes mellitus and tumor of the pituitary gland, respondents eliminate such persons from their treatment program during the initial screening and testing visit.

Since the cost of the Simeons treatment is the same as, or less than, the cost of comparable university endocrine clinic programs for weight reduction, the public is not injured by inflated prices for the treatments they are receiving.

Although the medical opinion is divided on the efficacy of HCG in weight reduction, respondents have demonstrated that their treatment program, which relies heavily on the HCG injections, does help many people to lose weight. In balancing the equities, I must also consider the needs of these obese people to have readily available, effective weight reduction treatments which meet their physiological and psychological needs. The success of the treatment, even if only successful for a limited portion of the population, weighs heavily against granting the injunctive relief.

I find that respondents' business would suffer financially if they were precluded from advertising. Respondents require a high volume of business generated by advertising to sustain their specialized medical practice at a reasonably low cost to the public. Although respondents' business losses would not be controlling if there were proof of harm to the public (*FTC* v. *National Health Aids*, *supra*), in the instant case, where the public has not been injured by the Simeons weight treatments, the equities favor denying the injunctive relief.

IV. CONCLUSION

[12] I find that the FTC has not made a proper showing that there is reason to believe respondents have violated Sections 45 and 52 of the Act. Accordingly, I deny the FTC's motion for a preliminary injunction.

[708] Pursuant to Rule 52 of the Federal Rules of Civil Procedure this Memorandum Opinion constitutes the Court's Findings of Fact and Conclusions of Law, and pursuant thereto:

It is ordered, That:

1. The FTC's motion for a preliminary injunction is denied.
2. Respondents shall bear the costs of the fee for the Court's appointed expert witness, Dr. John Karam. Dr. Karam's fee shall be two hundred dollars ($200). The fee shall be paid directly to Dr. Karam and payment shall be made by March 25, 1975. Evidence of such payment shall be filed with the Court by March 25, 1975. Dr. Karam's address is University of California Medical Center, H.S.W. Room 1141, 501 Parnassus Avenue, San Francisco, California 94143.
3. Respondents shall submit a judgment in accordance with the foregoing by March 21, 1975.

CLAUDE THIRET et al. v. F.T.C.*

Nos. 74-1100, 74-1112. F.T.C. Docket No. 8875

(United States Court of Appeals, Tenth Circuit, March 18, 1975)

1. ONLY IF SUPPORTED BY SUBSTANTIAL EVIDENCE ARE FINDINGS OF F.T.C. CONCLUSIVE.

   [176] Findings of Federal Trade Commission on factual issues are conclusive on appeal only if the findings are supported by substantial evidence.

2. F.T.C. FINDINGS SHOULD BE CLOSELY SCRUTINIZED WHERE COMMISSION OVERRULES ADMINISTRATIVE LAW JUDGE'S FINDINGS AND SUBSTITUTES OWN, AND COURT'S TASK IS TO DETERMINE WHETHER COMMISSION'S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

   Where Federal Trade Commission in effect overrules the Administrative Law Judge and substitutes its findings for those of the Judge, the Commission's findings should be closely scrutinized; however, even though the Judge and the Commission may disagree as to the prop[177]er findings, reviewing court's task is still to determine whether the Commission's findings are supported by substantial evidence.

3. F.T.C. FINDINGS WERE SUPPORTED BY EVIDENCE.

   Federal Trade Commission's findings regarding unfair and deceptive trade practices which were engaged in by sellers and installers of steel siding on residential properties, i.e., deceptions as to extent of warranty, lower heating and air-conditioning bills and use of a buyer's premises as a "model home" enabling the buyer to receive commissions, were supported by substantial evidence.

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* Reported in 512 F.2d 176 (1975). For case before the Commission, *see* 83 F.T.C. 1004.

4. WITNESS SATISFACTION WITH PRODUCT IS NOT CONTROLLING ON ISSUE OF USE OF UNFAIR OR DECEPTIVE PRACTICES.

Fact that many witnesses indicated overall satisfaction with steel siding was not controlling on issue of whether seller and installer of such siding had engaged in unfair and deceptive trade practices, some of which included misrepresentations as to warranty coverage and use of a purchaser's premises as a "model home" thereby allegedly enabling the purchaser to receive commission.

5. CAPACITY TO DECEIVE, NOT ACTUAL DECEPTION, IS ESSENTIAL TO FINDINGS OF UNFAIR OR DECEPTIVE PRACTICES.

Evidence of actual deception is not necessarily essential to a finding of unfair and deceptive trade practices; it is the capacity to deceive which is important.

6. ONCE VIOLATION IS FOUND TO EXIST, F.T.C. HAS CONSIDERABLE LATITUDE IN FASHIONING EFFECTIVE CEASE AND DESIST ORDER.

Federal Trade Commission has considerable latitude in fashioning an effective cease and desist order once an unfair trade practice is found to exist; all that is necessary is that the Commission's remedial orders have a reasonable relation to the unlawful practices found to exist.

7. HYPOTHETICAL SITUATIONS SHOULD NOT MODIFY OR NARROW REMEDIAL ORDERS IN UNFAIR TRADE PRACTICE CASES.

A remedial order entered in an unfair trade practice case should ordinarily not be modified or narrowed because of hypothetical situations where lawful conduct could conceivably be prohibited by the cease and desist order.

8. PROPRIETY OF CONSENT ORDER WAS NOT CONTROLLED BY FACT THAT CORRECTIVE ACTION WAS TAKEN TO BRING SALES CONTRACTS INTO LINE WITH PROVISIONS OF TRUTH IN LENDING ACT.

Fact that sellers and installers of steel siding took corrective action to bring their sales contracts into line with provisions of the Truth in Lending Act and, in effect, promised to sin no more, was not controlling on issue of propriety of a cease and desist order.

9. WHERE GENERAL MANAGER WAS IN COMMAND POSITION AND HAD CONTROL OF THE ACTUAL GUILTY PARTIES, HE WAS PROPERLY MADE SUBJECT TO CEASE AND DESIST ORDER.

General manager of corporate seller and installer of steel siding for residential premises was properly made subject of Federal Trade Commission's cease and desist order, which required that two corporations and two officers thereof cease and desist from engaging in certain acts and practices found to be unfair and deceptive, where manager was in a command position and had control over the salesmen, who allegedly were the ones actually guilty of the unfair practices.

10. COMMAND TO CORPORATION TO CEASE AND DESIST IS A COMMAND TO THOSE OFFICIALLY RESPONSIBLE FOR CONDUCT OF ITS AFFAIRS.

A command to a corporation to cease and desist from engaging in certain practices which have been found to be unfair and deceptive is a command to those who are officially responsible for the conduct of its affairs.

(Syllabus, with substituted captions, taken from 512 F.2d 176.)

On petition to review order to cease and desist, court held that where Commission overrules the findings of the Administrative Law Judge and substitutes its own findings, those findings are subject to close scrutiny; the F.T.C.'s findings were supported by substantial evidence;

that the capacity of a defendant to deceive, not actual deception, was essential to a finding of unfair and deceptive trade practices; and plaintiff's promise "to sin no more" was not controlling on issue of the propriety of the order to cease and desist.

Order affirmed.

Blaine L. Boyens, Denver, Colo. (*Boltz, Boyens & Glenn*, Denver, Colo., on the brief), for petitioner Claude Thiret.

Richard M. Koon, Denver, Colo. (*Holland & Hart*, Denver, Colo., on the brief), for petitioners Certified Building Products, Inc., Certified Improvements Co., and Michael P. Thiret.

Warren S. Grimes, Washington, D.C., (*Calvin J. Collier*, Gen. Counsel, *Gerald Harwood*, Asst. Gen. Counsel, and *Karl H. Buschmann*, Atty., Washington, D.C.), for respondent F.T.C.

Before LEWIS, *Chief Judge*, and BREITENSTEIN and MCWILLIAMS, *Circuit Judges*.

MCWILLIAMS, *Circuit Judge:*

[178] These consolidated cases involve two petitions for review of an order of the Federal Trade Commission that the petitioners cease and desist from certain acts and practices found by the Commission to be unfair and deceptive under Section 5 of the Federal Trade Commission Act. 15 U.S.C. § 45. The order of the Commission also provided that petitioners cease and desist from certain other acts and practices found to be in violation of the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.*, and Regulation Z, 12 C.F.R. 226, promulgated thereunder.

The petitioners are engaged in the business of selling and installing steel siding on residential properties in Colorado, Wyoming, Nebraska, Kansas and New Mexico. One of the petitioners, Certified Building Products, Inc., was incorporated in the early 1950's, and ceased doing business in November 1970. Certified Improvements Company, another petitioner, had been dormant since its organization in 1961 and was activated in January 1970 to carry on the business previously conducted by Certified Building Products. Michael Thiret, also one of the petitioners, was president and sole owner of Certified Building Products. Claude Thiret, the remaining petitioner, was a salesman for Certified Building Products from about 1953 to 1968, at which time he became the general manager for that company. When Certified Improvements Company was activated in January 1970, Claude Thiret became its president and he made a cash contribution for which he received 40% of the company stock. Michael Thiret then became the vice-president of Certified Improvements and by virtue of his cash contribution to the company he received 60% of its stock.

Based on its investigation the Commission issued a complaint against Certified Building Products, Inc., Certified Improvements Company, Michael Thiret, Claude Thiret and one Jack Bitman, who was the secretary-treasurer of Certified Improvements Company. In Count 1 of the complaint it was alleged that the respondents had violated Section 5 of the Federal Trade Commission Act by falsely and deceptively representing that their siding materials were being offered for sale at a special reduced price for a limited time only; that purchasers of the siding material would realize a 50% saving in their air-conditioning and heating bills; that the siding materials would never require repairing; that the siding materials were unconditionally guaranteed for 30 years; that homes of prospective purchasers had been specially selected as model homes, and, after installation, such homes would be used for demonstrating and advertising purposes for which the purchasers of siding material would receive allowances, discounts, or commissions; and that purchasers of the siding materials would receive enough commissions to obtain their own installation at little or no cost. Count 1 also charged that the respondents had violated Section 5 by negotiating customer obligations thus obtained to third parties, thereby cutting off certain defenses which might otherwise have been available to the customer who defaulted on his installment payments.

Count 2 of the complaint alleged that the respondents had violated the Truth-in-Lending Act and its implementing Regulation Z relating to the extension of credit to customers.

A prehearing conference was held before the Administrative Law Judge, during which Michael and Claude Thiret were deposed. As we understand it, at the time of this so-called prehearing conference it was contemplated that a consent decree would be entered as concerns the two business entities, i.e., Certified **[179]** Building Products and Certified Improvements Company, and Michael Thiret. The prehearing conference was apparently held for the primary purpose of ascertaining the degree of involvement, if any, on the part of Claude Thiret and Jack Bitman. In any event, based on the testimony of Michael and Claude Thiret given at this prehearing conference, Claude Thiret and Jack Bitman filed motions to dismiss based on the proposition that neither had any control over the activities of the salesmen who were doing the actual selling of the steel sidings.

In this posture, then, the matter was certified to the Commission by the Administrative Law Judge. The Commission, however, rejected the proposed consent decree as being inadequate, and denied the motions to dismiss made by Claude Thiret and Jack Bitman.

The entire matter then came on for full hearing before the Administrative Law Judge. After hearing the testimony of some twenty-two witnesses, the Judge dismissed both counts in the complaint as to all respondents. As to Count 1, the Judge found that complaint counsel had failed to sustain its burden of proof.

As to Count 2, though the respondents were found to have violated Regulation Z, the violation was characterized as only "technical," and not substantive in nature. Further, the Judge found that since the practices in question had been discontinued and that the respondents were unlikely to resume them in the future, there was no need for a cease and desist order.

Complaint counsel then appealed the matter to the Commission, and the latter in its decision modified the Judge's order in substantial particulars. The Commission substituted its findings for those of the Judge with respect to Count 1, the Commission finding that the evidence sustained most of the allegations of unfair and deceptive trade practices as set forth in the complaint. The Commission also concluded that the violations of the Truth-in-Lending Act should be prohibited. Accordingly, cease and desist orders were issued in connection with both counts of the complaint as to all respondents, except Jack Bitman. The four petitioners in the present consolidated proceeding in this court, namely, the two business entities, Michael Thiret and Claude Thiret, seek review of the orders thus entered.

The questions to be resolved are as follows: (1) Are the findings of fact as made by the Commission supported by substantial evidence on the record as a whole; (2) do the findings in turn support the remedial orders entered by the Commission; and (3) is Claude Thiret properly held to be subject to the cease and desist orders? In our view the answer to each of the questions is in the affirmative.

[1,2] The applicable statute provides that "the findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c). This statutory language has been held to mean that the findings of the Commission as to facts are conclusive on the courts if the findings be supported by substantial evidence. *Adolph Coors Company* v. *F.T.C.*, 497 F.2d 1178 (10th Cir. 1974), and *OKC Corp.* v. *F.T.C.*, 455 F.2d 1159 (10th Cir. 1972). Where, as here, the Commission in effect overrules the Judge and substitutes its findings for those of the Judge, the Commission's findings should be closely scrutinized. However, even though the Judge and the Commission may disagree as to the proper findings, our task is still to determine whether the Commission's findings are supported by substantial evidence. *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474, 496, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

[3-5] Our study of the record as made in the instant case leads us to conclude that the findings of the Commission regarding unfair and deceptive trade practices are supported by substantial evidence. More than a score of persons who had purchased steel siding from the petitioners testified as to the selling tactics practiced upon them by [180] petitioners' salesmen. And to us there was a remarkable

similarity in the testimony of these several witnesses. In each instance the salesmen hired by the petitioners to go out in the field and sell steel siding were using pressure tactics, of one form or another.

Many of the witnesses testified that they were led to believe that they were receiving special discount prices in exchange for use of their homes as "showcases" or "model homes," when in fact such prices were those normally charged by petitioners. In some instances, a magazine advertisement showing the manufacturer's suggested retail price for the steel siding to be higher than that charged by petitioners was used to support representations that discounts were given in connection with the model homes plan. Customers were generally informed that they must make immediate decisions, or the salesmen would go elsewhere with their offers.

Customers were told that they would receive referral commissions for finding new purchasers for petitioners' siding and services. Some who testified were informed that they could earn substantial sums and perhaps even pay for their siding through commissions. Signs were to be placed on the properties with new siding and advertising pictures were to be taken. In one case, petitioners' salesman borrowed the customer's hammer and tore off some existing siding to dramatize the "before" part of a "before and after" set of pictures for such advertising. Few, if any, of the properties ever had signs placed on them and none of the customers who testified saw any advertising pictures using his home. Several customers were led to believe that petitioners' salesmen would bring prospective buyers to their "model homes" and that they would then receive commissions if purchases ensued. The salesmen did not, to the witnesses' knowledge, bring anyone for such purpose. Some customers received small amounts of commissions, but none was able to finance to any appreciable degree the purchase of his siding.

Petitioners' salesmen also represented orally and through printed material that installation of their siding would bring significant savings in costs of heating and cooling the homes. Witnesses testified that they generally noticed little improvement. Although customers were told that the siding was unconditionally guaranteed for thirty years, they later received written guarantees from the manufacturer covering only manufacturer's defects and excluding from coverage damage due to the elements or to installation workmanship. Replacement of any defective material was to be on a prorated basis and labor costs were not included.

The fact that many of the witnesses nonetheless indicated overall satisfaction with the steel siding is not controlling. Evidence of actual deception is not necessarily essential to a finding of unfair and deceptive practices. It is the capacity to deceive which is important.

Double Eagle Lubricants, Incorporated v. *F.T.C.*, 360 F.2d 268 (10th Cir. 1965). And as was said in *F.T.C.* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, 85 S.Ct. 1035, 1042, 13 L.Ed.2d 904 (1965), "an administrative agency which deals continually with cases in the area * * * is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the Act." In sum, the Commission's finding of unfair trade practices is in our view supported by substantial evidence.

As concerns Count 2 in the complaint, it is conceded that there had been violations of the Truth-in-Lending Act, and Regulation Z promulgated thereunder, though the petitioners contended the violations were unintentional, and quickly corrected when discovered.

[6-8] The petitioners alternatively argue that if the Commission's findings are deemed to be supported by substantial evidence, the remedial orders were overly broad and not warranted by the findings. The Commission of course has considerable latitude in fashioning an effective cease and desist order, once an unfair trade practice is found to exist. [181] All that is necessary is that the Commission's remedial orders have a "reasonable relation" to the unlawful practices found to exist. And an order should ordinarily not be modified or narrowed because of hypothetical situations where lawful conduct could conceivably be prohibited by the cease and desist order. In this regard, see *F.T.C.* v. *National Lead Co.*, 352 U.S. 419, at 428-429, 431, 77 S.Ct. 502, at 509, 1 L.Ed.2d 438 (1957), where the following pertinent language appears:

> The Court has held that the Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist. In *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608 [66 S.Ct. 758, 90 L.Ed. 888] (1946), the Court named the Commission "the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.*, at 612-613, [66 S.Ct. 758 at page 760]. Thereafter, in *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 726 [68 S.Ct. 793, 815, 92 L.Ed. 1010] (1948), the Court pointed out that the Congress, in passing the Act, "felt that courts needed the assistance of men trained to combat monopolistic practices in the framing of judicial decrees in antitrust litigation." In the light of this, the Court reasoned, it should not 'lightly modify' the orders of the Commission. Again, in *Federal Trade Commission* v. *Ruberoid Co., supra*, 343 U.S. at 473, we said that "if the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." We pointed out there that Congress had placed the primary responsibility for fashioning orders upon the Commission. These cases narrow the issue to the question: Does the remedy selected have a "reasonable relation to the unlawful practices found to exist"? * * *

* * * * * * *

> Respondents pose hypothetical situations which they say may rise up to plague them. However, 'we think it would not be good judicial administration,' as our late Brother Jackson said in *International Salt Co.* v. *United States*, 332 U.S. 392, 401 [68 S.Ct. 1217, 92 L.Ed. 20] (1947), to strike the contested paragraph of the order to meet such conjectures. The Commission has reserved jurisdiction to meet just such contingencies. As actual situations arise they can be presented to the Commission in evidentiary form rather than as fantasies. And, we might add, if there is a burden that cannot be made lighter after application to the Commission, then respondents must remember that those caught violating the Act must expect some fencing in. *United States* v. *Crescent Amusement Co., supra*, 323 U.S. at 187 [65 S.Ct. 254 at page 261].

We conclude, then, that the orders here involved do have a "reasonable relationship" to both the unfair trade practices and the violations of the Truth-in-Lending Act. The fact that the petitioners took corrective action to bring their sales contracts into line with the provisions of the Truth-in-Lending Act and, in effect, promised to sin no more, is not controlling. *Cotherman* v. *F.T.C.*, 417 F.2d 587 (5th Cir. 1969).

[9,10] Claude Thiret contends that he should not be made subject to the cease and desist orders because he was himself only an employee of the two companies, and had no control over the salesmen who were the ones actually guilty of the unfair practices. We think that Claude Thiret's own testimony, which in our view was generally corroborated by the testimony of Michael Thiret, refutes this contention. As general manager, Claude Thiret did exercise a [182] degree of control over the salesmen. A command to a corporation is a command to those who are officially responsible for the conduct of its affairs. *Trade Comm'n* v. *Education Society*, 302 U.S. 112, 58 S.Ct. 113, 82 L.Ed. 141 (1937), and *Wilson* v. *United States*, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771 (1911). And in our view the record supports the finding that Claude Thiret, as well as Michael Thiret, was in a command position.

Claude Thiret additionally argues that when he was dismissed from the proceedings before the Judge, he lost his right to thereafter participate in such proceedings and accordingly was precluded from putting on evidence as to his role in the conduct of the companies' affairs. This argument is highly speculative, at best. We are convinced that Thiret was not denied "his day" before either the Judge or the Commission. And, as above indicated, it was his own testimony which in our view supported the Commission's finding that he did have supervisory control over the salesmen.

Order affirmed.

A. O. SMITH CORPORATION, et al. v. FEDERAL TRADE COMMISSION, et al.[*]

File No. 99-199

INLAND STEEL COMPANY v. FEDERAL TRADE COMMISSION, et al.

File No. 99-213

NORTHWEST INDUSTRIES, INC. v. FEDERAL TRADE COMMISSION, et al.

File No. 99-215

OSCAR MAYER & CO., INC. v. FEDERAL TRADE COMMISSION, et al.

File No. 99-216

MERCK & CO., INC. v. FEDERAL TRADE COMMISSION, et al.

File No. 99-214

HOBART CORPORATION v. FEDERAL TRADE COMMISSION, et al.

File No. 99-212

The GOODYEAR TIRE & RUBBER COMPANY v. FEDERAL TRADE COMMISSION, et al.

File No. 99-211

THOMAS J. LIPTON, INC. v. FEDERAL TRADE COMMISSION, et al.

File No. 99-224

Civ. A. Nos. 75-15, 75-45 to 75-50 and 75-56.

(United States District Court for the District of Delaware,
March 18, 1975)

1. **FOR PREENFORCEMENT JURISDICTION PURPOSES, COURT MUST EVALUATE HARDSHIP OF COMPLIANCE AND HARDSHIP OF NONCOMPLIANCE WITH ADMINISTRATIVE ORDER: MATTER NOT RIPE IF EITHER IS MINIMAL AT THE TIME OF ADJUDICATION.**

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[*] Reported in 396 F.Supp. 1125 (1975). See also pp. 1205, 1474 herein.

[1126] In measuring ripeness for preenforcement jurisdiction purposes court must evaluate hardship of compliance and hardship of noncompliance with administrative order, and if either is minimal at the time of adjudication the matter will be held not ripe.

2. THE RISK OF CRIMINAL AND CIVIL SANCTIONS IS THE HARDSHIP OF NONCOMPLIANCE, NOT CHANCE THAT NO SANCTION WILL BE INVOKED.

Measuring ripeness for preenforcement jurisdiction purposes, hardship of noncompliance with administrative order is the risk of criminal and civil sanctions that controls rather than the chance that no sanctions will be invoked.

3. UNIMPORTANT CONSIDERATIONS IN DETERMINING RIPENESS FOR PURPOSE OF PREENFORCEMENT JURISDICTION INCLUDE PLAINTIFF'S ABILITY TO ASSERT DEFENSES OR LIKELIHOOD OF PREVAILING ON THE MERITS.

Issue of plaintiff's ability to assert all his defenses in an administrative order enforcement proceeding or the likelihood that plaintiff would prevail on the merits are unimportant considerations in determining ripeness for purpose of preenforcement jurisdiction.

4. COMPARISON OF COSTS OF COMPLIANCE IN TERMS OF PRE AND POSTENFORCEMENT TIME FRAMES IRRELEVANT: OPERATIVE CONSIDERATIONS ARE COST OF COMPLIANCE VIS-A-VIS COST OF NONCOMPLIANCE AT TIME OF RIPENESS DETERMINATION.

In determining ripeness for preenforcement purposes the operative considerations are cost of compliance with administrative order vis-a-vis cost of noncompliance at the time of ripeness determination, and comparison of costs of compliance in terms of pre and postenforcement time frames is irrelevant.

5. BURDEN OF COMPLIANCE WAS SUFFICIENTLY HEAVY TO SATISFY PREENFORCEMENT RIPENESS REQUIREMENTS EVEN THOUGH SOME PROGRESS TOWARD COMPLETION OF ROUGH DRAFTS OF FIRST REPORT HAD APPARENTLY BEEN MADE.

Even though some of the corporate plaintiffs, seeking to preliminarily enjoin enforcement of Federal Trade Commission order requiring filing of certain business reports by large corporations, had apparently made progress toward completion of a rough draft of a first line of business report to Commission, the burden of compliance yet remaining as to each plaintiff was sufficiently heavy to satisfy preenforcement ripeness requirements.

6. BURDEN IN SEEKING PREENFORCEMENT RELIEF IS TO SHOW BOTH RIPENESS OF CONTROVERSY BEFORE COURT AND ABSENCE OF CONGRESSIONAL INTENT TO DENY RELIEF.

Whenever plaintiffs seek what is arguably preenforcement relief with respect to administrative order, the burden is to show both the absence of a congressional intent to deny preenforcement relief and the ripeness of controversy before the court.

7. REASONABLE PROBABILITY OF SUCCESS; IRREPARABLE INJURY PENDENTE LITE; POSSIBILITY OF THIRD PARTY HARM AND PUBLIC INTEREST ARE MINIMUM GROUNDS FOR ISSUANCE OF PRELIMINARY INJUNCTION.

Issuance of preliminary injunction requires at the minimum a showing that the moving party has a reasonable probability of success on the merits and that it will suffer irreparable injury pendente lite if status quo is not maintained; in addition court must consider where relevant the possibility of harm to third parties from grant or denial of injunction as well as public interest.

8. FEDERAL REPORTS ACT REQUIRES ONLY THAT COMPTROLLER GENERAL EXAMINE BURDENSOMENESS OF PRODUCING INFORMATION AND THAT INFORMATION IS NOT AVAILABLE FROM ANOTHER FEDERAL SOURCE; IT DOES NOT ALLOW SOLICITATION OF COMMENTS FROM PUBLIC.

Review function placed on comptroller general by Federal Reports Act to approve all agency forms soliciting certain types of information is limited to only an examination of burdensomeness of producing the information requested and an assurance that the requested information is not available from another source within the federal government and does not contemplate plenary consideration of all issues of possible importance relating to desirability of reporting program or soundness of reporting methods utilized nor does it allow solicitation or receipt of comments from interested members of public.

9. APA'S RULE-MAKING PROVISION MERELY OUTLINES MINIMUM ESSENTIAL RIGHTS AND PROCEDURES; IT DOES NOT ENCROACH REGULATORY AGENCY'S SUBSTANTIVE NEEDS.

Imposition of the Administrative Procedure Act's rule-making requirements does not encroach on substantive needs of federal regulatory agencies and the rule-making provisions as well as other provisions of Act are merely an outline of minimum essential rights and procedures.

10. PLAINTIFFS DEMONSTRATED THAT APA RULE-MAKING PROCEDURES APPLIED TO IMPLEMENTATION OF F.T.C. LINE OF BUSINESS REPORTING PROGRAM AND ISSUANCE OF PRELIMINARY INJUNCTION WAS WARRANTED.

Uncomplied with rule-making procedures specified in the Administrative [1127] Procedure Act were tentatively shown to apply to the implementation of Federal Trade Commission line of business-reporting program so that the plaintiff corporations had demonstrated to court sufficient probability of success on the merits to warrant issue of preliminary injunction against Commission's enforcement of order requiring filing of such reports.

11. COURT HAS DISCRETION TO ALLOW AS MUCH DISCOVERY AS IT FEELS IS CONSISTENT WITH THE EXPEDITIOUS ADJUDICATION OF ISSUES BEFORE IT.

Court to which administrative order enforcement application is made has discretion to allow as much discovery as is consistent with need for expeditious adjudication of issues before it.

12. PLAINTIFFS' REMEDY WAS RENDERED INADEQUATE BY THE TENSIONS BETWEEN SPEEDY ADJUDICATION AND FAIRNESS TO INVESTIGATED PARTY.

It was the tension between speedy adjudication and fairness to investigated party which rendered plaintiffs' remedy by way of summary enforcement suit inadequate vis-a-vis plenary preenforcement proceedings to enjoin Federal Trade Commission order requiring line of business reports.

13. COURT MAY INVOKE EQUITABLE POWERS TO AFFORD DISCOVERY NEEDED WHERE PLAINTIFFS DEMONSTRATE LIKELIHOOD OF SUCCESS ON MERITS AND NEED PANOPLY OF DISCOVERY DEVICES ENVISIONED BY FEDERAL RULES.

Where plaintiffs are able to demonstrate a likelihood of success on merits and may need panoply of discovery devices envisioned by federal rules if they are ultimately to carry burden of persuasion, court may invoke its equitable powers to afford discovery needed in summary enforcement proceeding concerning administrative order.

14. WHERE DISCOVERY IS INADEQUATE AT LAW, COURT OF EQUITY MAY PROVIDE DISCOVERY AND CONCOMITANT RELIEF.

Court of equity may on proper application invoke its auxiliary jurisdiction to provide discovery and concomitant relief where discovery is inadequate at law; in proper cases this may include issuance of decree enjoining further proceedings at law in favor of removal of entire case to equity.

15. PLAINTIFFS WOULD SUFFER IMMEDIATE IRREPARABLE HARM WITHOUT INJUNCTION WHERE MANDAMUS PROCEEDING BY F.T.C. WAS NOT ADEQUATE VEHICLE FOR ADJUDICATION OF PLAINTIFFS' RIGHTS.

In view of the various considerations and the demonstrated need of plaintiff corporation for full discovery on several issues, mandamus proceeding contemplated by Federal Trade Commission was not an adequate vehicle for the adjudication of rights plaintiffs asserted in action to preliminarily enjoin enforcement of Federal Trade Commission order requiring line of business reports, so plaintiffs would suffer immediate irreparable injury unless injunction was issued.

16. DESPITE POSSIBILITY OF DELAY IN IMPLEMENTATION OF PROGRAM, THERE WAS NO SHOWING THAT PUBLIC INTEREST WOULD BE DISSERVED IF PRELIMINARY INJUNCTION WERE GRANTED.

There was no showing that the public interest would be disserved if preliminary injunction were granted in favor of seven large corporations enjoining enforcement of Federal Trade Commission order requiring line of business reports from large corporations despite arguments that issuance of injunction would delay implementation of program.

17. COURT DECLINED TO SUSPEND INJUNCTION ISSUED PENDING F.T.C.'S APPEAL THEREFROM.

Court, which issued preliminary injunction against enforcement of Federal Trade Commission order relating to line of business reporting with respect to plaintiff corporation, declined in absence of any additional facts bearing on merits of case to suspend the preliminary injunction issued pending the Commission's appeal therefrom.

18. FINAL TRIAL OF CASE ON MERITS IS NOT GENERALLY DELAYED BY DENIAL OR GRANT OF TEMPORARY INJUNCTION.

Generally, an appeal from denial or grant of temporary injunction should not ordinarily delay final trial of case on the merits.

19. WHERE ONLY CERTAINTY RESULTING FROM GRANT OF STAY WOULD BE A DELAY NO PARTY WISHED, IT WAS INAPPROPRIATE FOR COURT TO STAY ALL PROCEEDINGS PENDING APPEAL FROM GRANT OF TEMPORARY INJUNCTION.

It was inappropriate for court, which had previously granted temporary injunction against enforcement of Federal Trade Commission order requiring large corporations to file line of business reports pursuant to suit brought by one corporation and later issued a similar temporary injunction in suits brought by seven other corporations, to grant a stay of all proceedings pending appeals from grant of temporary injunction in either the first case or in the other cases where only certainty resulting from grant of stay would be to delay which none of parties wanted.

(Syllabus, with substituted captions, taken from 396 F.Supp. 1125.)

In seven separate actions to enjoin enforcement of order of F.T.C. requiring line of business reports, court held that (1) A.P.A. rule-making provisions were applicable to orders issued without compliance therewith; (2) enforcement would temporarily be enjoined; and (3) it would deny a stay of proceedings pending appeal from earlier injunction.

Temporary injunction granted in accordance with opinion.

Richard F. Corroon, Charles F. Crompton, Jr., Potter, Anderson & Corroon, Wilmington, Del., *Gilbert J. Helwig, Edward T. Tait, Lee A. Rau, John M. Wood, Reed, Smith, Shaw & McClay*, Washington, D.C., for plaintiffs A.O. Smith, and others.

Paul P. Welsh, Robert F. Stewart, Jr., Morris, Nichols, Arsht & Tunnell, Wilmington, Del., for all plaintiffs except A.O. Smith Corporation, and others; *Frank P. Cihlar, Charles W. Petty, Mayer, Brown & Platt*, Washington, D.C., of counsel, for plaintiffs Inland Steel

Co., Northwest Industries, Inc. and Oscar Mayer & Co., Inc.; *Philip A. Lacovara, Howell Begle, Hughes, Hubbard & Reed*, Washington, D.C. of counsel, for plaintiff Merck & Co., Inc.; *John F. McClatchey, Leslie W. Jacobs, Thompson, Hine & Flory*, Cleveland, Ohio, of counsel, for plaintiffs Hobart Corp. and The Goodyear Tire & Rubber Co.; *David W. St. Clair, Charles H. McAuliffe*, Englewood Cliffs, N.J., of counsel, for plaintiff Thomas J. Lipton, Inc.

Ralph Keil, U.S. Atty., Wilmington, Del., *Calvin J. Collier, Gerald Harwood, James P. Timony, William A. Cerillo, Warren S. Grimes, Bruce E. Freedman*, Federal Trade Commission, Washington, D.C., for defendant Federal Trade Commission.

Ralph Keil, U.S. Atty., Wilmington, Del., for defendant General Accounting Office.

OPINION AND ORDER

[1128] MURRAY M. SCHWARTZ, *District Judge.*

On February 19, 1975 this Court issued its opinion in *A. O. Smith Corporation, et al.* v. *Federal Trade Commission, et al.*, Civil Action No. 75-15, wherein it denied defendants' motion to dismiss for lack of jurisdiction and granted plaintiffs' motion for preliminary injunction. That case involves a suit by seven corporations seeking declaratory and injunctive relief against the Federal Trade Commission ("Commission" or "FTC"), its chairman and each commissioner separately, and the Comptroller General of the United States. The suit challenges the validity of an order promulgated by the Commission requiring the plaintiffs there, along with 338 other large corporations, to file annual line-of-business reports ("LB Reports").

Thereafter, an additional seven separate but nearly identical actions were filed by seven other corporations.[1]

This opinion treats two motions arising from the preliminary injunction previously issued in *A. O. Smith Corporation, et al.* v. *Federal Trade Commission, et al.*[2] ("*Smith*" or "*A. O. Smith*"), plaintiffs'[3] motions for preliminary injunction in seven unconsolidated civil actions all seeking relief identical to that granted in *A. O. Smith*, and the motion of defendant, Federal Trade Commission, to dismiss, or in the alternative, to trans[1129]fer the seven actions to the Southern District of New York.

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[1] At oral argument on March 13, 1975, the Court was advised all but 10 of the 345 corporations ordered to file LB Reports have either filed or are engaged in litigation revolving about the requirement of filing the report. As of March 13, 1975, 220 corporations had filed LB Reports. One hundred two corporations are engaged in pre-enforcement litigation in the Southern District of New York or the District of Delaware, while the FTC was actively pursuing 110 enforcement proceedings in the Southern District of New York.

[2] Civil Action No. 75-15 Opinion and Order dated February 19, 1975. The Findings of Fact and Conclusions of Law in *A. O. Smith Corporation, et al.* v. *Federal Trade Commission, et al.* to the extent they are not inconsistent with those in the instant opinion are herein incorporated by reference and made a part hereof and made applicable to all the plaintiffs captioned herein. *See* D.C., 396 F.Supp. 1108.

[3] The respective lawsuits wherein the FTC and its commissioners are defendants are as follows: Inland Steel Company, Civil Action No. 75-45; Northwest Industries, Inc., Civil No. 75-46; Oscar Mayer & Co., Inc., Civil Action No. 75-47; Merck & Co., Inc., Civil Action No. 75-48; Hobart Corporation, Civil Action No. 75-49; The Goodyear Tire & Rubber Company, Civil Action No. 75-50; Thomas J. Lipton, Inc., Civil Action No. 75-56.

The varied motions[4] will be considered separately.

I. DEFENDANTS' MOTION TO DISMISS DIRECTED TO THE SEVEN ADDITIONAL COMPLAINTS

Defendants have filed motions to dismiss the seven separate but nearly identical actions brought by seven additional corporations against the same defendants as in the *A. O. Smith* case.

A. *Background*

These seven plaintiffs are among the 345 corporations subject to the Commission's Line-of-Business order. Most of the background facts pertinent to these actions are identical to those cited in the *A. O. Smith* opinion D.C., 396 F.Supp. 1108 at pp. 1111-1112. In addition, nearly all of the record in that proceeding has been introduced into the record of each of these cases. There are, however, some differences in the facts incident to these plaintiffs which, according to the FTC, require a different outcome than that reached in the *A. O. Smith* opinion.

In *A. O. Smith*, no Commission enforcement proceeding, per 15 U.S.C. § 49, as amended, had been applied for prior to the time suit was filed in this Court. As to the seven new plaintiffs the following facts apply. On February 11, 1975, a district judge of the Southern District of New York signed a show cause order directed to Thomas J. Lipton, Inc. ("Lipton"), among others, concerning compliance with the Commission's order. By its own terms this show cause order was to be served upon Lipton by February 21, 1975.[5] This order, docketed on February 21, 1975,[6] was not served upon Lipton by February 21 and had not been served by February 26, 1975.[7] Lipton filed suit in this district on February 24, 1975.

Six of the seven actions herein involved (Civil Action Nos. 75-45 to 75-50) were filed with this Court on February 14, 1975. On February 20, 1975, Judge Weinfeld issued another order to show cause, at the request of the Commission, to 95 additional companies then due to file reports. By its terms service was to be made by March 4, 1975. This latter order was directed to the other six plaintiffs in these actions. It was filed with the Docket Clerk of the Southern District of New York Court on March 7, 1975.[8] Service had not been perfected as to any of these six plaintiffs by February 26, 1975.

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[4] Plaintiffs have withdrawn a motion to intervene in the *Smith* litigation following waiver of a venue defense by the FTC. Motions of certain of the additional seven plaintiffs to consolidate and an intervention motion by Thomas J. Lipton, Inc. are in limbo not having been pursued at the March 13, 1975 preliminary injunction hearing. The FTC has also advised it did not wish to pursue its alternative motion to transfer if a preliminary injunction should issue with respect to the seven additional plaintiffs.

[5] Civil Action No. 75-56, Docket No. 18, Affidavit of James Timony.

[6] Civil Action No. 75-56, Docket No. 13, Affidavit of Laura Allen.

[7] *Thomas J. Lipton, Inc.* v. *Federal Trade Commission, et al.*, Civil Action No. 75-56, Docket No. 15, Affidavit of David W. St. Clair.

On February 26, 1975 this Court issued a temporary restraining order preventing the Commission from taking any further action toward enforcement of its order, including any service of show cause orders, with respect to the seven plaintiffs involved in these actions. A hearing was held on March 13 on plaintiffs' motion for preliminary injunction. The timing of the issuance of this opinion is controlled by the expiration of the Temporary Restraining Order on March 18, 1975, the parties having been unable to agree to an extension. As a result, the Court has had no opportunity to review a forthcoming transcript of the March 13 hearing.

B. *Ripeness*

[1130] Following the order in which the issues were treated in the *A. O. Smith* opinion, the first challenge posed by the defendants to the conclusions reached therein goes to the absence of hardship to these plaintiffs, hence, the lack of ripeness, as that concept is discussed in the *Abbott Labs* trilogy.[9]

First, defendants need not worry that this Court finds hardship here based upon grounds which it could not accept in *A. O. Smith.* Specifically, the risk that data obtained through the LB Program will mislead the public and thereby redound to the detriment of complying corporations is a factor too speculative to be considered here.[10]

Defendants in their brief next examine the hardship of noncompliance and reassert that as to any enforcement proceeding brought by the Commission all claims and defenses asserted in this preenforcement action could be asserted in an enforcement action. Assuming the truth of this argument and ignoring the possible unavailability of discovery so as to effectively prevent the assertion of defenses (*see* infra p. 1134), the Court deems it irrelevant to a discussion of hardship for purposes of establishing ripeness. Similarly irrelevant is the fact that, upon receiving a notice of default, plaintiffs could seek a stay of the accrual of penalties.

[1] In measuring ripeness, the Supreme Court in the *Abbott Labs* trilogy said that for pre-enforcement jurisdiction purposes, a Court must evaluate the hardship of compliance and the hardship of non-

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[8] Civil Action No. 75-48, Docket No. 23, Second Affidavit of James Timony.

[9] *Abbott Laboratories, Inc.* v. *Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967); *Gardner* v. *Toilet Goods Association*, 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed. 2d 704 (1967).

[10] *See* opinion in *A. O. Smith*, 396 F.Supp. at 1116.

compliance. If either is minimal at the time of adjudication, the matter will be held not ripe.[11]

[2,3] The hardship of non-compliance is the risk of criminal and civil sanctions, not the chance that no sanctions will be invoked, that controls. For this reason, the issue of plaintiff's ability to fully assert all his defenses in an enforcement proceeding or the likelihood that plaintiff would prevail on the merits are unimportant considerations in determining ripeness. Thus, defendants' reference to cases such as *Reisman* v. *Caplin*[12] and *Federal Trade Commission* v. *Claire Furnace Co.*[13] completely misconstrues the important distinction between testing hardship for purposes of ripeness and testing the adequacy of some other remedy for purposes of exercising *vel non* a court's discretionary equitable jurisdiction.[14]

[4] Defendants next promote the argument that plaintiff's burden of compliance will be the same and no greater if and when an enforcement proceeding determines they must submit the LB Report, as it would be if compliance were engaged in voluntarily at this time. The answers to this argument are two[**1131**]fold: (1) In determining ripeness for pre-enforcement purposes, the operative considerations are cost of compliance *vis-a-vis* cost of non-compliance at the time of the ripeness determination. Comparing costs of compliance in terms of pre- and post-enforcement time frames is irrelevant; (2) if defendants' argument were accepted, pre-enforcement relief would nearly always be denied, and the Court would be forced to conclude that the *Abbott Laboratories* case was wrongly decided.

[5] Some of these plaintiffs have apparently made progress toward completion of a rough first draft of an LB Report to the Commission.[15] However, this Court finds that the burdens of compliance yet remaining as to each plaintiff is sufficiently heavy to satisfy ripeness requirements.

All prior discussion in this section assumes the propriety of applying the tests set forth in the *Abbott Labs* trilogy, a position which defendants supported in *A. O. Smith.*[16] Defendants in this action, however, urge this Court to consider the line of cases commencing with *Federal Trade Commission* v. *Claire Furnace Co.*[17] and extending through *St. Regis Paper Co.* v. *United States*,[18] *Reisman* v. *Caplin*,[19] and *Donaldson* v. *United States*.[20] A careful reading of these cases compels a conclusion that ripeness was not treated. As such, these cases are more appropriately discussed in the forthcoming section considering the grounds for granting the requested preliminary relief.

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[11] It was suggested by a party at oral argument that the test set forth in *Abbott Laboratories* was a disjunctive test and not a conjunctive test, so that the presence of *either* hardship in sufficient degree would satisfy ripeness. For reasons cited in the text above, this Court is inclined to interpret the language of those cases as setting forth a conjunctive test. Thus, in *General Motors* v. *Volpe*, 321 F.Supp. 1112 (D.Del.1970), *aff'd as modified*, 457 F.2d 922 (3d Cir. 1972), assuming Chief Judge Wright intended to find in the alternative an absence of hardship sufficient to render that case ripe, his decision can be more easily understood not in terms of the $400,000 penalty that General Motors risked by non-compliance, but by the choice of compliance, the direct costs of which would have been mere postage.

[12] 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964).

[13] 274 U.S. 160, 47 S.Ct. 553, 71 L.Ed. 978 (1927).

[14] *See A. O. Smith* Opinion and *General Motors* v. *Volpe*, 457 F.2d 922 (3d Cir. 1972).

[15] For a summary of the status of each plaintiff in preparing for compliance with the Commission's order, see various affidavits of corporate officials filed separately in each case.

[16] *See A. O. Smith, et al.* v. *Federal Trade Commission, et al.*, Civil Action No. 75-15, Docket No. 22, pp. 134, 137.

[6] The *Abbott Labs* trilogy makes it no easier for plaintiffs to maintain suit for pre-enforcement relief than the above-referenced line of cases upon which defendants now rely. In fact, the *Abbott Labs* trilogy imposes an additional burden upon plaintiffs whenever, as here, they seek what is arguably "pre-enforcement" relief. That burden, which is to show both the absence of a Congressional intent to deny pre-enforcement relief and the ripeness of the controversy before the Court, has been met for the same reasons here as detailed in *A. O. Smith*.

II. THE SEVEN ADDITIONAL PLAINTIFFS' MOTIONS FOR ISSUANCE OF A PRELIMINARY INJUNCTION

[7] The issuance of a preliminary injunction requires, at a minimum, two showings: (1) that the moving party has a reasonable probability of success on the merits; and (2) that it will suffer irreparable injury *pendente lite* if the status quo is not maintained. *Delaware River Port Authority* v. *Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919-20 (3d Cir. 1974). In addition, the Court must consider, where relevant, the possibility of harm to third parties which would attend a grant or denial of the injunction as well as the public interest. *Id.* at 920.

In *A. O. Smith*, this Court had occasion to consider each of the foregoing factors as they applied to a factual situation not dissimilar from that now before it. Therein, the Court found that plaintiffs had demonstrated a likelihood of eventual success and irreparable injury, and that the interests of specific third parties as well as those of the public at large would not be disserved if the injunction were to issue. Defendants suggest a different result is compelled in the cases at bar, based upon a re-exami[1132]nation of the applicable law as well as a change in circumstances between the *A. O. Smith* plaintiffs and those at bar. For the reasons articulated below, the Court must disagree.

A. *Probability of Success on the Merits*

Defendants argue that the Court erred in *A. O. Smith* in suggesting the applicability of APA rulemaking procedures to the adoption of the Line-of-Business Reporting Program. They principally contend that imposition of rulemaking procedures is inconsistent with the provisions of the Federal Reports Act,[21] which require that the Comptroller General review and approve all agency forms soliciting information of the type required by the LB Program. Defendants collaterally assert that the Federal Reports Act invests broad investigatory powers in the FTC and that the rule-making strictures of the APA constitute an unnecessary encroachment upon those powers.

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[17] 274 U.S. 160, 47 S.Ct. 553, 71 L.Ed. 978 (1927).

[18] 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961).

[19] 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964).

[20] 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971).

In *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969) Mr. Justice Douglas recounted the purpose underlying the APA's rulemaking requirements:

> The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming. It gives an opportunity for persons affected to be heard. . . .
>
> . . . Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice. See H. Friendly, The Federal Administrative Agencies 45 (1962).
>
> This is a healthy process that helps make a society viable. The multiplication of agencies and their growing power make them more and more remote from the people affected by what they do and make more likely the arbitrary exercise of their powers. Public airing of problems through rule making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism . . . .

Id. at 777-78, 89 S.Ct. at 1436, (Douglas, J., dissenting). *See also Texaco, Inc.* v. *Federal Power Comm'n*, 412 F.2d 740, 744 (3d Cir. 1969).

[8] The review functions vested in the Comptroller General pursuant to 44 U.S.C. § 3512 (Supp.1975) necessarily fail to fulfill these purposes. The Comptroller General's scope of review is limited; it extends only to an examination of the burdensomeness of producing the information requested and assurance that requested information is not available from another source within the federal government. The provision does not contemplate plenary consideration of all issues of possible importance relating to the desirability of a reporting program or the soundness of the reporting methods utilized nor does it allow solicitation or receipt of comments from interested members of the public.[22] Indeed, the period of time in which the GAO must consider a proposal and report back—45 days—would necessarily obviate any extended evaluation of a proposed reporting program.[23]

[1133] [9] Defendants' suggestion that imposition of rulemaking

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[21] 44 U.S.C. § 3512 (Supp.1973), amending 44 U.S.C. §§ 3501-3511.

[22] It is noteworthy that the Federal Reports Act, prior to its amendment in 1973, did indeed vest plenary review authority over agency information gathering programs in the Director of the Bureau of the Budget. This included authority to pass upon the necessity of a program for any proper purpose and to solicit the views of interested members of the public. 44 U.S.C. § 3506 as amended, 44 U.S.C. § 3512 (Supp.1975). A reading of the legislative history of the 1973 amendment suggests that its purpose was to delimit much of this review authority in that it had become an obstruction to data collection programs proposed by federal regulatory agencies. *See* House Conference Rep.No.93-924, 93d Cong., 1st Sess. (1973), 1973 U.S.Code Cong. & Admin.News pp. 2533-2534; 119 Cong.Rec. S13441-47 (1973).

[23] Defendants also argue that rulemaking procedures are unnecessary because Congress itself (through

(Continued)

procedures encroaches upon the FTC's broad investigatory powers is equally without merit. The Federal Trade Commission Act as well as 44 U.S.C. § 3512 confer far-reaching authority upon the FTC to request and collect information; the power of the courts to pass upon the propriety of such requests is accordingly limited. *See United States* v. *Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950). However, the imposition of the APA's rulemaking requirements does not, nor was it intended to, encroach upon the substantive needs of the federal regulatory agencies. The rulemaking provisions, as well as other provisions of the APA, are merely an outline of minimum essential rights and procedures. *See* House Rep.No.1980, 79th Cong., 2d Sess., 1946 U.S.Code Cong. Service pp. 1204-1205. Of course, these procedures may give rise to some administrative inconvenience, yet Congress envisioned this possibility and provided that the Act should nevertheless be fully operative according to its terms. *Id.* at 1204.

Defendants seek to divine further evidence of a Congressional intent to wholly exempt information-gathering programs from the APA's rulemaking regime in that Congress failed to mention investigations in the rulemaking section of that Act. 5 U.S.C. § 553. Instead, defendants assert that investigational matters were treated separately in 5 U.S.C. § 555(c) ("Ancillary Matters"). Section 553, however, purports only to describe the procedures which must be followed in the implementation of agency rules; it does not define "rule" or "rulemaking," nor does it constitute a catalogue of instances in which rulemaking procedures must be followed.[24] Neither is Section 555 indicative of the Congressional intent defendants suggest. As plaintiffs correctly observe, the ancillary matters described in that section, including investigations, are not a new category of substantive authority to which neither rulemaking nor adjudicatory procedures apply. "Section 6 [5 U.S.C. § 555] prescribes the rights of private parties in a number of miscellaneous respects which may be incidental to rulemaking, adjudication, or the exercise of any other agency authority."[25] The procedural requirements specified in Section 555(c) and (d) do not conflict with those specified in Section 553. The Court cannot hold Congress intended in Section 555 to obviate the applicability of all other procedural provisions of the APA.

[10] For the foregoing reasons, as well as those articulated in the Court's opinion in *A. O. Smith*, the Court affirms its earlier conclusion

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appropriations) exercises con[1133]trol over broad economic investigations which the FTC seeks to implement. However, it is doubtful that Congress is in a position to closely scrutinize and offer constructive comments on all such programs, a result which rulemaking procedures are designed to promote. Moreover, termination of Congressional funding for abortive economics reporting programs is a step which occurs only after the faults of the program become evident. Ideally, the opportunity for public comment in rulemaking proceedings should highlight the difficulties of such a program at its inception.

[24] The definition of "rule" and "rulemaking" together with examples are contained in 5 U.S.C. §§ 551(4) and (5).

[25] House Rep.No.1980, 79th Cong., 2d Sess., 1946 U.S.Code Cong. Service p. 1206.

that the rulemaking procedures specified in the APA tentatively apply to the implementation of the FTC's LB Program. Accordingly, the Court finds that the seven plaintiffs now before it have demonstrated the requisite probability of success on the merits to warrant the issuance of a preliminary injunction.

B. *Irreparable Injury*

The seven additional corporate plaintiffs in their seven separate but nearly identical actions challenge the validity of the same FTC order, upon the same legal grounds and seek virtually the same ultimate declaratory and injunctive relief as that sought in *A. O. Smith.* Defend[**1134**]ants urge that the circumstances surrounding these plaintiffs differ from those in the *A. O. Smith* case because the Commission has taken legal steps aimed toward enforcing its Order in the Southern District of New York as against each plaintiff. Plaintiffs challenge whether those proceedings were validly instituted, a point this Court does not address. As to six of the plaintiffs the service of orders to show cause was apparently interrupted by this Court's granting of a TRO. As to the seventh plaintiff, Lipton, the time for service of the order to show cause apparently expired by its own terms prior to the granting of the TRO. Regardless of the present status of these orders, it may be fairly assumed that were the TRO to be lifted enforcement proceedings would very shortly be pending against all seven plaintiffs in the Southern District of New York. The relief here requested would enjoin the Commission from taking further enforcement steps in the Southern District of New York.[26]

Defendants correctly stress that the conclusion concerning the lack of adequate alternative remedy in *A. O. Smith* was predicated upon two grounds: (1) the absence of pending enforcement proceedings; and (2) the inadequacy of such proceedings for purposes of conducting needed discovery so as to be able to fully and adequately assert defenses. The first ground is arguably irrelevant with respect to the plaintiffs now before the Court; at the time the TRO issued, the institution of enforcement proceedings in New York against these seven corporations was a virtual certainty.[27] The difficulties posed by the second ground, however, are undiminished.

Enforcement by mandamus is an action quite distinguished from the usual civil action.[28] It appears relatively infrequently in the U. S. Code.[29] "Its purpose is to enforce rights already established, rather than to establish or declare the rights of the parties."[30] Because of the summary nature of mandamus proceedings, procedural rights normally associated with plenary civil actions may be curtailed.[31] This is particularly true with respect to the use of discovery devices. *See United States* v. *Associated Merchandising Corp.*, 256 F.Supp. 318 (S.D.N.Y.1966).

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[26] A grant of such relief must always be accompanied by a finding of reasonable probability of success on the merits, an adequate safeguard against a "gutting" of the Commission's procedures for enforcement.

[27] Defendants' Memorandum in Support of Their Motion to Dismiss, Civil Action No. 75-46, Docket No. 10 at 6.

[28] 52 AmJur2d Mandamus §§ 1-11 (2d ed. 1970).

[29] 7 Moore's Federal Practice ¶ 81.01[11] at 81-26 to 81-27 (1974 ed).

[11] Defendants correctly point out that the availability of discovery in summary enforcement proceedings is not categorically foreclosed to either party. Rather, the court to which enforcement application is made has discretion to allow as much discovery as is consistent with the need for expeditious adjudication of the issues before it. *See FTC* v. *Kujawski*, 298 F.Supp. 1288, 1290 (N. D.Ga.1969); *cf. Venn* v. *United States*, 400 F.2d 207, 212 n. 12 (5th Cir. 1968); *United States* v. *Moriarity*, 278 F.Supp. 187 (E.D.Wis.1967). This, however, introduces an element into a court's decision to allow discovery in a summary enforcement context which is not present in a plenary pre-enforcement action, i.e., the "tension between speedy adjudication and fairness to the investigated party." *FTC* v. *Kujawski*, 298 F.Supp. at 1290.[32]

[1135] [12] In the Court's view, it is this tension which renders plaintiffs' remedy by way of summary enforcement suit inadequate *vis-a-vis* plenary pre-enforcement proceedings. In the context of a summary enforcement suit in which a prompt determination of the need for compliance with an administrative order is demanded, a court may be understandably ill-disposed to grant requests for discovery which would be otherwise permissible in a plenary civil action. *See, e. g., United States* v. *Associated Merchandising Corp.*, 256 F.Supp. 318 (S.D.N.Y.1966).

[13,14] This is not to say that a pre-enforcement injunction may issue in every instance in which there appears the possibility that discovery in a pending enforcement proceeding may be limited. Where, as here, however, plaintiffs are able to demonstrate a likelihood of success on the merits and may need the panoply of discovery devices envisioned by the Federal Rules if they are ultimately to carry the burden of persuasion, this Court may invoke its equitable powers[33] to afford the discovery needed.

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[30] 52 Am.Jur.2d Mandamus § 4 (2d ed. 1970).

[31] *Cf. Donaldson* v. *United States*, 400 U.S. 517, 528-29 & n. 11, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971); *United States* v. *Howard*, 360 F.2d 373 (3d Cir. 1966); *FTC* v. *Kujawski*, 298 F.Supp. 1288, 1290 (N.D.Ga.1969).

[32] Indeed, it appears that this tension is already present; the Commission has made clear its intent to press for limited discovery in the enforcement suits which are now pending against other plaintiffs in the Southern District of New York. *See* Defendants' Mem[1135]orandum in Support of Their Motion to Dismiss, Civil Action No. 75-46, Docket No. 10 at 24-25 and *A. O. Smith, et al.* v. *Federal Trade Commission, et al.*, Civil Action No. 75-15, Defendants' Memorandum in Support of a Motion for Protective Order at 3-15.

[33] It is well-settled that a court of equity may, upon proper application, invoke its auxiliary jurisdiction to provide discovery and concomitant relief where discovery is inadequate at law. In proper cases this may include issuance of a decree enjoining further proceedings at law in favor of removal of the entire case to equity. 1 J. Pomeroy, A Treatise on Equity Jurisprudence § 197a, at 296-97 & n. 17 (1941). *See generally id.* §§ 191-215, at 275-365.

[15] Given the foregoing considerations and in view of plaintiffs' demonstrated need for full discovery on several issues,[34] the Court reiterates that the mandamus proceedings contemplated by the Commission are not an adequate vehicle for the adjudication of rights plaintiffs here assert.[35] Accordingly, for the applicable reasons set forth in *A. O. Smith*, at 1117-1118, and as amplified above, the Court concludes plaintiffs will suffer immediate irreparable injury.

C. . *Public Interest*

[16] In *A. O. Smith*, the Court concluded that the public interest would not be disserved if a preliminary injunction were issued in favor of the seven moving plaintiffs. Defendants here renew this argument contending that de[**1136**]lay in the implementation of the program with respect to the seven new plaintiffs will render useless the efforts of the Commission as well as the corporations having already submitted reports. Defendants additionally argue that issuance of an injunction will impede their efforts to consolidate and resolve all actions relating to the LB Program in a single forum.[36]

For the reasons set forth in *A. O. Smith* and the facts previously alluded to,[37] the Court does not find defendants' first argument persuasive. Defendants' second argument, while possessed of some merit, is more properly the subject of a motion pursuant to 28 U.S.C. § 1404 (a). At this juncture, such a motion is not before the Court.[38]

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[34] *See* Plaintiffs' Memorandum in Support of Their Motion for a Preliminary Injunction at 15-16.

[35] Given the holding here, the defendants' reliance on the holdings in *Donaldson* v. *U. S.*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971), *Reisman* v. *Caplin*, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964), *St. Regis Paper, Co.* v. *U. S.*, 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961), and *FTC* v. *Claire Furnace, Inc.*, 274 U.S. 160, 47 S.Ct. 553, 71 L.Ed. 978 (1927) is misplaced; none of these cases considered the adequacy of discovery in the pending enforcement proceeding, nor does it appear that plaintiffs in any case had established a likelihood of eventual success on the merits.

It may also be argued that Claire Furnace was decided on alternative grounds, specifically, the existence of a Congressional intent to minimize the judicial burden which such actions placed upon the courts and prospective enforcement defendants through a statutory scheme requiring the Attorney General to screen Commission requests for enforcement relief in the courts. *See* 15 U.S.C. § 49. This statute has recently been amended to permit the Commission to bring its own actions; therefore, the prior implied Congressional concern for burdening the courts and enforcement defendants with suits involving Commission orders has faded with the passage of time. *See* 15 U.S.C.A. § 56(a) (1975).

Finally, language utilized by the Supreme Court in *Claire Furnace* would seem to indicate that the Court envisioned the applicability of all procedural incidents of a plenary proceeding in an enforcement action. *See* 274 U.S. at 174, 47 S.Ct. at 556 ("If, exercising his discretion, [the Attorney General] had instituted either proceeding, the defendant therein would have been fully heard, and could have adequately and effectively presented every ground of objection sought to be presented now."). The law has nonetheless developed in a different manner. *See* discussion *supra*, pp. 1134-1135.

[36] Defendants do not argue that the rights of any specific third parties will be impaired by the issuance of the requested injunction. *See Delaware River Port Authority* v. *Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 920 (3d Cir. 1974).

[37] *See* note 1, *supra*.

[38] Defendants requested withdrawal of pending transfer motions in each of the seven actions in the event the Court granted the respective plaintiffs' motions for preliminary injunction.

III. THE FTC MOTION TO SUSPEND THE PRELIMINARY INJUNCTION ISSUED IN THE *A. O. Smith* CASE.

[17] The February 19, 1975 preliminary injunction granted to preserve the status quo was accompanied by an Opinion. In that Opinion the Court found that plaintiffs were entitled to the grant of a preliminary injunction in view of their reasonable probability of success on the merits of Count III of their complaint which alleges that the Commission, in promulgation of the LB Program, has violated the rulemaking provisions of the Administrative Procedure Act (5 U.S.C. § 553). (At 1121-1125) This Court also concluded that plaintiffs would suffer immediate, irreparable injury absent the grant of a preliminary injunction (At 1117-1118); that "the possibility of harm to other interested persons from the grant or denial of the injunction is nonexistent or at best speculative" (At 1118); and that it could not be said that the public interest would be harmed by the issuance of an injunction and, indeed, that the public interest may benefit from the grant of a preliminary injunction (At 1118-1119).[39]

On February 26, 1975, the FTC appealed the grant of the preliminary injunction as well as this Court's denial of its Motion to Dismiss. On March 3, 1975 it filed pursuant to Fed.R.Civ.P. 62(c)[40] its motions seeking a suspension of the injunction and stay of all proceedings pending appeal. The FTC has not placed in the record any additional facts bearing upon the merits of the *A. O. Smith* case. Instead it argues the Court erred in its findings of pre-enforcement jurisdiction because of the emphasis placed upon the *Abbott Labs* trilogy.[41] The Commission urges "[t]he Supreme Court has consistently declined to permit pre-enforcement review of investigational orders or subpoenas issued by administrative agencies where persons seeking the review are assured a proper hearing of any good faith defenses in an enforcement proceeding, and, absent the initiation of the enforcement proceeding, the agency is without power to compel compliance with the order or subpoena. [1137] *Donaldson* v. *United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1970); *Reisman* v. *Caplin*, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964); *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 225-227, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961); *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U.S. 160, 174, 47 S.Ct. 553, 71 L.Ed. 978 (1927)." It is noted that at oral argument on the hearing for preliminary injunction in *A. O. Smith*, counsel for the FTC asserted that the *Abbott Labs* trilogy controlled,[42] only briefly mentioning some of the other cases upon which the FTC now presses this Court to consider and rely. The Court, in any event, declines to reach the result urged by the Commission, for reasons set out *supra* at 1131, 1135 & note 34.

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[39] Civil Action No. 75-15, Plaintiff's Memorandum of Points and Authorities, Docket No. 37.

[40] (c) *Injunction Pending Appeal.* When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. . . .

[41] *Abbott Laboratories* v. *Gardner, supra; Toilet Goods Association* v. *Gardner, supra; Gardner* v. *Toilet Goods Association, supra.*

The FTC also urges this Court erred in its finding of likelihood of success based upon the admitted failure of the FTC to follow the APA. The Court disagrees for reasons more fully set forth *supra* at 1131-1132.

In summary, the Court reaffirms its views expressed on February 19, 1975; the *A. O. Smith* plaintiffs and the seven additional plaintiffs have a sufficient probability of success on the merits of Count III of their complaint to warrant the grant of a preliminary injunction; the plaintiffs would be irreparably injured absent the grant of a preliminary injunction; the possibility of harm to other interested persons is "nonexistent or at best speculative"; and the public interest will not be harmed by the grant of a preliminary injunction.[43]

If the FTC were to be granted a suspension of the preliminary injunction pending appeal, it candidly conceded at oral argument it would initiate a summary enforcement proceeding against all plaintiffs. That action would disrupt the status quo pending appeal thereby permitting, *inter alia*, the irreparable injury the preliminary injunction was designed to prevent. *See* 7 Moore's Federal Practice ¶ 62.05, at 62-25 to 62-26 (1974). This result cannot be permitted. The FTC's motion for suspension of the preliminary injunction will be denied.

IV. DEFENDANTS' MOTION TO STAY ALL PROCEEDINGS PENDING APPEAL[44]

The Commission urges this Court to stay all proceedings pending appeal in the *A. O. Smith* case and in the seven new cases, assuming this Court denies its motion to dismiss and grants plaintiffs' motion for preliminary injunction in each of the seven additional cases. The Commission states it intends to appeal from both decisions,[45] and thus seek review of this Court's jurisdiction over these proceedings. In view of the appeals, the Commission urges it would be an appropriate exercise of this Court's discretion to await a decision by the Court of Appeals in *A. O. Smith* and, assumedly, the seven additional cases, before permitting further proceedings in any of them.

Apparently there is no dispute that the nature of defendants' appeal is interlocutory and that this Court retains jurisdiction and responsibility over all those phases of the case which have not been decided.[46]

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[42] Civil Action No. 75-46, Docket No. 21, Tr. pp. 134, 137-38.

[43] At 1118-1119, 1124.

[44] At a March 13, 1975 hearing on preliminary injunction, counsel for the FTC requested that its motion for stay of all proceedings be deemed applicable to the seven actions filed subsequent to *A. O. Smith* if a preliminary injunction should issue in those actions, as well as the *A. O. Smith* case itself.

[45] Defendants rely upon *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 61 S.Ct. 229, 85 L.Ed. 189 (1941).

[18] This Court does not agree that merely because the issue of jurisdiction may be addressed on appeal, it is neces[1138]sarily appropriate to stay further proceedings before it. The general rule is that "an appeal from the denial or granting of a temporary injunction should not ordinarily delay the final trial of the case on its merits."[47]

[19] The Commission also argues that this Court should stay proceedings to avoid the costs and hardship to all the parties resulting from a multiplicity of actions. First, no plaintiff in these cases has yet come forward to complain of any such hardship. In fact, *A. O. Smith* has filed a brief opposing the grant of any stay.[48] It is therefore concluded this argument is addressed solely to the hardship of the Commission in cases in which it is a defendant. Where the FTC is the proponent of the action, it apparently regards its hardship as tolerable, since it not only has not moved for a stay but is instead filing and vigorously pursuing enforcement actions. Second, a closer examination of the alleged hardship exposes certain weaknesses in the position.

For example, the Commission requests relief from the necessity to "[litigate] simultaneously identical issues before separate fora."[49] Surely the FTC does not refer to the separate actions of the *A. O. Smith* proceeding and that of the seven new actions, for by appealing the Court's decisions in the latter cases, the FTC will assure that virtually identical issues will be presented to the Third Circuit in all cases, with the strong likelihood of their being consolidated for argument. Still another reason convinces the Court that FTC is unconcerned over litigating identical issues in *A. O. Smith* and the other seven cases. At the start of the March 13 hearing on all of these pending motions the Court inquired of FTC as to its willingness to agree to a stay in the seven cases, with the TRO remaining in effect, pending the outcome of the appeal in *A. O. Smith.* The FTC responded it would not agree to a stay except upon terms which would have destroyed the status quo.

If, alternatively, the Commission is referring to the separate fora of the Southern District of New York and of Delaware, it would appear that the motion to stay, if at all appropriate, is being urged in the wrong district court. For as it stands now the Commission must argue the identical issues in the Southern District of New York that are now beyond this Court's jurisdiction and before the Third Circuit Court of Appeals.

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[46] *Janousek* v. *Doyle*, 313 F.2d 916, 921 (8th Cir. 1963); *United States* v. *Lynd*, 321 F.2d 26, 28 (5th Cir. 1963); 9 Moore's Federal Practice ¶ 203.11, at 739 (1973).

[47] *Nalco Chemical Company* v. *Hall*, 347 F.2d 90, 92 (5th Cir. 1965) citing *United States* v. *Lynd*, *supra* note 45.

[48] *A. O. Smith, et al.* v. *Federal Trade Commission, et al.*, at pp. 1116-1117.

[49] Civil Action No. 75-49, Reply Memorandum of Commission, Docket No. 18, p. 4.

It may be that the Commission's concern is centered not on the few issues now on appeal but rather all the other issues that still remain within this Court's jurisdiction. As to these, however, a stay would only postpone the time when the Commission must litigate those issues before this Court. Even if the Third Circuit were to decide contrary to this Court's holdings, it is impossible at this time to know on what ground such a reversal might occur. Barring reversal on jurisdictional grounds, discovery and disposition by motion or trial as to all issues raised on the merits will inevitably have to occur.

Thus by far the only certainty resulting from the grant of a stay would be delay to all parties. Neither side wants delay. The plaintiffs have a right to a speedy determination of their cause of action. They have a right to question witnesses who, while available now, may be unavailable at some later point in time.[50] Furthermore, if required soon by order of the Commission to commence [1139] preparation of LB Reports for fiscal year 1974, plaintiffs have a strong interest in knowing whether such orders must be obeyed.

As to the defendants, the Commission has left a deep impression upon this Court that the FTC seeks as speedy a resolution of these issues as possible. Several actions taken by the Commission lead the Court to this inexorable conclusion:

(1) The Commission issued its "Order to File Special Report" on August 2, 1974, requiring 345 companies to complete and submit reports within roughly 150 days. The Commission then took until January 7, 1975 to dispose of all the various motions to quash the order which were filed, yet it did not toll the 150 day deadline. Eventually, as to certain of the corporations, an additional 30 days was granted.

(2) At a hearing on the preliminary injunction and dismissal motions in the *A. O. Smith* case held February 5, 1975, this Court inquired as to whether the FTC would be willing to forego initiating enforcement proceedings against the plaintiffs in that action for a period of 30 days to permit the Court to give full consideration to all the issues raised at the hearing. The FTC advised it could wait to enforce only fourteen days or until February 20, 1975. February 20, 1975 was the earliest date enforcement proceedings could first be begun as to all the plaintiffs in the *A. O. Smith* case.

(3) At a February 26, 1975 hearing originally intended as a scheduling conference in the *A. O. Smith* case, all counsel including the Commission agreed to file certain motions requesting suspension of the injunction and stay of all proceedings by March 7, with hearing set for March 13. On February 27, 1975 the FTC made an ex parte telephone application to the Court to present and argue these unfiled motions on the following day, February 28. The Court denied this application. A similar attempt to present the motions at a previously set hearing on an FTC application for a protective order on March 3, 1975 was turned back by the Court when the plaintiffs made clear their preference to litigate issues according to the original schedule.

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[50] Plaintiffs thus far have sought to depose one individual, an employee of the Commission, and the Court was immediately informed that he might soon be departed from the Commission and presumably his whereabouts unknown. *A. O. Smith Corporation, et al.* v. *Federal Trade Commission, et al.*, 396 F.Supp. 1108, Affidavit of Frederic M. Scherer, Docket No. 31.

(4) At the Thursday, March 13, 1975 hearing on all of these motions the Court took note of the very tight brief schedule[51] and noted that plaintiffs felt the TRO in the seven new cases would expire on March 18 unless the FTC agreed to an extension. In view of the Commission's allegations that several facts meaningfully distinguished these cases from that of *A. O. Smith*, the Court invited the FTC's consent to an extension of the TRO to permit this Court time to both give full consideration to the arguments presented and reduce the same to opinion form. The FTC declined to consent.

In summary, the actions of the FTC leave no doubt that a speedy resolution of these issues is viewed by the Commission as being paramount, overriding at times the burdens imposed on all other parties and branches of government.

For all the foregoing reasons this Court finds it inappropriate to grant a stay of proceedings pending appeal in either *A. O. Smith* or the seven other cases.

* * * * * * *

This opinion contains, *inter alia*, the Court's decision on plaintiffs' motion for preliminary injunction and constitutes its findings of fact and conclusions of law with respect to said motion.

ORDER

[1140] It is ordered and adjudged that:

(1) Defendants, their agents, officers, servants, and employees, and all persons in active concert or participation with them are herewith enjoined and restrained during the pendency of this litigation and until further order of this Court from:

(a) Giving notice of default to plaintiffs Inland Steel Company, Northwest Industries, Inc., Oscar Mayer & Co. Inc., Merck & Co., Inc., Hobart Corporation, The Goodyear Tire & Rubber Company and Thomas J. Lipton, Inc., for failure to file Form LB as required by the resolution of the Federal Trade Commission dated August 2, 1974, and its special orders entered pursuant thereto; and

(b) Enforcement of or causing to be enforced civil penalties and all other forms of judicial and administrative relief, including but not limited to mandamus, for plaintiffs', Inland Steel Company, Northwest Industries, Inc., Oscar Mayer & Co., Inc., Merck & Co., Inc., Hobart Corporation, The Goodyear Tire & Rubber Company and Thomas J. Lipton, Inc., failure to file the aforesaid Form LB.

(2) Defendants' motion to dismiss plaintiffs', Inland Steel Company, Northwest Industries, Inc., Oscar Mayer & Co., Inc., Merck & Co., Inc., Hobart Corporation, The Goodyear Tire & Rubber Company and Thomas J. Lipton, Inc., complaint for want of jurisdiction is herewith denied.

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[51] Simultaneous exchange of briefs on March 7 and March 11, 1975.

(3) Defendants' motion to suspend the preliminary injunction issued February 19, 1975 in Civil Action No. 75-15 is denied.

(4) Defendants' motion to stay all proceedings pending appeal in Civil Action No. 75-15 is denied.

(5) Defendants' motion to suspend the preliminary injunction issued on March 18, 1975 as more fully set forth in paragraph (1) above is denied.

(6) Defendants' motion to stay all proceedings pending prospective and actual appeal in Civil Action Nos. 75-45, 75-46, 75-47, 75-48, 75-49, 75-50 and 75-56 is denied.

(7) The Clerk of the Court is instructed to file a copy of the within Opinion and Order in each of the file jackets of the above-captioned matters.

UNITED STATES v. ANCORP NATIONAL SERVICES, INC.*

Docket No. 74-1214. F.T.C. Docket No. 7396.

(United States Court of Appeals, Second Circuit, March 21, 1975)

On appeal from judgment of district court awarding U.S. Government $204,000 plus court costs, appellate court held that order prohibiting allowances respecting "products for resale on newsstands" correctly included newspapers; and defendants' good faith but erroneous interpretation of cease and desist order obligations was not a defense to civil enforcement proceedings; affirmed.

Gerald A. Rosenberg, Asst. U.S. Atty., New York, N.Y. (*Paul J. Curran*, U.S. Atty., and *Naomi Reice Buchwald*, Asst. U.S. Atty., on brief) for plaintiff-appellee.

Roy M. Cohen, New York, N.Y. (*Saxe, Bacon, Bolan & Manley*, New York, N.Y., on brief) for defendant-appellant.

Before TIMBERS, *Circuit Judge*.

OPINION

Ancorp National Services, Inc. (Ancorp) appeals from a judgment entered December 18, 1973 after a bench trial in the Southern District of New York, Dudley B. Bonsal, District Judge, 367 F. Supp. 1221, awarding the United States $204,200 in civil penalties, plus $1,430.66 costs, against Ancorp for violations of a Federal Trade Commission cease and desist order, and permanently enjoining Ancorp from further violations of the order.

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* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶60,233 at 65,932 (1975-1 Trade Cases). For district court case, see p. 808 herein. For case before the Commission, see *In the Matter of American News Company, et al.*, 58 F.T.C. 10, *modified*, 65 F.T.C. 294.

Of the various claims of error raised on appeal, we find that the only ones that warrant discussion are whether the district court correctly concluded that the cease and desist order applies to newspapers and whether the district court exceeded its discretion in fixing the amount of the penalties. For the reasons below, we affirm.

I.

On February 5, 1959, the FTC commenced an administrative proceeding under Section 5 of the Federal Trade Commission Act, 15 U. S. C. § 45 (1970). It charged Ancorp's predecessor, American News Company,[1] and the latter's wholly owned subsidiary, Union News Company,[2] with having received certain payments or disproportionate promotional allowances from their suppliers in violation of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13(d)(1970). The FTC issued a cease and desist order on January 10, 1961 after a hearing. On a petition to review, we modified the order and, as modified, affirmed and enforced it. *American News Company* v. *FTC*, 300 F.2d 104 (2 Cir.), *cert. denied*, 371 U. S. 824 (1962). The cease and desist order became final on May 13, 1964. It has remained in effect ever since.[3]

During the period 1964-1969, the Union News Division of Ancorp operated a large number of newsstands located primarily at railroad, airport, bus and subway terminals in New York City, as well as in other parts of New York State and in 21 other states and the District of Columbia. Most of these stands sold magazines, comic books, paperback books, candy, tobacco products and other items, in addition to newspapers.

The instant enforcement action was commenced December 31, 1970 by the United States at the direction of the Attorney General acting upon the FTC's certification of facts as to alleged violations by Ancorp of the cease and desist order.[4] The complaint alleged that Ancorp during the period 1965-1969[5] had received compensation from three New York City newspapers (The New York Times, The Daily News and The Post) in connection with promoting and displaying those newspapers on newsstands operated by it in New York and elsewhere; that Ancorp knew or should have known that such compensation was not made available by the newspapers on proportionally equal terms to all of their newsstand customers who were in competition with Ancorp; and that by receiving such compensation Ancorp had violated the cease and desist order. The government sought $585,000 in civil penalties pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U. S. C. § 45(l) (1970), and permanent injunctive relief.

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[1] American News Company changed its name to Ancorp National Services, Inc., in 1969.

[2] Union News Company, now an operating division of Ancorp, was a wholly owned subsidiary of American News Company in 1959.

[3] The final cease and desist order provides:

"It Is Ordered that the respondents, The American News Company and the Union News Company, corporations, their officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the purchase in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of products for resale on newsstands operated by respondents, do forthwith cease and desist from:

"Receiving, or inducing and receiving, or contracting for the receipt of, anything of value from any of their suppliers as compensation or in consideration for display or promotional services or facilities furnished by or through respondents in connection with the processing, handling, sale, or offering for sale of products purchased from any of their suppliers, when respondents know or should know that such compensation or consideration is not affirmatively offered or otherwise made available by such suppliers on proportionally equal terms to all their other customers competing with respondents in the sale and distribution of such suppliers' products."

After a four day bench trial, the district court found that during the period in question Union News had billed the Times for "Rental of Space in Newsstands for New York Times Advertising Signs" and the News and Post for "Advertising Service" in an aggregate amount of approximately $4,600 per month and that the newspapers had paid these bills.[6] The court further found that Union News never inquired of the Times, the News or the Post whether payments were being offered on a proportionally equal basis to other newsstand operators who were in competition with Union News. The evidence establishes that in fact the three newspapers did not offer such payments to competitors of Union News.

Based on its finding of 122 violations of the order by Ancorp during the period from January 1, 1966 to July 1, 1969, the court awarded the United States the civil penalties and injunctive relief stated above.

II.

We turn directly to the issue of whether the cease and desist order applies to newspapers.

The language of the order itself surely is broad enough to encompass newspapers. It prohibits respondents from receiving anything of value "from any of their suppliers" in connection with "products for resale on newsstands operated by respondents" or "products purchased from any of their suppliers."

Ancorp contends that the order, although broad, does not apply to newspapers; or, in the alternative, that Ancorp reasonably misconstrued the scope of the order. It points out that the original FTC complaint in 1959 referred only to promotional allowances on magazines, pocket books, comic books and cigars. It argues that, since the practice of granting such allowances on newspapers was in existence prior to 1959, the FTC must have known of and ignored such allowances when it filed its original complaint. We disagree.

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[4] Ancorp claims that the action was jurisdictionally defective because the government failed to comply with the certification procedure required by 15 U. S. C. § 56(1970), citing *United States* v. *St. Regis Paper Co.*, 355 F.2d 688, 699 (2 Cir. 1966). This claim is frivolous. Ancorp did not dispute an affidavit submitted by the government in the district court stating that it had complied with the certification procedure. 367 F.Supp. at 1223 n. 1. The government has included the certification in its appendix in this Court.

[5] Recovery for violations based on payments allegedly received prior to December 31, 1965 is barred by the five year statute of limitations applicable to civil penalty actions. 28 U. S. C. § 2462 (1970).

[6] The court also found that the former New York Herald Tribune and The Wall Street Journal had made substantial payments to Union News during portions of this period.

While it is true that the original proceeding was "primarily concerned with practices in connection with sales of certain publications, including magazines, comic books and pocket books", *American News Co.* v. *FTC, supra,* 300 F.2d at 107,[7] it is well settled that the FTC could have included newspapers in its order so as to prevent Ancorp's continuation of its practices by merely substituting newspapers for magazines. *FTC* v. *Broch & Co.* 368 U. S. 360, 364 (1962); *FTC* v. *Mandel Brothers* 359 U. S. 385, 391-93 (1959); *Vanity Fair Paper Mills, Inc.* v. *FTC* 311 F.2d 480, 487 (2 Cir. 1962); *Swanee Paper Co.* v. *FTC* 291 F.2d 833, 837-38 (2 Cir. 1961), *cert. denied*, 368 U. S. 987 (1962).

We hold that the district court here was amply justified in construing the order to encompass newspapers. As we pointed out in *United States* v. *J. B. Williams Co.*, 498 F.2d 414, 431 (2 Cir. 1974), "[A cease and desist] order must be interpreted in light of its principal purpose. . . ." The purpose here was to prohibit Ancorp in the exercise of its market dominance from demanding and receiving from its suppliers rebates not offered to competitors. The order applies to any suppliers of Ancorp's products. Magazines and books are not different enough from newspapers to make it unfair to construe the order as applicable to newspapers. Ancorp is engaged in a similar function with respect to magazines, books and newspapers: it merely displays them at its newsstands for resale to the public. It would make no sense to interpret the order so as to limit its scope to those products specified in the original complaint and to exclude newspapers from its coverage.

There are other indications that the FTC intended to frame a broad order rather than a narrow one. The hearing examiner's proposed order had enumerated "magazines, pocket books, paperback and comic books, newspapers, cigars, candy, toys and sundry items." The Commission's replacement of this list of products with the phrase "products for resale on newsstands" strongly suggests an intent to generalize, rather than to constrict, the scope of the order.

Moreover, the original complaint had charged unsuccessful inducement of discriminatory payments from cigar manufacturers in violation of Section 2(d) of the Clayton Act, 15 U. S. C. § 13(d)(1970). While the FTC found this charge to be unsupported by the evidence and therefore did not reach the issue whether such an attempt to induce a violation of Section 2(d) would constitute a violation of Section 5, it stated in its opinion that:

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[7] We also noted that Union News stands sold "candy, cigars, cigarettes, and other items *in addition to newspapers and magazines.*" 300 F.2d at 107 (emphasis added).

> We feel that the public interest will be adequately served by an order prohibiting respondents from actually receiving discriminatory allowances from their suppliers, including cigar manufacturers.

Similarly, no evidence was adduced with respect to newspapers, but it also was in the public interest to prohibit discriminatory allowances with respect to them.

If Ancorp had objections to the generalization aspect of the order or was unsure of its meaning, its remedy was to raise the point in its petition to review in this Court or to inquire of the FTC as to the scope of the order before embarking on the course of conduct which resulted in the offenses charged here. See *United States* v. *Beatrice Foods Co.* 493 F.2d 1259, 1264, 1269 (8 Cir. 1974), *cert. denied*, 420 U. S. 961 (1975); *Rettinger* v. *FTC* 392 F.2d 454, 456-57 (2 Cir. 1968).

We find no merit in Ancorp's contention that it reasonably misconstrued the scope of the order. A defendant's good faith but erroneous interpretation of the obligations of a cease and desist order which is sufficiently clear to place it on notice of the prohibited conduct, is no defense in a civil enforcement proceeding. A claim of good faith would be relevant only as a factor to be considered by the district court in assessing the penalty to be imposed. *United States* v. *Beatrice Foods Co., supra*, 493 F.2d at 1269; *United States* v. *Swingline, Inc.* 371 F.Supp. 37, 45 (E. D. N. Y. 1974); *United States* v. *H. M. Prince Textiles, Inc.* 262 F.Supp. 383, 389 (S. D. N. Y. 1966); *United States* v. *Vitasafe Corp.* 212 F.Supp. 397, 398 (S. D. N. Y. 1962); cf. *United States* v. *St. Regis Paper Co.* 285 F.2d 607, 614 (2 Cir. 1960), *aff'd* 368 U. S. 208 (1961).

Ancorp claims that the amount of the penalties assessed was excessive. The total penalties imposed ($204,200), while somewhat more than the total money received by Ancorp from the Times, the Post and the News from 1966 to 1969, is less than half the amount demanded by the government ($585,000).[8] Determination of the amount of penalties is committed to the informed discretion of the district judge. *United States* v. *J. B. Williams Co., supra*, 498 F.2d at 438. Here the judge, in determining the amount of the penalties, 367 F.Supp. 1224-25, explicitly considered each of the factors delineated in *Williams*. We find no abuse of discretion.

The issuance of a permanent injunction by the district court was justified as a prophylactic measure in view of the near-identity between the instant scheme involving newspapers and that involving magazines and books charged in the original complaint. 15 U. S. C. § 45(l) (Supp. III 1973). See *SEC.* v. *Koenig*, 469 F.2d 198, 202 (2 Cir. 1972); *Sec* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100-01 (2 Cir. 1972); *United States* v. *Diapulse Corp. of America*, 457 F.2d 25, 27-28 (2 Cir. 1972).

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[8] The government in its complaint sought the then maximum penalty per violation ($5,000). 15 U. S. C. § 45(l) (1970). The maximum has since been raised to $10,000 per violation. 15 U. S. C. § 45(l) (Supp. III 1973).

Affirmed.

F.T.C. v. LUKENS STEEL CO., and UNITED STATES STEEL CORP.*

Civ. A. No. 74-926. F.T.C. Docket No. 5508.

(United States District Court, District of Columbia, April 5, 1975)

On cross-motions for summary judgment on civil penalties suit, court held that since various requirements enabling F.T.C. to represent itself in court in civil penalties suits had been fulfilled, respondents were not entitled to summary judgment; but, since there was a substantial question of whether steel products sold were of the same category as those covered by the order, F.T.C. was not entitled to summary judgment either.

Ronald B. Rowe, Washington, D.C., for plaintiff.

J. Allen Dougherty, Washington, D.C., for Lukens Steel Co.; *Max N. Edwards*, Washington, D.C., for U.S. Steel Corp.

Before GASCH, *District Judge*.

ORDER

This matter is before the Court on cross-motions for summary judgment. Defendants' motion seems to be clearly without merit. There is no doubt that the FTC has the authority to represent itself in Court under certain circumstances. 15 U.S.C. §§45(m), 56. The various requirements enabling the FTC to represent itself herein have been fulfilled. Defendants' motion will be denied.

In connection with plaintiff's motion, the Court has carefully reviewed both the motion itself and the numerous technical documents filed in support thereof. That review has caused the Court to be of the opinion that there is a substantial question of material fact regarding the appropriate categorization of the types of steel involved here. Plaintiff's motion must also be denied.

Accordingly, it is by the Court this 5th day of April, 1975,

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* Not reported in Federal Reporter. Reported Trade Reg. Rep. ¶60,252 at 65,988 (1975-1 Trade Cases). For case before the Commission, see 48 F.T.C. 123.

Ordered that defendants' motion for summary judgment be, and the same hereby is, denied; and it is further

Ordered that plaintiff's motion for summary judgment be, and the same hereby is, denied.

RESORT CAR RENTAL SYSTEM, INC., et al. v. FEDERAL TRADE COMMISSION*

No. 73-3031. F.T.C. Docket No. 8862.

(United States Court of Appeals, Ninth Circuit, April 14, 1975)

1. **IN CASES REQUIRING INFERENCE AND PRAGMATIC JUDGMENT, F.T.C.'S JUDGMENT IS ENTITLED TO GREAT DEFERENCE.**

   Federal Trade Commission's judgment is entitled to great deference in deceptive advertising cases as such cases necessarily require inference and pragmatic judgment.

2. **PROVIDING IT IS RELEVANT, MATERIAL AND RELIABLE, HEARSAY EVIDENCE IS GENERALLY ADMISSIBLE IN F.T.C. HEARINGS.**

   Hearsay evidence is generally admissible in Federal Trade Commission hearing provided that it is relevant, material and reliable.

3. **UNLESS TESTIMONY IS INHERENTLY IMPROBABLE, COMMISSION DETERMINATION OF RELIABILITY OF HEARSAY EVIDENCE IS CONCLUSIVE.**

   Federal Trade Commission's determination of reliability of hearsay evidence is conclusive unless the testimony is inherently improbable.

4. **DETERMINATION OF WHETHER ADVERTISING HAS CAPACITY TO DECEIVE THE PUBLIC IS WITHIN F.T.C.'S EXPERTISE.**

   Federal Trade Commission has the expertise to determine whether advertisements have the capacity to deceive or mislead the public; consumer testimony, although sometimes helpful, is not essential.

5. **FINDING THAT USE OF SLOGAN AND TRADE NAME "DOLLAR-A-DAY" WAS DECEPTIVE WAS SUPPORTED BY EVIDENCE.**

   Evidence sustained finding that use of slogan and trade name "Dollar-A-Day" in connection with automobile rental agencies was deceptive.

6. **PUBLIC NOT REQUIRED TO MAKE REASONABLE INQUIRY INTO TRUTH OF ADVERTISING.**

   Public is not under any duty to make reasonable inquiry into the truth of advertising; Federal Trade Commission Act is violated if advertising induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract.

7. **ADVERTISING CAPABLE OF MISLEADING PUBLIC SHOULD BE CONSTRUED AGAINST ADVERTISER.**

   Advertising capable of being interpreted in a misleading way should be construed against the advertiser.

8. **ISSUANCE OF CEASE AND DESIST ORDER DOES NOT REQUIRE SHOWING OF ACTUAL DAMAGE TO PUBLIC NOR ACTUAL DECEPTION.**

   Neither actual damage to the public nor actual deception need be shown in order for Federal Trade Commission to order business to cease and desist deceptive advertising.

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* Reported in 518 F.2d 962 (1975). For case before the Commission, see 83 F.T.C. 234.

9. IN FASHIONING ORDERS APPROPRIATE TO PREVENT UNFAIR TRADE PRACTICES, F.T.C. HAS BROAD DISCRETION.

Federal Trade Commission has broad discretion to fashion orders appropriate to prevent unfair trade practices; its discretion was not abused by directing automobile rental agency to cease doing business under the deceptive name "Dollar-A-Day" even though excision of the slogan and trade name allegedly destroyed valuable good will vested in the slogan and name and even though less drastic means were allegedly available to achieve the desired end.

10. RESPONDENTS WERE NOT DENIED DUE PROCESS WHEN THEY WERE INFORMED THROUGH COMPLAINT, INITIAL DECISION AND IN ARGUMENT BEFORE THE COMMISSION THAT EXCISION OF THE TRADE NAME WAS BEING SOUGHT.

Automobile rental agencies which were told, in complaint filed against them by Federal Trade Commission, that excision of their trade name "Dollar-A-Day" was proposed, which knew that excision of the trademark was recommended in the initial decision and order of the Administrative Law Judge and was argued before the Federal Trade Commission and which, due to apparent tactical decision, failed to propose qualifying language, were not denied due process by manner in which Federal Trade Commission arrived at decision to order rental agencies to cease and desist doing business under the name "Dollar-A-Day".

(Syllabus, with substituted captions, taken from 518 F.2d 962.)

On petition to review cease and desist order of F.T.C., court held that (1) hearsay evidence was admissible before F.T.C.; (2) finding that slogan and trade name "Dollar-A-Day" was deceptive was supported by evidence; (3) inducement of first contact through use of misleading advertisement constituted violation of F.T.C. Act; and (4) due process was not denied where F.T.C. required respondent to cease trading under deceptive trade name.

Affirmed and order enforced.

Eric L. Zubel, (argued) and *Orin G. Grossman*, Las Vegas, Nev., for petitioners.

John T. Fischbach, Atty., F.T.C. (argued), Washington, D.C., for respondent.

OPINION

[963] Before BROWNING and HUFSTEDLER, *Circuit Judges*, and SKOPIL,* *District Judge*.

PER CURIAM:

Petitioners request a review of the Federal Trade Commission's cease and desist order of July 31, 1973. It is contended that the order was not supported by substantial evidence on the record and that it exceeded the scope of the Federal Trade Commission's authority to prescribe remedial measures.

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* The Honorable Otto R. Skopil, Jr., United States District Judge, District of Oregon, sitting by designation.

[1] We review the evidence to determine whether it was sufficient to reasonably support the Commission's conclusions. The Federal Trade Commission's judgment is entitled to great deference here because deceptive advertising cases necessarily require "inference and pragmatic judgment". *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965).

[2,3] Petitioners' challenge to the evidence is concentrated on hearsay questions regarding the testimony of two consumer witnesses and documents upon which their testimony was partially based. We note in passing that hearsay is generally admissible in Federal Trade Commission hearings provided it is relevant, material, and reliable. *Callaway Mills Co.* v. *Federal Trade Commission*, 362 F.2d 435 (5th Cir. 1966); *Samuel H. Moss, Inc.* v. *Federal Trade Commission*, 148 F.2d 378 (2d Cir. 1945). The Commission's determination of reliability is conclusive unless the testimony is "inherently improbable". *Universal Camera* **[964]** *Corp.* v. *NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

[4,5] Detailed scrutiny of the hearsay problems raised is unnecessary here because substantial evidence exists even if the disputed testimony and documents are stricken from the record. The Federal Trade Commission has the expertise to determine whether advertisements have the capacity to deceive or mislead the public. Consumer testimony, although sometimes helpful, is not essential. *Floersheim* v. *Federal Trade Commission*, 411 F.2d 874 (9th Cir. 1969), *cert. denied*, 396 U.S. 1002, 90 S.Ct. 551, 24 L.Ed.2d 494; *Federal Trade Commission* v. *Colgate-Palmolive Co., supra*. The Commission could have arrived at the same conclusions regarding the deceptive nature of petitioners' advertising without its consumer witnesses, whose testimony merely supported the inferences which can logically be drawn by scrutinizing the advertising alone. The "Dollar-A-Day" slogan carries strong psychological appeal. Its connotations are obvious. The design of the form contracts used by petitioners tended to continue the deception initiated by the slogan.

[6-8] Contrary to petitioners' assertions, the public is not under any duty to make reasonable inquiry into the truth of advertising. The Federal Trade Act is violated if it induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract. *Exposition Press, Inc.* v. *Federal Trade Commission*, 295 F.2d 869 (2d Cir. 1961), *cert. denied*, 370 U.S. 917, 82 S.Ct. 1554, 8 L.Ed.2d 497; *Carter Products, Inc.* v. *Federal Trade Commission*, 186 F.2d 821 (7th Cir. 1951). Advertising capable of being interpreted in a misleading way should be construed against the advertiser. *Ward Laboratories, Inc.* v. *Federal Trade Commission*, 276 F.2d 952 (2d Cir. 1960), *cert. denied*, 364 U.S. 827, 81 S.Ct. 65, 5 L.Ed.2d

55; Neither actual damage to the public nor actual deception need be shown. See *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 54 S.Ct. 315, 78 L.Ed. 655 (1934).

[9] Petitioners further complain that the Commission's order exceeded its lawful authority to proscribe unlawful trade practices. They argue that excision of the trade name "Dollar-A-Day" destroyed the valuable good will vested in that slogan when less drastic means could have achieved the desired end.

The Federal Trade Commission has broad discretion to fashion orders appropriate to prevent unfair trade practices. That was not abused here. The order was reasonably related to its goals. As the order stated, "[t]he trade name, 'dollar-a-day' by its nature has a decisive connotation for which any qualifying language would result in a contradiction in terms".

[10] Petitioners' due process arguments are betrayed by the record. Excision of the trademark was a threshold proposal in the complaint, was recommended in the initial decision and order of the Administrative Law Judge, and was argued before the Commission. Petitioners' apparent failure to propose qualifying language was a tactical decision. The Federal Trade Commission's order reveals that the Commission considered that possibility anyway. If anything, petitioners received more due process on this issue than they sought. See *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962); *Carter Products, Inc.* v. *Federal Trade Commission*, 268 F.2d 461 (9th Cir. 1959), *cert. denied*, 361 U.S. 884, 80 S.Ct. 155, 4 L.Ed.2d 120.

Bell Rent-A-Car, Inc. has been dismissed from this appeal for lack of jurisdiction because it was not included in the Commission's disputed order. 15 U.S.C. § 45(c).

Affirmed and ordered enforced.

ASH GROVE CEMENT COMPANY v. FEDERAL TRADE COMMISSION*

Nos. 73-2212, 74-1144. F.T.C. Docket No. 8795.

(United States Court of Appeals, District of Columbia Circuit, April 16, 1975)

1. UNDER FREEDOM OF INFORMATION ACT "INVESTIGATORY FILES" AND "STAFF DIRECTIVES" OR "BLUE MINUTES" ARE PROTECTED FROM DISCLOSURE.

Records which Federal Trade Commission designated as "investigatory files" and Commission minutes designated as "staff directives" or "blue minutes" were protected from disclosure under Freedom of Information Act.

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* Reported in 511 F.2d 815 (1975). *See* also pp. 565, 796, 815, 1371 and 1533 herein.

2. DISTRICT COURT ERRED IN DENYING DISCOVERY OF CERTAIN DOCUMENTS WITHOUT *in camera* inspection of a random sample.

In proceeding by company subject to agency complaint pending before Federal Trade Commission for discovery of certain documents from Commission's files, trial court erred in denying discovery without inspecting at least a random sample of documents sufficient to provide objectively verifiable basis for determining whether Commission's descriptions of documents as "internal memoranda" were conclusory or instead reasonably accurate and specific.

3. PRIMA FACIE SUBJECT TO DISCLOSURE ARE COMMISSION CHRONOLOGICAL MINUTES CONTAINING "POLICY DETERMINATIONS," UNDER FREEDOM OF INFORMATION ACT.

Chronological minutes of Federal Trade Commission proceedings, described as containing "policy determinations", were prima facie subject to disclosure under Freedom of Information Act.

4. F.T.C. DESCRIPTION WAS CONCLUSORY AND INSUFFICIENT TO SHIELD MINUTES FROM DISCLOSURE.

Federal Trade Commission's one paragraph, 77-word description covering all its agency chronological minutes was clearly conclusory and insufficient in itself to shield minutes from disclosure under Freedom of Information Act as internal memoranda.

(Syllabus, with substituted captions, taken from 511 F.2d 815.)

In Freedom of Information Act suit, Court held that district court erred and remanded a portion of the suit to the lower court with direction to inspect *in camera* at least a random sample of certain internal memoranda and certain "chronological minutes" of the Commission. The lower court had determined on the basis of affidavits and without inspecting the documents *in camera*, that they were exempt from disclosure. The Court also directed that the Commission be required to furnish an itemized description of the requested minutes.

Remanded.

Appeals from the United States District Court for the District of Columbia (D.C. Civil 1298-71).

Robert L. Williams, Washington, D.C., with whom *David J. McKean*, Washington, D.C., was on the brief for appellant.

Leonard Schaitman, Atty., Dept. of Justice, with whom *Carla A. Hills*, Asst. Atty. Gen., *Earl J. Silbert*, U.S. Atty., and *Donald Etra*, Atty., Dept. of Justice, were on the brief for appellees.

Karl H. Buschmann, Washington, D.C., also entered an appearance for the F.T.C.

Before DANAHER, *Senior Circuit Judge*, WILKEY, *Circuit Judge*, and JUSTICE,* *United States District Court Judge* for the Eastern District of Texas.

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge:*

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* Sitting by designation pursuant to Title 28, U.S. Code, Section 292(d).

[816] This is an action arising under the Freedom of Information Act (FOIA)[1] as an outgrowth of an investigation by the Federal Trade Commission of Ash Grove Cement Company, plaintiff-appellant here, and others. Rather than remain on the defensive in the FTC proceeding, Ash Grove took the offensive by filing an action in the District Court for the discovery of certain documents in the possession of the agency, which Ash Grove asserted were necessary to substantiate its defense that the Commission has prejudged all of the allegations in the agency complaint now before the Commission for adjudication. Of the four categories of documents involved, the District Court inspected two *in camera*, declined to inspect two categories, and ultimately determined that plaintiff was entitled to access to none of the documents. Finding that the District Court based its classification of some of the documents on inadequate information and that it should have made further inspection, we remand to the District Court for action in accordance with this opinion.

[1] The two categories which the District Judge did inspect were those the FTC designated as "investigatory files" and those Commission minutes designated as "staff directives," the so-called "blue minutes." After inspection *in camera* the District Judge concluded that these documents had been properly classified by the agency and that under Exemptions 7 and 5 of the FOIA[2] they were protected from disclosure. We agree.[3]

The District Judge likewise determined, but without *in camera* inspection, that the third and fourth categories of documents were exempt from disclosure. Regarding these we have difficulty.

[2] Documents of the third category were defined by the FTC as "internal memoranda," asserted to fall under Exemption 5 of the FOIA.[4] After the usual interchange of demands and a partial agreement between counsel, the agency released some documents to Ash Grove for inspection, but balked at releasing **[817]** forty-two to which plaintiff's demand had been narrowed. These were listed and described in an affidavit by an attorney in the Commission's Office of General Counsel as "internal memoranda." Ash Grove asserts that the description of each document given by the FTC affidavit is so

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[1] 5 U.S.C. § 552 (1970).

[2] 5 U.S.C. §§ 552(b)(5) and (7): (b) This section does not apply to matters that are—

> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

[3] The four investigatory files and the seventeen directive-type minutes submitted for *in camera* inspection by the agency were found to be exempt from disclosure under Exemptions 7 and 5, respectively, by order of the District Court on 22 December 1973. This action is made the subject of the appeal in No. 74-1144, which is affirmed. The appeal from the opinion and order of 24 October 1973 is No. 73-2212, which is the subject of our remand for reconsideration in accordance with this opinion.

[4] 5 U.S.C. § 552(b)(5).

conclusory as to be of little aid to the trial court and, therefore, legally insufficient under *Vaughn* v. *Rosen*[5] and others of our FOIA decisions. The District Judge found, on the other hand, that "[t]hese descriptions are more than mere conclusions."

Our review of the descriptions of the forty-two documents indicates that Ash Grove may well be right; we could not be satisfied by these general descriptions that each of the forty-two documents is properly defined as "internal memoranda," and that each falls within Exemption 5. The District Judge could not have reached any more definite and secure conclusion than we are able to on appeal, since he did not inspect *in camera* any of the forty-two documents. Had he verified the accuracy of at least a few of the agency's descriptions, his acceptance at face value of the accuracy of the rest would have stood on more solid ground. In the absence of more specific document analysis by the agency, we think such a procedure was necessary to meet the requirement of *Vaughn* v. *Rosen* that judicial determinations under the FOIA be based upon a detailed record. Therefore, on remand we direct that the District Judge inspect at least a random sample of these forty-two documents sufficient to provide an objectively verifiable basis for deciding whether the agency descriptions are indeed conclusory or instead reasonably accurate and specific.

The fourth category of documents is described as the Commission's "chronological minutes," and is asserted by the Commission likewise to fall under Exemption 5 of the FOIA. In an affidavit, the Secretary of the Commission described these chronological minutes as

> . . . accounts of the Commission's executive meetings and conferences . . . the deliberations of the Commission such as exchange of opinions between individual Commissioners, their recommendations, motions, discussions and statements. They also contain staff recommendations and involve pending cases, internal reorganization procedures, personnel actions, *policy determinations* and generally reflect the Commission's decision-making process.[6]

This description was relied on by the District Judge in his Second Memorandum Order of 22 February 1973[7] and Memorandum Opinion of 24 October 1973.[8] Significantly, the District Judge thought that "[p]laintiff . . . apparently accepts the characterization of chronological minutes as set forth above, . . ."[9]

[3] Ash Grove sharply disputes the Commission's characterization of its chronological minutes, points to pleadings in the record in which it has done so, and asserts that it has described these minutes more accurately as

> stenographic and other detailed recordings of transactions, voting decisions, binding

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[5] 157 U.S.App.D.C. 340, 484 F.2d 820 (1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

[6] Joint Appendix II at 283 (emphasis supplied).

[7] Joint Appendix I at 45.

[8] Joint Appendix I at 87.

[9] *Ibid.*

> opinions, policies, interpretations and other actions of the Commission or of individual Commissioners [relating to the actions taken by the Commission during its 1964-1967 Trade Regulation Rule Proceeding Concerning Vertical Integration in the Cement Industry][10]

Ash Grove argues that these chronological minutes contain "secret law" and proof positive of its defense in the FTC proceeding that its fate is foreordained and its case has been prejudged by covert decisions of the Commission growing [818] out of a previous trade regulation rule-making proceeding in 1964-1967. Ash Grove also asserts, and we think correctly, that where the agency Secretary and the trial judge described the chronological minutes as containing "policy determinations," such minutes or portions thereof were subject to disclosure under *Sterling Drug, Inc.* v. *Federal Trade Commission,*[11] in which we held that such determinations are *prima facie* disclosable.[12]

[4] The agency's one-paragraph description of seventy-seven words of all the agency chronological minutes, not just the minutes demanded by the plaintiffs, is clearly conclusory under the standard of *Vaughn* v. *Rosen,*[13] *Cuneo* v. *Schlesinger,*[14] and *Pacific Architects and Engineers, Inc.* v. *Renegotiation Board.*[15] The affidavit relied upon by the agency and the District Judge does not assert that any of these minutes have ever been examined by any agency employee to determine their exact content; there has been no inspection by the trial court *in camera;* and no sample of the minutes has been examined.

We remand for these reasons: First, we think that "policy determinations" at least, and perhaps other matters included, are subject to public scrutiny. Second, before ruling whether the chronological minutes are protected against disclosure by Exemption 5, the District Judge should examine *in camera* a representative portion of the minutes.[16] Third, the District Judge should require an itemized description to be made of these minutes as he required for the forty-two staff memoranda.

The case is remanded for action in accordance with this opinion.

So ordered.

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[10] Appellant's Br. at 29.

[11] 146 U.S.App.D.C. 237, 450 F.2d 698 (1971).

[12] [T]he policy of promoting the free flow of ideas within the agency does not apply here, for private transmittals of binding agency opinions and interpretations should not be encouraged. These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Thus, to prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it.

Id. at 247, 450 F.2d at 708.

[13] 157 U.S.App.D.C. 340, 484 F.2d 820, *cert. denied,* 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

[14] 157 U.S.App.D.C. 368, 484 F.2d 1086, *cert. denied, Rosen* v. *Vaughn,* 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

[15] 164 U.S.App.D.C. 276, 505 F.2d 383 (1974).

[16] From the record we have derived no concept of what volume of documents is involved.

FEDERAL TRADE COMMISSION v. JERRY L. FELDMAN, President and CHECKER TAXI COMPANY, INC.*

Civ. A. No. 74 C 2787. F.T.C. File No. 99-183.

(United States District Court, Northern District of Illinois, April 30, 1975)

In subpoena enforcement proceeding, court held that respondent's contention that precedent cases in Supreme Court precluded enforcement of subpoena was not dispositive of the instant case in light of potential differences in facts and law between those cases and current F.T.C. investigation; and there was insufficient basis in record for finding that production of the subpoenaed information will do serious harm to respondent's business.

Subpoena enforced.

The court retained jurisdiction in the event that compliance with subpoena could be shown to be extremely burdensome.

Before PARSONS, *Chief Judge.*

MEMORANDUM OPINION

This is a proceeding initiated by the Federal Trade Commission (hereafter FTC) to enforce an administrative subpoena *duces tecum* which was issued on March 19, 1973. Respondents contend that the subpoena should not be enforced.

Respondents argue that the decisions in *U.S.* v. *Yellow Cab*, 332 U.S. 218 (1947) and *U.S.* v. *Yellow Cab*, 338 U.S. 338 (1949) preclude enforcement. I am of the opinion that these decisions are not dispositive of the dispute now before me. Though not legally binding, the rationale of *FTC* v. *Markin*, No. K 74-268 CA (W.D. Mich. 1974) is quite persuasive. Furthermore, the FTC has admitted that the doctrine of *res judicata* possibly applies to certain parts of its current investigation; in seeking enforcement, it seeks only factual material with which to explore this possibility. And, a decision by this Court on the *res judicata* effects of the two *Yellow Cab* cases would seem to be premature in light of the potential differences in facts and law between those two cases and the alleged scope of the current FTC investigation. Similarly, a decision on the "in commerce" issue would be premature. In its first *Yellow Cab* decision, the Supreme Court expressly stated that it did not intend to establish any absolute rule that local taxi service was "beyond the reach of federal power." 332 U.S. at 232.

I am also of the opinion that there is an insufficient basis in the record at this time for finding that the production of the subpoenaed information will do serious harm to respondents' business. Yet should such harm later become apparent, relief is available under the terms of the Court's order enforcing the subpoena.

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* Not otherwise reported. *Affirmed*, 532 F.2d 1092 (1976).

In light of the foregoing, an order should issue compelling the respondents to produce the evidence requested in the subpoena *duces tecum*.

ORDER

Petitioner, the Federal Trade Commission, having invoked the aid of this Court, pursuant to 15 U.S.C. 49, in requiring respondents, Jerry L. Feldman, President, Checker Taxi Company, Inc., and Checker Taxi Company, Inc., to comply with an administrative subpoena *duces tecum* issued by petitioner in an investigation being conducted by petitioner (Federal Trade Commission File No. 721 0091); and the Court having considered the verified petition and other papers of record, and, the Court being of the opinion that the relief sought by petitioner should be granted, it is hereby

ORDERED that respondents Jerry L. Feldman, President, Checker Taxi Company, Inc., and Checker Taxi Company, Inc., produce the evidence requested in the subpoena *duces tecum* issued by the Commission on March 19, 1973.

The parties will, prior to the production of evidence, pursuant to the Federal Trade Commission's offer, meet in a good faith effort to modify the subpoena's terms so as to make compliance with its specifications not unduly burdensome on respondents.

In the event that compliance with the subpoena's terms becomes patently vexatious and serious hindrance to the pursuit of respondent's business, the parties may file the appropriate supplemental motions, fully supported by briefs, and the Court will reconsider those specifications thus put in issue in supplemental proceedings.

It is further ORDERED that a certified copy of this order be served forthwith upon respondents Jerry L. Feldman and Checker Taxi Company, Inc., by the United States Marshal.

ALUMINUM CO. OF AMERICA v. FEDERAL TRADE COMMISSION*

Civ. A. No. 75 Civil 17. F.T.C. File No. 99-196.

(United States District Court, Southern District of New York, May 5, 1975)

On motion for class action determination, court held that there was no need for a class action in case contesting F.T.C. line-of-business reporting program since a favorable decision for the companies would inure to the benefit of every corporation required to file a line-of-business report.

Before WEINFELD, *District Judge:*

There have been so many motions and cross-motions in this and the related proceeding commenced by the Federal Trade Commission that there is no need to elaborate on their nature or the parties thereto. The instant motion is by the original plaintiffs for a class action determination.

The FTC order requiring the filing of LB reports was directed to 345 of the leading manufacturing corporations of the United States. Of these, 137 had filed reports as of February 11, 1975. Ninety-two companies are challenging the LB program in this court; in addition to the twelve original plaintiffs, sixty-two companies have intervened in the instant suit and eighteen companies have brought separate actions, most of which have been consolidated with this action. Fourteen other corporations are challenging the program in the District Court of Delaware. In addition, there is the Commission's enforcement proceeding against those corporations that have not complied with the Order to File LB reports. Each corporation, whether an original plaintiff, an intervenor, or a respondent in the Commission's proceeding, is in a position to protect its own interests. Those corporations which have not joined in this suit or filed suits of their own are aware of the alternatives open to them and are fully able to fend for themselves.

In any event, to the extent that this action raises general issues capable of resolution without examination of a particular company's circumstances, a favorable disposition of this lawsuit will inure to the benefit of every corporation that was required to file an LB report. There is no need for a class action. See *Galvan* v. *Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *Vulcan Society* v. *Civil Service Comm'n*, 490 F.2d 387, 399 (2d Cir.), *aff'g in part* 360 F.Supp. 1265, 1266-67 n. 1 (S.D.N.Y. 1973).

The motion for a class action determination is denied.

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* Not reported in Federal Reporter. Reported Trade Reg. Rep. ¶ 60,333 at 66,371 (1975-1 Trade Cases). See also p. 1177 herein.

UNITED STATES v. PAPERCRAFT CORPORATION*

Civ. A. No. 74-816 F.T.C. Docket 8779

(United States District Court, Western District of
Pennsylvania, May 9, 1975)

1. WHERE THERE IS A VIOLATION OF F.T.C. ORDERS, MAXIMUM PENALTIES OF $10,000 PER DAY ARE AVAILABLE.

Maximum penalties of $10,000 per day are available for violation of Federal Trade Commission order.

2. PENALTIES MUST BE SUFFICIENT TO ELIMINATE "AN ACCEPTABLE COST OF VIOLATION."

Penalties for violation of Federal Trade Commission corporate divestiture order must be sufficient to eliminate benefit which parent has had through its failure to divest subsidiary, to compel parent to divest, and to create deterrent to further delay in compliance so that others will not choose like course in future.

3. THAT REDUCTION OF COMPETITION THROUGH ILLEGAL MERGERS IS IS INJURIOUS TO THE PUBLIC IS A MAJOR PREMISE OF ANTITRUST LAW.

It is major premise of antitrust laws that reduction of competition through illegal mergers is injurious to public.

4. F.T.C. ORDER DEADLINE SETS DATE ON WHICH PENALTIES ARE ASSESSED, NOT DATE VIOLATOR CLAIMED NOTICE WAS RECEIVED.

Penalties for violation of Federal Trade Commission corporate divestiture order would be assessed from deadline set in order rather than from date which violator claimed that it first received notice of finalization of order.

5. A PENALTY OF $7,500 PER DAY WOULD BE ASSESSED WHERE PARENT COMPANY RECEIVED $5,000 PER DAY PROFIT THROUGH LACK OF GOOD-FAITH EFFORT TO COMPLY WITH DIVESTITURE ORDER.

Where parent corporation under Federal Trade Commission order to divest subsidiary did not make good-faith effort to comply by setting price too high and failing to advertise subsidiary, parent received about $5,000 per day profit from retaining subsidiary, parent's earnings were some 6.3 million dollars in previous year, and parent's acquisition of subsidiary resulted in merger of two largest competitors in the field thereby injuring competition, penalty of $7,500 per day would be assessed against parent.

6. PARENT WOULD BE REQUIRED TO SUBMIT DIVESTITURE PLAN WITHIN 60 DAYS OF COURT'S ORDER CONSIDERING OFFERS MADE, INTEREST SHOWN IN SUBSIDIARY, AND PUBLIC ADVERTISING RESULTS.

In proceeding by government for penalties and injunctive relief for violation of Federal Trade Commission corporate divestiture order, in consideration of details of offers made for subsidiary, extensive interest shown by many substantial corporations in subsidiary and results received from public advertising, parent would be required to submit divestiture plan subject to approval by FTC within 60 days.

(Syllabus, with substituted captions, taken from 393 F.Supp. 415.)

In suit for civil penalties, court held that penalties would be assessed from deadline set in F.T.C. order; parent firm did not make a good-faith effort to comply with the divestiture order; that, considering that company made approximately $5,000 per day profit, a penalty of $7,500 per day would be assessed; and that firm had 60 days to submit divestiture plans to F.T.C. for approval.

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* Reported in 393 F. Supp. 415 (1975). See also pp. 530 and 1261 herein. For case before Commission, see 78 F.T.C. 1353; *modified* 79 F.T.C. 420, *further modified* 82 F.T.C. 1781.

Thomas S. Brett, U.S. Dept. of Justice, *Ronald B. Rowe*, F.T.C., Washington, D.C., *David B. Atkins*, Asst. U.S. Atty., Pittsburgh, Pa., for plaintiff.

J. Tomlinson Fort, Reed, Smith, Shaw & McClay, Pittsburgh, Pa. for defendant.**[416]**

OPINION AND ORDER

SNYDER, *District Judge.*

In this proceeding for violations of a Federal Trade Commission (FTC) Order requiring Papercraft Corporation (Papercraft) to divest itself of CPS Indus**[417]**tries, Inc. (CPS), the Government seeks the maximum penalty of $10,000 per day and a mandatory injunction directing compliance. On March 11, 1975, this Court by Opinion and Order granted the Government's Motion for Partial Summary Judgment, finding Papercraft to be in default of the Divestiture Order. A lengthy history was there given which will not be repeated except as here required for clear understanding.

Proceedings for divestiture were initiated by the FTC on April 10, 1969, alleging illegal acquisition of CPS by Papercraft in December of 1967. FTC's initial Order requiring divestiture was issued June 30, 1971. On June 6, 1973, a Modified Order was entered in compliance with the unappealed Mandate of the Seventh Circuit Court of Appeals.[1] The Modified Order required Papercraft, within six months of the date thereof, to "divest, absolutely and in good faith, subject to the approval of the Federal Trade Commission, all assets, properties, rights and privileges, . . . of CPS Industries, Inc., . . .". None of the assets were permitted to be transferred to any person who was an officer, director or employee of Papercraft or affiliated corporations, or who controlled more than 1% of the shares of Papercraft Corporation, or to anyone who was not approved in advance by the FTC. However, it was provided that Papercraft could divest itself without the preceding limitations being applicable, if such divestiture was accomplished through a new corporation whose shares could be distributed to the stockholders of Papercraft in proportion to their holdings of Papercraft stock. For a period of ten years, Papercraft was ordered not to acquire, in whole or in part, stock or assets of any concern engaged in the manufacture, production, sale or distribution of any decorative gift wrap product.

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[1] *Papercraft Corporation* v. *F.T.C.*, 472 F.2d 927 (7th Cir. 1973) modified the FTC's Order only in minor matters. It deleted ¶ IX, which reads as follows:

"IT IS FURTHER ORDERED that for a period of three (3) years from the date of divestiture The Papercraft Corporation is prohibited from selling any decorative gift wrap products to any customer account which at any time has been sold any decorative gift wrap products by CPS Industries, Inc., unless such customer account was sold such decorative gift wrap products by The Papercraft Corporation prior to December 27, 1967."

The Cease and Desist Order as modified was enforced.

Papercraft twice requested extensions of the FTC Order which were rejected, and on August 6, 1974, the FTC, pursuant to Section 16 of the Federal Trade Commission Act, 15 U.S.C. § 56, certified the proceedings to the Attorney General of the United States setting forth that Papercraft had neither divested itself of CPS nor presented to the FTC any plan for divestiture of CPS by sale or spinoff.

Papercraft in this Court unsuccessfully asserted error of the FTC in denying requests for extension, and rather obliquely challenged the FTC's certification to the Attorney General. This Court entered Summary Judgment on the Order violation. A rather lengthy hearing was held by this Court on the imposition of civil penalties and the framing of a mandatory injunction to prevent continuation of the violation of the FTC Divestiture Order.

NON-COMPLIANCE

[1] The Government's suit was brought under both the Federal Trade Commission Act and the Clayton Act. Section 5(*l*) of the Federal Trade Commission Act (15 U.S.C. § 45(*l*),[2] autho[418]rized a penalty of not more than $5,000 for each violation. Under Section 11(*l*) of the Clayton Act (15 U.S.C. § 21(*l*),[3] a penalty of not more than $5,000 for each violation was established. The maximum penalty for violation of Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), has since been increased from $5,000 to $10,000. *See*, Pub.L. 93-153, Title IV, § 408(c), 87 Stat. 591, 592 (1973). These statutes must be read *in pari materia*. *Federal Trade Com.* v. *Cement Institute*, 333 U.S. 683, 690, 68 S.Ct. 793, 92 L.Ed. 1010 (1948); *Federal Trade Commission* v. *Reed*, 243 F.2d 308 (7th Cir. 1957). Thus, maximum penalties of $10,000 per day are available as contended for by the Government.[4]

Congress, as evidenced by the legislative history, was fully cognizant

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[2] 15 U.S.C. § 45(*l*) provided, prior to amendment:

"Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense."

[3] 15 U.S.C. § 21(*l*) provides:

"Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense."

[4] As noted in *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 231, 95 S.Ct. 926, 931, 43 L.Ed.2d 148, 157 (1975), in footnote 6:

". . . [T]he District Court has discretion to determine the amount of the penalty for each violation

(*Continued*)

of the problem before the Court of determining sufficient monetary penalties to provide incentive for prompt compliance with FTC Orders. Thus, in recommending passage of the 1959 Amendment to the Clayton Act, to bring it into accord with the 1938 Wheeler-Lea Amendment to the Federal Trade Commission Act, the House Committee on the Judiciary observed:

> . . . Although the maximum penalty may be severe, in certain cases it would be appropriate. In the absence of the maximum penalty for a continuing offense, for example, commission and board orders with respect to mergers and interlocking directorships would be ineffective.

The House further went on to add that:

> . . . In such cases, unless the maximum penalty applied and each day of a continuing violation considered a separate offense, an order dissolving an unlawful merger could be ignored after the mere payment of a $5,000 fine. (House Report No. 580, 86th Congress, First Session, U.S.Code, Congressional and Administrative News, pp. 1804, 1807 (1959)).

The United States Supreme Court in *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975), in the same context stated as follows (at p. 231, 95 S.Ct. at p. 932, 43 L.Ed.2d at p. 158):

> The legislative history also makes clear that Congress was concerned with avoiding a situation in which the statutory penalty would be regarded by potential violators of FTC orders as nothing more than an acceptable cost of violation, rather than as a deterrence to violation. . . .

One of the clearest expositions of the court's approach to civil penalties was [419] given by Judge Lay in *United States* v. *Beatrice Foods Co.*, 493 F.2d 1259 (8th Cir. 1974), *cert. denied*, 95 S.Ct. 1350, 43 L.Ed.2d 438, where the following appears in a factual situation very close to ours (at pp. 1270-1271):

> . . . As the government persuasively urges here:
>
> "For competitive purposes there is nothing intrinsically wrong with the "act of acquisition" in and of itself. *Rather it is the effect of an acquisition, the relationship it creates which may lead to its proscription.* . . . The order's express and agreed terms barred further "acquisitions" and that term plainly had the same meaning as in Section 7 of the Clayton Act. The anti-competitive effects of acquisitions condemned by Section 7 come from the fact that, by holding the assets, the acquiring firm changes the competitive structure of the industry involved. It is the permanent effect of prohibited acquisitions which Congress sought to remedy in the statute. . . . [Any other interpretation] *would convert all orders barring future acquisitions into minor expenses of any acquisition or merger, for the prohibition could be avoided by payment of a $5,000 penalty.* (emphasis added)"

In *Gottesman* v. *General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969), *Cert. denied*, 403 U.S. 911, 91 S.Ct. 2208, 29 L.Ed.2d 689 (1971), the court reasoned:

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whether the transactions are construed as single or as continuing violations. Thus, while totalling the penalty as a series of daily violations rather than as a single violation could raise substantially the total penalty assessed, the statutory scheme does not require that result, and the trial judge's determination would prevail in the absence of an abuse of discretion."

> "Here the very acquisition and position of potential control which was found violative of the Clayton Act as of 1949 continued through 1961. *We need not dispute the statement of the district court that, in the ordinary antitrust case, there is no "presumption of continuance of unlawful conduct." Here, however, what was unlawful was du Pont's status as stockholder in General Motors, and that status continued until divestiture.*"

Id. at 965 (emphasis added).

Similarly, in *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957), the defendants argued that where the challenged stock acquisition occurred in 1917, the government could not bring suit in 1949 to undo the acquisition since § 7 was applicable only to the acquisition and not to the subsequent holding of the stock. The Supreme Court rejected this argument:

> "We repeat, that the test of a violation of § 7 is whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints. . . . *The fire that was kindled in 1917 continues to smolder.*"

Id. at 607, 77 S.Ct. at 884 (emphasis added).

In *United States* v. *Schine*, 260 F.2d 552 (2d Cir. 1958), *cert. denied*, 358 U.S. 934, 79 S.Ct. 318, 3 L.Ed.2d 306 (1959), the defendants were found to have violated an antitrust decree by acquiring interests in theaters without prior court approval. The defendants tried to argue that the statute of limitations on these acquisitions had run; however, the court held:

> "[A]lthough the initial acts in contempt of the decree occurred prior to the statutory period, the 'illegal' conditions which they created continued up to the date of the order to show cause and resulted in what might be called 'continuing contempts.' "

Id. at 555-556. [Footnote omitted]

In *United States* v. *J. B. Williams Company, Inc.*, 498 F.2d. 414 (2d Cir. 1974), Judge Friendly had the following to say (at pp. 438-439):

> While there appears to be no authority on the point, we would think it [420] desirable that the court accord an evidentiary hearing on the amount of the penalty if this is reasonably and seasonably requested either by the defendants or by the Government. As the court below recognized, the size of the penalty should be based on a number of factors including the good or bad faith of the defendants, the injury to the public, and the defendants' ability to pay. 354 F.Supp. [521] at 548. *See United States* v. *Universal Wool Batting Corp.*, 1961 Trade Cases ¶ 70, 168 (S.D.N.Y.1961); *United States* v. *Vitasafe Corp.*, 212 F.Supp. 397 (S.D.N.Y.1962); *United States* v. *Wilson Chemical Co.*, 1962 Trade Cases ¶ 70, 478 (W.D.Pa.1962), *aff'd*, 319 F.2d 133 (3 Cir. 1963); *United States* v. *H. M. Prince Textiles, Inc.*, 262 F.Supp. 383, 389 (S.D.N.Y.1966); *United States* v. *Bostic, supra*, 336 F.Supp. [1312] at 1321. . . .

[2] We agree with the Government's basic position that the penalties must be sufficient to: (1) eliminate the benefit which Papercraft has had through its failure to divest CPS; (2) compel it to divest; and, (3) create a deterrent to further delay in compliance, so that others will not choose a like course in the future. The penalties must be sufficient to eliminate "an acceptable cost of violation". *United States* v. *ITT Continental Baking Co., supra.*

THE PENALTIES

I. The Evidence Of Good Faith

The Government contends the evidence shows Papercraft never seriously considered the alternative forms of divestiture available to it under the FTC Order, but only sought a sale transaction at an *unreasonably high price*. They point to the fact that Papercraft set a sale price of $37,500,000 for CPS, which was almost seven times the 1967 acquisition price of $5,706,000,[5] and approximately twenty times CPS' 1974 earnings of $1,992,294. The Government further points out that this price was set in an effort to make a good sale for Papercraft shareholders, and was maintained for an unreasonable period of time, in total disregard of the FTC Order requiring unconditional divestiture of CPS not later than December 16, 1973.

Papercraft, to the contrary, takes the position that it exercised good faith and due care in attempting to effectuate compliance. It points out that following the issuance of the decision of the Court of Appeals for the Seventh Circuit on January 25, 1973, Papercraft considered the possibility of filing a petition for certiorari to the United States Supreme Court but also, at the same time, considered plans to effect the divestiture of CPS. By late March or early April of 1973, Papercraft's management had decided not to file a petition for certiorari, and immediately began actively to originate plans to sell CPS. Within a short time, Papercraft employed Blyth Eastman Dillon (BED), its investment banker with experience in this field, as *exclusive* agent to assist in divestiture under the two options which it considered to be available to it to achieve full compliance: (1) Papercraft could sell either the stock or assets of CPS to another company in exchange for stock, cash or notes, or a combination thereof; or (2) CPS could be reestablished as an independent company by the spinoff of CPS stock to Papercraft stockholders, or the sale of CPS stock to the public, or an offer to exchange CPS stock for outstanding Papercraft stock. Papercraft contends the first option was the only realistic choice "either from the point of view of financial benefit to Papercraft's stockholders or for the maintenance of [421] CPS as a viable economic competitor." (Papercraft's Trial Brief at p. 12).[6]

Papercraft, in consultation with BED, concluded, after consideration

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[5] Papercraft paid for CPS with 285,300 shares of Papercraft stock valued for the purposes of the transaction at $20 per share.

[6] Papercraft argued in its Trial Brief that the second option was not feasible for many reasons, including:

"(a) There is serious doubt that CPS would remain a successful viable concern as an independent entity, as evidenced by its declining condition prior to acquisition by Papercraft. In particular, it would lack the strong upper echelon management group which was available to it through Papercraft and the additional financial resources which Papercraft was able to provide from time to time.

(b) There would be little or no market for the sale of CPS stock by the public generally. If the stock was spun off to stockholders of Papercraft, the FTC Order requires that the substantial block obtained by the Katz family be sold

(Continued)

of such factors as historic price-earnings ratios of Papercraft stock, the price-earnings ratios of comparable consumer-oriented companies, general market conditions and interest rates, and the projected profitability of CPS, that an asking price of $37,500,000 was justified. BED seemed not to have played a major role in the final price determination. Despite preparation of a confidential report on CPS, and a rather wide circulation of that report by BED, early reaction to this price was not favorable. For example, Allen H. Seed III of The Gillette Company "concluded that . . . [CPS] wouldn't be of interest to us at anywhere near the price level contemplated." Dan Rodgers, Chairman of John F. Murray Advertising Agency, Inc., stated on behalf of American Home Products Company, that the "asking price is substantially above anything we could consider." E. J. Sullivan of Borden, Inc. reportedly discussed an initial offer on a cash basis of $20,000,000. Kraftco, through an intermediary, indicated that they would be willing to consider a price of $25,500,000.

By September 12, 1973, the FTC staff was communicating with Papercraft, noting that "some prospective acquirers considered the asking price for the property to be divested to be too high. In this connection, you are reminded that the obligation to divest which the Commission's order imposes, is paramount to any consideration of price." (Govt. Exhibit 25, Letter of Lawrence E. Gray, attorney for the FTC). And again, on October 24, 1973, after continued generation of negative responses, Attorney Gray wrote Papercraft's attorneys about its excessive price. (Govt. Exhibit 27). On December 19, 1973, FTC attorney Wayne Kaplan wrote to Papercraft's attorneys addressing the rigidity of Papercraft's price and stated "we believe the record shows that respondent's continued adherence to the $37.5 million asking price has deterred prospects from further interest in CPS at a lower price level." (Govt. Exhibit 33). When Papercraft was unable to secure favorable response to its request for additional time from the FTC by letter-petition dated December 3, 1973, it effected certain changes early in January 1974 in its procedures for divestiture. It (1) appointed a Divestiture Committee, composed of outside directors and Papercraft's Chairman of the Board, to monitor closely the efforts to divest CPS, and (2) it reduced the asking price to $29,000,000 (which was still more than five times the price paid by Papercraft in 1967).

It is noted that at this time the *exclusive* brokerage arrangement with BED was terminated; four additional banking firms were

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within six months. The existence of so large a block of stock in an untried company would further depress whatever public market existed for CPS stock.

(c) Aside from the monetary interests of Papercraft and its stockholders, re-establishing CPS as an independent company would be contrary to the basic purposes sought to be achieved by the FTC, since a weakened and ineffective CPS would not be a strong competitor in the gift wrap field." [footnote omitted].

approached to assist divestiture; Papercraft circulated the confidential report to the acquisition de[422]partments of eight major accounting firms eliciting the interest of their clients in purchasing CPS; and in response to the specific urging of the FTC, Papercraft advertised CPS in the Wall Street Journal and the New York Times. (The FTC is particularly critical of Papercraft's failure to advertise in these highly respected papers long before January of 1974). Following placement of the advertisements, Papercraft and BED received many inquiries, and more than a passing interest was indicated by such companies as American Can Company, American Home Products, Borden, Inc., Swingline Division of American Brands, Ward Foods, Inc., Minnesota Mining and Manufacturing Company, Dart Industries, Inc., Avery Products, Revlon, Inc., Wyomissing Corporation, and Franklin Mint.

Papercraft continued [sic] to receive numerous indications that its asking price of $29,000,000 was regarded as being too high. C. A. Nelson, Vice President of Dart Industries, Inc., wrote Papercraft on March 6, 1974, that "it is difficult from our point of view to justify a value anywhere near that indicated by you." (Deft. Exhibit AA). Minnesota Mining and Manufacturing Company stated on March 12, 1974, that "we would have no real interest in the acquisition unless the price were considerably less than half of the asking price." (Deft. Exhibit CC). William D. Walsh of Arcata National wrote on March 26, 1974, that Arcata proposed a valuing of CPS in the range of $12 to $12.5 million which was "close to 7 times 1973 earnings and at about $5,000,000 over . . . the company's book value. Given current market conditions which find most U.S. companies—including Arcata—selling at multiples of 5 and 6, we believe this is an equitable and realistic valuation." (Deft. Exhibit X). On May 14, 1974, Thomas H. Saliba of Arthur D. Little, Inc., wrote that "I do have difficulty in understanding the 'asking price' when the book value of the parent Papercraft is approximately $32.8 million and the market value is roughly $30 million." (Govt. Exhibit CR. 11 at 1988). The evidence is thus clear that Papercraft must have been aware that even its $29,000,000 asking price was clearly unreasonable.

In addition, the FTC's staff continued to point out to Papercraft the fallacy of maintaining a high sale price, stating "although the reduction in price was a forward step, nevertheless it may be necessary for respondent to accept an even lower price in order to accomplish a divestiture of CPS without further undue delay." (Govt. Exhibit 34, Letter of March 1, 1974 from FTC staff attorney).

During this period of time and in order to demonstrate that the fair market value of CPS assets was in excess of the book value, Papercraft engaged Industrial Appraisal Company in Pittsburgh, one of the country's large appraisal firms, to determine market value. In

September of 1974, Industrial Appraisal Company found the appraised value of the assets was $14,993,000.

We now come to the Arcata offer. Considerable negotiations were carried on throughout 1974, and in November of 1974 an offer of $13,000,000 was made, payable in large part with preferred stock at the rate of 8%. This offer was, of course, in the face of a sales demand price of $29,000,000, and Papercraft rejected the offer. Finally, in February of 1975, Papercraft lowered its asking price to $20,000,000. On March 31, 1975, Arcata made Papercraft an offer to purchase the stock of CPS for a net amount of $14.1 million, after forgiveness of $2.9 million owed Papercraft by CPS. At the time of the hearing in this proceeding on April 7, 1975, a letter of intent had been delivered comtemplating a definitive purchase agreement by May 1st. This has not, however, been accomplished.

During the years 1968 through 1974, Papercraft has reported total net income from CPS of $10,811,000 and during this same period Papercraft has received [423] dividends from CPS totaling $5,721,000. In the period of violation, since December 16, 1973, when divestiture was required by the Order, Papercraft has benefitted in excess of $2,500,000 or approximately $5,000 a day, based upon CPS' 1974 earnings.

John Kelsey, Vice President of BED, testified that the profit history of CPS was as follows: 1968-$842,000; 1969-$1,416,000; 1970-$1,406,000; 1971-$1,549,000; 1972-$1,739,000. [See also Deft. Exhibit A at p. 14]. In his opinion, the $37.5 million was "an appropriate price" even though it was more than twenty times earnings; even though the price of Papercraft stock, for example, on May 1, 1973 was $14—a price-earnings ratio of 8 to 1; even though any owner of CPS after divestiture would have to know that they would be in direct competition with Papercraft, who would vigorously compete in the gift wrap business. It is worth noting in passing that in 1972, 31.6% of Papercraft's profits came from CPS ($1.707 million out of a total $5.391 million).

One difficulty here is that after having agreed to a price of $37.5 million, no realistic effort was ever made by BED to weigh the market reaction to this price. All decisions thereafter were made by Papercraft, not based on the primary consideration of the illegal acquisition of CPS in 1967 or the Order to divest by December 16, 1973, but upon an attempt to get the highest possible sales price. Even in the face of continued market resistance to the asking price, no real effort was made to determine the validity of that asking price until the recent negotiation with Arcata at the $17 million figure.

Mr. Kelsey openly admitted that he wore "two hats" in the performance of his duties. As the representative of BED, he felt an obligation to the shareholders to get a "fair price" and at the same time, trying to face up to the responsibility to divest. Nowhere does he explain any reaction by Papercraft to the failure of the market to indicate interest at the $37.5 million mark, at the $29 million mark, or at any figure anywhere near thereto.

Howard Clark, First Vice President of BED, testified the $37.5 million asking price was "fair" and told of the hopeful negotiations which had been carried out with Swingline, Inc., only to receive notice in December of 1973 that CPS did not fit in with Swingline's plans. He denied that the asking price was of major concern to Swingline. On cross-examination, Clark admitted that the asking price for CPS was set by Papercraft's management and that the Kraftco offer of $25 million was not followed up by Papercraft. He admitted he had never read the FTC Opinion, nor at any place in his testimony did he indicate any understanding of the urgency of the Order to divest.

Joseph Katz, Chairman of the Board and President of Papercraft, told of stabilizing CPS' earnings after taxes through modernization of plant and various other cost saving devices whereby the earnings were as testified to by Kelsey. However, he added these approximations: 1973—$1,850,000; 1974—$2,002,000—a ratio of 10% of total sales after taxes and 20% before taxes.

Mr. Katz admitted that a sales price was developed at $37.5 million by Papercraft management, and then the investment banker was selected, whose analysis served to confirm the $37.5 million price. He acknowledged receipt of information concerning Kraftco's $25.5 million offer, to which he replied on May 18, 1973 that the price was too low.

In October of 1973, American Brands was interested enough to visit CPS in Tennessee, and was quoted the "asking price" of $37.5 million. Even though Federal Rules of Civil Procedure. further contacts were made in November and December, and there was a final rejection by American Brands, Joseph Katz would have this Court believe that the price had no effect on these considerations.

Mr. Katz spoke of the Borden situation where a cash offer of $20 million [424] was apparently made, which was not brought to his attention. In March of 1974, when Arcata originally contacted BED and gave "our concept of values" in the range of $12 to $12.5 million, Katz admitted he did not consider this a viable offer, but simply a "fishing expedition", and told BED no such price could be accepted. On cross-examination, Mr. Katz acknowledged price-earning ratios of various companies as follows: Beatrice Foods, 17 to 1; Clark, 17 to 1; Kraftco, 13 to 1; Liggett & Myers, 12 to 1; Norton-Simon, 17 to 1. He also acknowledged that as early as December of 1973, he was aware that the asking price based on the price-earnings ratio of 20 to 1 was too high, particularly in light of the fact that by September of 1973, no one had offered anything near the price. Even when the Arcata offer was made at $12 to $12.5 million, he testified "I thought it was a frivolous indication of an offer".

His son, Marshall Katz, a Vice President of Papercraft, handled much of the effort by Papercraft to divest CPS. Again, there was no indication whatsoever of consideration being given to the urgency of divestiture compared with the asking price of $37.5 million.

This Court finds that Papercraft's "asking price" was unreasonable and only discouraged inquirers without consideration of the unconditional divestiture requirement. Though the FTC had on numerous occasions brought this forcibly to Papercraft's attention, it was not until January of 1974, after the deadline for divestiture, that Papercraft allegedly "redoubled" its efforts to divest CPS possibly by lowering the price to $29 million. This was still unreasonably above any market interest generated up to that time. Finally Papercraft lowered its price to $20 million, but the entire course of conduct shows that Papercraft pursued a subjectively desired price in complete disregard of the Divestiture Order. As this Court previously held: "the Order suggests nothing to indicate that Papercraft's divestiture was to be affected by the price it would receive . . . [and] Defendant's bargaining position may well have been weakened by virtue of the Order, but its position was the product of Defendant's earlier violations of the antitrust laws." (Page 8 of Opinion on Motion for Partial Summary Judgment filed March 11, 1975).

In addition, as noted above, Papercraft failed to follow up the offer of Kraftco (through an intermediary) at $25.5 million, and the offer from Borden at $20 million, and the offer at $13 million by West Bend Company, a division of Dart Industries, Inc., and an offer of $15 million made by Wyomissing Corporation. In other instances, Papercraft rejected offers without indicating any willingness to reduce their asking price of $29 million. Undoubtedly, one of the effects of the artificially high price in the face of market resistance, was the discouraging of medium and small prospective inquirers. This effect was brought to Papercraft's attention as early as December 19, 1973 by the FTC staff member who wrote to Papercraft's attorneys that there was some disappointment that its efforts had focused only on "very large, broad based consumer products companies". (Govt. Exhibit 33). Furthermore, the FTC on March 1, 1974, pointed out to Papercraft that its use of the terms "selling price" and its statement that the price was to be "payable in cash", represented an inflexible position which was unacceptable "in that it tends to preclude interest and does not comport with the duty of respondent to accomplish the divestiture which is already overdue." (Govt. Exhibit 34).

It thus becomes apparent from the entire record before us that it was Papercraft's failure to realistically approach the subject of divestiture, and to take the necessary steps therefor within the six month period provided by the FTC Order, that gave rise to the necessity of the instant proceedings.

[425] Papercraft had the unconditional obligation to divest within six months, or as an alternative it could have used a spinoff to its shareholders as contemplated by Paragraph III of the FTC Order. However, Papercraft, deliberately disregarded the spinoff alternative, and devoted all of its attention to the sale to an acquirer. It was not until January of 1974, after the December 16, 1973 Divestiture Order deadline, that Papercraft initiated any substantial divestiture efforts. Had Papercraft, in the first six months after the effective date of the FTC Order, not persisted in its limited approach to large prospects, and its insistence on the avoidance of advertising, it seems possible that divestiture would have been entirely possible within the established time limitations. This possibility is evidenced by the fact that within six months from the first advertisement of CPS on January 8, 1974, Dart Industries, Inc., on June 28, 1974, made a substantial offer of $13 million. This offer was made despite the deterrent effect of Papercraft's price inflexibility. Its acceptance within the six month period would have provided the FTC with an opportunity to appraise Dart's qualifications as an acquirer. Wyomissing Corporation made its inquiry at $15 million on June 5, 1974, and this inquiry was quickly rejected. This establishes that Papercraft could have presented a divestiture proposal within the six month period prescribed by the FTC Order.

On the issue of good faith, it is apparent that Papercraft did not exercise that good faith which the Order required.

II. The Injury To The Public

[3] It is the major premise of the anti-trust laws that reduction of competition through illegal mergers is injurious to the public. Under the FTC's Opinion of June 30, 1971, it stated that Papercraft's acquisition of CPS affected or would probably affect competition in the following ways:

> ### V. Injury to Competition
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> The acquisition involved in this proceeding is so far outside the pale of permissible combinations that, even if we accepted respondent's efforts to expand the universe figure to double or more the figure we believe to be reasonably correct and to place the two firms in question in separate "submarkets" of the overall gift-wrap field, we would still be constrained to enter an order restoring this acquired firm to its former status as a separate full-line gift-wrap producer. No matter how the product markets (or submarkets) might be defined, the facts still would remain, as noted, that the 1st and 2nd largest gift-wrap manufacturers have been combined into one; that the combination thus created is more than twice the size of the next-

> largest competitor; that those two firms were the most likely entrants into all aspects of gift-wrap production; that the number of significant firms in the industry has been decreasing; that the trade expects this trend to continue, with only four significant firms ultimately remaining in the industry; and that there is no prospect for any new firms to enter the industry in the future. The case law simply does not sanction acquisitions of this kind. (citations omitted). [Govt. Exhibit 21 at p. 16]. (footnote omitted).

As previously noted, as long as Papercraft holds CPS, it benefits by an average profit of better than $5,000 a day. As discussed in the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) (at p. 317):

> [Competition is valued] . . . (1) because the actual level of prices in competitive markets should in the short run more accurately reflect the influence of demand and of cost, and thus in the long run help guide the flow of capital and other resources toward the most productive possible uses; (2) because the goad of compe[426]tition provides powerful and pervasive incentives for product innovations and product development, and for long-run cost reduction, both through improved technology and improved management; . . . (3) because competitive conditions in business should lead to an equitable diffusion of the resulting real income among consumers and factors of production; and (4) . . . because the more flexible prices of competitive markets should make it easier and cheaper for the economy to adjust to industrial fluctuations. . . .

It is, therefore, apparent that to the extent that Papercraft profits from the retention of a lucrative subsidiary, it and other respondents in divestiture cases will be encouraged to delay divestiture ordered by the FTC. It is also apparent that civil penalties must take into account the extent to which the public has been harmed through the repression of competition and the profit which Papercraft has received is an indication of this harm.

IV. Papercraft's Ability To Pay

It is noted in the District Court Opinion in *United States* v. *J. B. Williams Company, Inc.*, 354 F.Supp. 521, 548 (S.D.N.Y.1973) (at p. 548):

> The court believes it appropriate to consider the financial ability of defendants to pay the penalties demanded by the Government in Section 5(*l*) actions. While imposition of maximum penalties against a large corporation may amount to little more than a slap on the wrist, the same penalties may throw a small enterprise out of business. The severity of the sanction imposed necessarily depends on the ability of each particular defendant to pay whatever fines are assessed.

In the instant case, it is noted that CPS has earned $1,002,294 on sales of $20,739,017 in 1974. (Govt. Exhibit CR-20 at 4573). In addition, the Wall Street Journal reported on March 7, 1975 that Papercraft has earned $5.3 million in 1974 on sales of $82.8 million. There is a present ability to pay even to the maximum, penalties of $10,000 per day as set by the Act.

V. The Penalty To Be Applied

In the present action, the Government seeks penalties of $10,000 a day for Papercraft's "continuing failure or neglect to obey". The statute makes each day of such failure or neglect to divest under a final order a separate violation. The Defendant Papercraft took the position that in an action for civil penalties, only $5,000 a day could be assessed on an alleged violation of Section 7 of the Clayton Act, as amended. But this assertion is in error as we have noted hereinabove.

[4] However, before coming to a conclusion as to the amount of the penalty to be assessed, we must first determine the time involved. Papercraft argues that no penalties may be assessed prior to March 29, 1974, the date that it claims it first received notice of finalization of the FTC Order. But this assertion is without merit because the Order is perfectly clear that divestiture was required by December 16, 1973. Penalties must, therefore, be assessed from that date. This point was recently stressed by the Eighth Circuit in the following comments which appear in *United States* v. *Beatrice Foods, Co., supra*, (at pp. 1265, 1266-1267, 1269):

> Beatrice argues that *no* penalty could be imposed before the FTC gave notice that Beatrice's conduct was in violation of the cease and desist order. Assessment of penalties for conduct occurring before such notice would, according to Beatrice, violate due process.
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> * * * * * * *
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> We are thus satisfied that no notice is required under the statutes. How[427]ever, this does not resolve the constitutional challenge to the imposition of penalties before notice of violation is given. As indicated Beatrice asserts that notice was not given until the complaint was filed. On the other hand, the government's position is that the cease and desist order itself gives sufficient notice of what conduct is proscribed.
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> * * * * * * *
>
> We think the basic question necessarily turns on whether the order itself is sufficiently clear to place Beatrice on notice of the prohibited conduct. . . . Our examination satisfies us that the FTC decree . . . was in fact sufficiently precise in terminology to place Beatrice on notice of its wrongful action in its transactions with Maple Island Dairies. . . .

Thus, in each civil penalty case in which the "notice" argument was raised, the Court has flatly rejected it. *United States* v. *J. B. Williams Company, Inc., supra; Federal Trade Commission* v. *Consolidated Foods Company*, 1972—2 Trade Cas. ¶ 75,431 (S.D.N.Y.1974); *United States* v. *Swingline, Inc.*, 371 F.Supp. 37, 45 (E.D.N.Y.1974).

This Court, therefore, holds that the civil penalty in this case is to be assessed beginning with December 17, 1973, and running through the date of this Order.

[5] This Court has carefully considered the teachings of *Beatrice Foods* (a penalty of $200 a day), and many other cases as set forth in *United States* v. *Swingline, Inc., supra,* at p. 46 (fixing penalties at various amounts, less than $10,000 a day). In considering Papercraft's financial ability to pay, and the harm caused by the delay, the degree of bad faith, and the benefit received by Papercraft, we do not think that the penalty assessed should be the maximum, however, it must be large enough to deter Papercraft and anyone else in the future from showing as little concern as Papercraft did for the need to meet the FTC timetable.

A penalty of $7,500 a day is determined to represent a fair consideration of all of the factors involved, for a total of $3,817,500.

INJUNCTION

[6] In addition to the civil penalties, injunctive relief for violations of FTC Orders is provided by Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*):

> The United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of final orders of the Commission.

A consideration of the evidence presented in this case requires a careful balancing of the urgency of prompt compliance with the practicalities of developing a realistic plan for divestiture. After consideration of the details of many offers made to Papercraft, the extensive interest shown by many substantial corporations, and the results received from public advertising, it is the opinion of this Court that Papercraft must be required to submit a divestiture plan subject to approval by the FTC. It is further the opinion of the Court that such a plan can be developed for submission within sixty (60) days from the date of this Opinion and Order, and it will be so ordered.

The foregoing constitutes the Court's Findings of Fact and Conclusions of Law as required by Rule 52(a) of the Federal Rules of Civil Procedure.

An appropriate Order will be entered.

F.T.C. v. NATIONAL COMMISSION ON EGG NUTRITION*

No. 74-2043. F.T.C. Docket No. 8987.

(United States Court of Appeals, Seventh Circuit, May 15, 1975)

1. NONPROFIT CORPORATION PROMOTING INTEREST IN EGG INDUSTRY FALLS WITHIN F.T.C. JURISDICTION.

Not-for-profit corporation which was organized to promote the general interests of the egg industry came within the jurisdiction of the Federal Trade Commission.

2. STATEMENTS, BOTH PUBLISHED AND BROADCAST, MADE IN AN EFFORT TO ALLAY FEARS CONCERNING EGGS AND HIGH CHOLESTEROL, WERE "ADVERTISEMENT" UNDER F.T.C. ACT.

Published and broadcast statements, which were sponsored by not-for-profit corporation composed of representatives of various associations of egg producers and which were designed to allay fears of the public concerning relationship between consumption of eggs and high cholesterol were "advertisements" within Federal Trade Commission Act, as they were representations concerning the qualities of a product and promoting its purchase and use.

3. CONGRESS INDICATED INTENTION OF CONSIDERATION OF EQUITIES AND FTC'S LIKELIHOOD OF SUCCESS ONLY WHERE F.T.C. SEEKS INJUNCTION UNDER ITS GENERAL AUTHORITY NOT BECAUSE IT BELIEVES RESPONDENT IS DISSEMINATING MISLEADING ADVERTISING.

Congress has indicated an intention that considerations of equities and Federal Trade Commission's likelihood of ultimate success be applied only where Commission seeks to act under its general grant of authority to seek injunctions and not to those situations in which injunction is sought because Commission has reason to believe that corporation is engaged in disseminating misleading advertising intended to induce the purchase of items of food.

4. F.T.C. WAS ENTITLED TO TEMPORARY INJUNCTION WHERE IT DEMONSTRATED REASON TO BELIEVE THAT ADVERTISEMENTS WERE MATERIALLY MISLEADING AND WHERE IT SHOWED INJUNCTION WOULD BE IN THE PUBLIC INTEREST.

Where Federal Trade Commission demonstrated that it had reason to believe that advertisements sponsored by not-for-profit corporation composed of egg producer associations were materially misleading concerning relationship between egg consumption and cholesterol and where FTC showed that it believed that an injunction would be in the best interest of the public, FTC was entitled to temporary injunction against the advertisements without consideration of balance of equities or likelihood of ultimate success of the FTC.

5. IF GOVERNMENT SELECTIVELY SEEKS PROHIBITION OF ADVERTISEMENTS BECAUSE OF ESPOUSAL OF ONE SIDE OF GENUINE CONTROVERSY, FIRST AMENDMENT IS NOT WHOLLY IRRELEVANT.

First Amendment is not wholly irrelevant if government selectively seeks to prohibit commercial advertisements because they espouse one side of a genuine controversy.

6. TEMPORARY INJUNCTION DID NOT VIOLATE FIRST AMENDMENT RIGHTS OF RESPONDENT WHERE RESPONDENT DISSEMINATED FALSE OR MISLEADING ADVERTISING;

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*Reported in 517 F. 2d 485 (1975); *rehearing denied* June 17, 1975; *cert. denied* 426 U.S. 919 (1976). For case before the Commission, see 88 F.T.C. 89. See also p. 1109 herein.

THERE IS NO CONSTITUTIONAL RIGHT TO DISSEMINATE FALSE OR MISLEADING ADVERTISEMENTS.

Issuance of temporary injunction against continued advertisements, sponsored by not-for-profit corporation composed of egg producer associations, which espoused one side of controversy concerning relationship between egg consumption, cholesterol, and heart attacks, and which made statements denying the existence of scientific evidence contrary to its view, although such evidence clearly existed, did not violate First Amendment; there is no constitutional right to [487] disseminate false or misleading advertisements.

7. **RESPONDENT WAS NOT PROHIBITED FROM STATING THAT THERE IS SCIENTIFIC EVIDENCE SUPPORTING THEORY THAT DIETARY CHOLESTEROL INTAKE IS NOT HARMFUL PROVIDED IT ALSO STATES THAT THERE IS SUBSTANTIAL CONTRARY EVIDENCE.**

Temporary injunction against continuation of advertisements, which were sponsored by not-for-profit corporation formed by egg producer associations and which made misleading statements concerning relationship between egg consumption and cholesterol, should not go so far as to prohibit the association from making a fair presentation of its side of the controversy so long as it did not state that there was no scientific evidence relating egg consumption and cholesterol; association was entitled to state that there was scientific evidence supporting the theory that dietary cholesterol intake is not harmful provided that it also stated that there was substantial contrary evidence.

8. **EVEN THOUGH EVIDENCE IN THE FORM OF RECENT ADVERTISING WAS NOT BEFORE THE DISTRICT COURT, APPELLATE COURT GRANTS MOTION FOR LEAVE TO SUPPLEMENT THE RECORD BECAUSE THE RECENT ADVERTISING BEARS ON NATURE OF PROVISIONS TO BE INCLUDED IN THE INJUNCTION.**

Where Court of Appeals was framing temporary injunction against misleading advertisements and where recent advertising bore on the nature of the provisions which should be included in that injunction, Court would grant motion for leave to supplement the record with copies of the advertisements published by advertiser shortly before and after all argument in the Court of Appeals, even though the evidence was not before the district court.

(Syllabus, with substituted captions taken from 517 F.2d 485.)

On motion for appeal from district court denial of injunctive relief, appellate court held that (1) nonprofit corporation fell under F.T.C. jurisdiction; (2) statements disseminated were advertisements and were misleading; (3) where advertisements were misleading and dealt with food, court was not required to balance equities or consider likelihood of success; and (4) injunction did not violate First Amendment rights.

Reversed and remanded with directions.

FAIRCHILD, *Chief Judge*, concurred and filed an opinion.

Calvin J. Collier and *Karl H. Buschmann*, F.T.C., Washington, D.C., *James R. Thompson*, U.S. Atty., and *Gary L. Starkman*, Asst. U.S. Atty., Chicago, Ill., for petitioner-appellant.

James L. Fox, Chicago, Ill., for respondent-appellee.

Before FAIRCHILD, *Chief Judge*, and CUMMINGS and TONE, *Circuit Judges*.

TONE, *Circuit Judge*.

The National Commission on Egg Nutrition (NCEN), a private, not-for-profit corporation composed of representatives of various associations of egg producers throughout the United States, has caused to be published and broadcast statements, in the form of paid advertisements, representing in substance that there is no scientific evidence that eating eggs increases the risk of heart disease or a heart attack. The Federal Trade Commission filed an administrative complaint against NCEN alleging that these statements were false and in violation of sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52, and sought from the District Court a temporary injunction under section 13(a) of the Act, 15 U.S.C. § 53(a), restraining the continuation of the advertising pending completion of the administrative proceeding. Before the District Court, the Commission offered substantial evidence that there is a medical controversy about the subject and considerable expert opinion based on experimental evidence showing a correlation, and possibly a causal connection, between high levels of dietary cholesterol resulting from eating eggs and other foods with a high cholesterol content and increased risk of heart disease. The District Court held that it had jurisdiction notwithstanding NCEN's claim that it was not subject to the Act, but denied the application on the ground that the equitable conditions required for issuance of an injunction under section 13(a) of the Act, 15 U.S.C. § 53(a), had not been met. We reverse that court's order and direct that an injunction be entered.

I.

[1,2] We agree with the District Court that the Commission had jurisdiction over NCEN and the statements in question. Although NCEN is a non-profit corporation, it was formed to promote "the general interests of the egg industry," according to its articles of incorporation and bylaws. Thus, it comes [488] within the scope of section 4 of the Act, 15 U.S.C. § 44, which defines "corporation" as "any company . . . which is organized to carry on business for its own profit or that of its members . . . ." See *Community Blood Bank of Kansas City Area, Inc.* v. *F.T.C.*, 405 F.2d 1011 (8th Cir. 1969), where the court interpreted the legislative history of this section, stating:

> . . . Congress did not intend to provide a blanket exclusion of all nonprofit corporations, for it was also aware that corporations ostensibly organized not-for-profit, such as trade associations, were merely vehicles through which a pecuniary profit could be realized for themselves or their members. 405 F.2d at 1017.

In holding that the Blood Bank was a solely charitable enterprise, the Eighth Circuit distinguished the line of cases following *F.T.C.* v. *Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948), and

Fashion Originators' Guild of America v. *F.T.C.*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941), explaining:

> It is evident, however, that the organizations in the above cases were designed to and did in fact bring together firms having common business concerns and such organizations or their members derived a profit over and above the ability to perpetuate or maintain their existence. 405 F.2d at 1019.

See also *National Harness Mfrs.' Ass'n* v. *F.T.C.*, 268 F. 705 (6th Cir. 1920). In the instant case, there is sufficient evidence to support the District Court's finding that NCEN was organized for the profit of the egg industry, even though it pursues that profit indirectly. The clear purpose of the statements in issue in this case is to encourage the consumption of eggs by allaying fears the public may have about their high cholesterol content. Also, given the nature of the pronouncements in question, the District Court could properly conclude that they were advertisements within the meaning of that term as used in the Act, because they were representations concerning the qualities of a product and promoting its purchase and use. See *Koch* v. *F.T.C.*, 206 F.2d 311, 317-318 (6th Cir. 1953); compare *Scientific Mfg. Co.* v. *F.T.C.*, 124 F.2d 640, 643-645 (3rd Cir. 1941).

II.

As the District Court recognized, the Commission invoked section 13(a) as the basis for the issuance of a temporary injunction. We now turn, therefore, to the showing the Commission must make in order to receive injunctive relief under that subsection.

Section 13 of the Act consists of two different grants of authority to the Commission to seek injunctions against violations of the Act. Section 13(a) provides in substance that "[w]henever the Commission has reason to believe" that a corporation is engaged in dissemination of materially misleading advertising intended to induce the purchase of items of food, in violation of section 12 of the Act, and further has reason to believe that enjoining that conduct "would be to the interest of the public," the Commission is authorized to bring suit in a federal district court for injunctive relief, and "[u]pon [a] proper showing a temporary injunction . . . shall be granted . . . ." By contrast, section 13(b) is a general grant of authority to seek injunctions "[w]henever the Commission has reason to believe . . . that any . . . corporation . . . is violating . . . any provision of law enforced by the Federal Trade Commission," and provides that "[u]pon a proper showing that, *weighing the equities and considering the Commission's likelihood of ultimate success*, such action would be in the public interest, . . . a preliminary injunction may be granted." (Emphasis added.)

[3] Congress added subsection (b) in 1973, leaving subsection (a) unchanged. By providing the traditional equity standards italicized in

the above quota[489]tion and the permissive "may" in (b), while leaving (a) without those standards and with its peremptory "shall," Congress indicated an intention that those standards be applied in proceedings under (b) but not in those under (a), and no intention that the judicial interpretations of (a) should be affected by the amendment. This inference is not refuted by the somewhat ambiguous legislative history of the amendment. Accordingly, our decision in *F.T.C.* v. *Rhodes Pharmacal Co.*, 191 F.2d 744 (7th Cir. 1951), remains the law and is controlling in this case. We there held that the following standard was applicable under subsection (a):

> . . . all the Commission had to show was a justifiable basis for believing, derived from reasonable inquiry or other credible information, that such a state of facts probably existed as reasonably would lead the Commission to believe that the defendants were engaged in the dissemination of false advertisements . . . in violation of the Act . . . . This is to say, in the instant case, the court had only to resolve the narrow issue of whether there was "reasonable cause" to believe that the alleged violation had taken place. 191 F.2d at 747-748.

[4] Under this standard, the Commission in the case at bar was entitled to temporary injunctive relief against NCEN's advertising statements to the effect that there was "no scientific evidence" of any relationship between dietary cholesterol intake resulting from eating eggs and increased risk of heart disease. The District Court explicitly found that the Commission had demonstrated that it had reason to believe NCEN's advertisements to be materially misleading. The Commission also showed that it believed an injunction would be in the best interest of the public, a statement which the District Court credited to the extent that more people were likely to be misled if the pronouncements were permitted to continue. It was error for the District Court to go further than the statutory requirements, which had been satisfied according to *Rhodes*, by requiring the Commission to justify its request for an injunction on the basis of a balancing of the equities and the likelihood of ultimate success, the traditional equity standards prescribed in subsection (b).

III.

[5,6] NCEN argues that the issuance of an injunction would at least raise a serious First Amendment question. As Chief Judge Fairchild's concurring opinion suggests, the First Amendment is not "wholly irrelevant if government selectively seeks to prohibit commercial advertising because it espoused one side of a genuine controversy." Cf. *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S. 376, 384-389, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973); *Barrick Realty, Inc.* v. *City of Gary*, 491 F.2d 161, 163-164 (7th Cir. 1974); compare *Breard* v. *Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951). NCEN has done more than espouse one side of a genuine controversy, however. It

has made statements denying the existence of scientific evidence which the record clearly shows does exist. These statements are, therefore, false and misleading. "There is no constitutional right to disseminate false or misleading advertisements." *E. F. Drew & Co.* v. *F.T.C.*, 235 F.2d 735, 740 (2d Cir. 1956). The First Amendment problem suggested above is therefore not before us.

IV.

[7,8] Regardless of the reach of the First Amendment in this area, we think the injunction should not go so far as to prohibit NCEN from making a fair presentation of its side of the controversy. NCEN should, as the Commission contends, be enjoined from disseminating in commerce or by mail advertising containing statements to the effect that there is no scientific evidence that increased intake of dietary cholesterol resulting from eating eggs increases the [490] risk of heart disease or attendant or related conditions or other statements tending to misrepresent the state of scientific evidence on the subject in question. The injunction should not, however, prohibit NCEN from stating that there is scientific evidence supporting the theory that dietary cholesterol intake is not harmful, or from describing that evidence, provided that it also states that there is substantial contrary evidence.

In order to avoid further delay, we are directing that an injunction in the form appearing in the Appendix to this opinion* be entered by the District Court on remand.

Reversed and remanded with directions.

FAIRCHILD, *Chief Judge* (concurring).

The material involved consists of statements of position with respect to a controversial issue. It is deemed advertising because its dissemination is caused by those whose profit interests are served by the view espoused.

We are in an area of difficulty in considering whether and to what extent the First Amendment protects such material. It is clear that "purely commercial advertising" is treated differently from other communication of information and opinion in terms of applicability of the First Amendment. *Valentine* v. *Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942). Compare, *Pittsburgh Press Co.* v. *Human Rel. Comm'n.*, 413 U.S. 376, 384, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973) with *New York Times* v. *Sullivan*, 376 U.S. 254, 266, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). See also, *Breard* v. *Alexandria*, 341 U.S. 622, 71

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* NCEN has moved for leave to supplement the record with copies of advertisements published by it shortly before and after the oral argument in this court. While we would ordinarily not consider evidence that was not before the District Court, we grant the motion, because we are framing the temporary injunction, and the recent advertising bears on the nature of the provisions that should be included in that injunction.

S.Ct. 920, 95 L.Ed. 1233 (1951). I question whether the cases mean that the First Amendment is wholly irrelevant if government selectively seeks to prohibit commercial advertising because it espoused one side of a genuine controversy.

Mr. Justice Brennan has recently observed:

> . . . while it is possible that commercial advertising may be accorded *less* First Amendment protection than speech concerning political and social issues of public importance, compare *Valentine* v. *Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942), with *Schneider* v. *State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), and *Breard* v. *City of Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951), with *Martin* v. *City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), it is "speech" nonetheless, often communicating information and ideas found by many persons to be controversial. *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 314, 94 S.Ct. 2714, 2723, 41 L.Ed.2d 770 (Brennan, J., dissenting) (Emphasis in original, footnote omitted).

Like political speech, the purveyor of a commercial advertisement has an interest in expression, and the mere fact that government seeks to regulate advertising bespeaks the interest the recipients have in receiving the message. See Note, Freedom of Expression in a Commercial Context, 78 Harv.L.Rev. 1191 (1965). Most importantly, society, as a whole, has a substantial interest in the free interplay of opinion when an advertisement addresses a matter of current public debate.

When we are dealing with a genuine controversy, I do not think that mere reason to believe that a statement is false or misleading is a sufficient basis for an injunction. I conclude that the First Amendment at least requires a higher standard. I can, however, concur in ordering a limited injunction in this [491] case because I consider that it has been demonstrated that the particular statements enjoined are misleading.

APPENDIX

INJUNCTION ORDER

Petitioner, the Federal Trade Commission, having invoked the authority of this court pursuant to 15 U.S.C. § 53(a) for the purpose of temporarily enjoining the respondent from disseminating advertisements which the Commission has reason to believe violate section 12 of the Federal Trade Commission Act, 15 U.S.C. § 52; the court hereby finds as follows:

The court has jurisdiction over the subject matter and the respondent.

Eggs are a "food" as defined by 15 U.S.C. § 55(b).

The Federal Trade Commission has made a proper showing that it has reason to believe that the respondent's advertisements for eggs which have been disseminated in commerce or through the United States mails were false in violation of 15 U.S.C. § 52.

The Federal Trade Commission has made a proper showing that the issuance of a temporary injunction against respondent's continued dissemination of advertisements which the Commission had reason to believe were false, pending completion of its administrative proceeding with respect to respondent, would be in the public interest.

It is therefore ordered that respondent, National Commission on Egg Nutrition, is forthwith enjoined from disseminating or causing the dissemination of any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that there is no scientific evidence that consuming eggs, even in large quantities, increases the risk of heart attacks, heart or artery disease, or any attendant condition;
2. Represents the insignificance of the available scientific evidence that the consumption of eggs may increase the risk of heart attacks, heart or artery disease, or any attendant condition, or represents that there is overwhelming scientific evidence or otherwise misrepresents the amount of scientific evidence, if any, that eating eggs does not increase the risk of heart attacks, heart or artery disease, or any attendant condition;
3. Represents that there exists, or describes, scientific evidence which supports the theory that eating eggs does not increase or in any way decreases the risk of heart attacks, heart or artery disease, or attendant conditions, unless such representation is accompanied by a statement that this theory and its supporting evidence are the subject of considerable scientific controversy, and there is much evidence to the contrary.

It is further ordered that respondent shall:

Distribute or mail a copy of this order, within 30 days from the date of this order, to each of its members and to all persons, corporations, associations or other entities to which it has provided advertising materials for publication or republication and which contain any of the claims which respondent is enjoined by this order from making;

Furnish petitioner, within 30 days from the date of this order, with a list of all members, persons, corporations or other entities to whom it has furnished copies of this order as required above; and

Notify the Commission at least 30 days prior to any proposed change in NCEN, such as dissolution, emergence of a successor corporation, or any other change in the corporation which may affect compliance with obligations arising out of this order.

This order shall continue in effect until the pending complaint against respondent by petitioner Federal Trade Commission (F.T.C. Docket No. 8987) is either dismissed by petitioner or until a [492] final order issued by petitioner against respondent in that matter becomes final as defined by section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, unless sooner vacated or modified by this court.

FEDERAL TRADE COMMISSION v. GLEN E. JORGENSEN and C.I.T. FINANCIAL CORPORATION*

Misc. No. 75-46. F.T.C. File No. 99-226.

(United States District Court for the District of Columbia, May 15, 1975)

Memorandum-Order

This matter is before the Court on the Federal Trade Commission's petition for an order requiring respondents: 1) to appear, testify and produce records and documentary evidence and 2) to provide petitioner access to specified files located at particular places. The Federal Trade Commission (FTC) seeks this order pursuant to its own subpoena duces tecum and order requiring access issued in the course of an FTC nonpublic investigation.[1] The respondents have filed an answer to the petition and have also moved for summary judgment.[2]

Respondents contend first that the FTC is here seeking to exceed its lawful powers. The administrative orders herein were issued pursuant to an investigation under the so-called Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.* It is undisputed that the FTC is the agency charged with overall enforcement of the Act. 15 U.S.C. § 1607(c). It is also undisputed that the Board of Governors of the Federal Reserve

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* Not otherwise reported.

[1] The subpoena and order requiring access were issued pursuant to the authority of the FTC under the Truth-in-Lending Act, 15 U.S.C. §§ 1601, 1607. The FTC resolution authorizing the subpoena stated the nature and scope of the investigation to be as follows:

> To determine whether certain unnamed direct loan finance companies may be engaged in violation of the Truth in Lending Act and whether they may be engaged in unfair and deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act including misrepresenting whether credit insurance is in truth and in fact voluntarily purchased by consumers.

Resolution Directing Use of Compulsory Process in Nonpublic Investigation, FTC File No. 712 3064 (filed July 23, 1974).

The subpoena required production of records regarding extension of consumer credit by C.I.T. Financial Corp. and its subsidiaries. Requested were articles of incorporation, annual reports, books and records of 1973 transactions, manuals and other materials in use in October and November, 1973, giving instructions to employees in such transactions, a list of names and addresses of customers who requested cancellation of insurance from January 1, 1973, to August 1, 1974, and a list of certain former employees of C.I.T. Financial Corp. and its subsidiaries. The access order required C.I.T. Financial Services Co. to make available the individual files containing personal loan contracts entered into during the period October-December, 1973.

[2] That motion is filed pursuant to the claim of respondents that the FTC is not entitled to seek a summary proceeding in this Court. Instead, say respondents, a full plenary proceeding must be had with complaint, answer and opportunity for discovery. This view is without merit. A summary proceeding suffices. *United States* v. *Bell*, 448 F.2d 40 (9th Cir. 1971); *United States* v. *Gajewski*, 419 F.2d 1088 (8th Cir. 1969), *cert. denied* 397 U.S. 1040 (1970); *Venn* v. *United States*, 400 F.2d 207 (5th Cir. 1968); *Wild* v. *United States*, 362 F.2d 206 (9th Cir. 1966); *McGarry's, Inc.* v. *Rose*, 344 F.2d 416 (1st Cir. 1965); *United States* v. *Associated Merchand. Corp.*, 256 F. Supp. 318 (S.D.N.Y. 1966); *FTC* v. *Sherry*, ¶ 72,906 [1969] *Trade Cases* at 87,453-55 (D.D.C. 1969); *FTC* v. *Gallo*, ¶ 74,740 [1973-2] *Trade Cases* at 95,242-43 (D.D.C. 1973). *Accord Donaldson* v. *United States*, 400 U.S. 517, 529 (1971).

System (the Board) is the sole agency empowered to prescribe regulations to carry out the purposes of the Act. 15 U.S.C. § 1605. Respondents contend that the FTC is attempting to make regulations under the Act and that it is without power to do so.[3]

Pursuant to its powers under the Act, the Board has issued certain regulations, including one known as "Regulation Z." 12 C.F.R. § 226.1 *et seq*. That regulation states that the charges for credit insurance shall be deemed to be part of the finance charge unless: 1) the insurance is not required by the creditor and this fact is clearly disclosed in writing to the consumer; 2) any consumer requesting coverage gives specific dated and signed affirmative written indication thereof after written disclosure of the cost of the insurance.[4] Respondents contend that their loan contract forms clearly meet the terms of Regulation Z and that no more may be required of them. According to respondents, any FTC inquiry seeking to explore company practices in regard to the utilization of the form[5] would impose a requirement beyond the scope of Regulation Z. Respondents contend that this would permit the FTC to create "ad hoc regulations," something which is assertedly beyond the FTC's powers. The argument of respondents is not persuasive. Regulation Z would be meaningless indeed if its requirements could be met in form and ignored or overridden in practice. An inquiry into actual practice is therefore appropriate.

Respondents also contend that the FTC investigatory resolution, authorizing compulsory process is vague and indefinite and fails to indicate the scope of inquiry. Mere official curiosity or desire to determine whether the law is being violated is enough to justify use of a subpoena.[6] The subpoena is enforceable if the inquiry is within agency authority, the demand is not too indefinite and the information sought is reasonably relevant.[7] Since, as has been seen, the FTC is responsible for overall enforcement of the Truth-in-Lending Act, the inquiry is within agency authority. The demand is quite specific and the items sought are reasonably relevant. The Court thinks that the FTC investigatory resolution, quoted *supra*,[8] sufficiently states the nature and scope of the investigation.[9]

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[3] At first respondents contended that the FTC sought to issue actual and explicit regulations in this matter. It relied essentially on certain press releases which indicated that a new rule might eventually result from this investigation. This, of course, might mean no more than that FTC intended to use its investigative results to persuade the Board to issue a new regulation. The FTC disclaims any intention whatsoever to issue its own regulations, an action which would concededly be beyond its power. Perhaps recognizing its inherent weakness, respondents largely abandoned this argument at the hearing of this matter.

[4] 12 C.F.R. § 226.4.

[5] It is the intention of the FTC to examine the *practices* of respondents in connection with the sale of credit insurance in consumer loan transactions. *See* Memorandum In Support of Petition for Order at 10 (filed herein on April 3, 1975).

[6] *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186 (1946).

[7] *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950).

[8] *See supra*, note 1.

Finally, respondents contend that the instant subpoena and order are unduly burdensome and unnecessary since they are allegedly duplicative of a prior subpoena issued in 1973. That earlier subpoena apparently resulted in the turning over of some 20,000 documents by respondents to FTC. Moreover, respondents contend that the instant subpoena violates an agreement between them and the FTC regarding how much documentation they would be required to produce. The FTC has taken a number of steps to insure, so far as it can, that respondents are not burdened with producing materials which have already been produced.[10] The FTC also asserts, and it is not seriously contravened, that the agreement between it and respondents related to another investigatory file altogether. In these circumstances, the Court does not find the instant subpoena or access order to be burdensome.

Accordingly, it is by the Court this 15th day of May, 1975,

ORDERED that respondents' motion for summary judgment be, and it is hereby, denied; and it is further

ORDERED that respondents Glen E. Jorgensen and C.I.T. Financial Corporation appear before a duly designated representative of petitioner at a time and place in the District of Columbia to be designated by petitioner upon not less than five (5) days' notice, and then and there to testify and produce books, papers and documents requested in the subpoena *duces tecum* issued by the FTC on August 5, 1974, as amended by the FTC's letter dated December 2, 1974, to counsel for C.I.T. Financial Corporation; and it is further

ORDERED that respondent C.I.T. Financial Corporation grant, at a time designated by petitioner upon not less than five (5) days' notice, access to duly authorized agents of the FTC at the places of business of its operating subsidiary, C.I.T. Financial Services Co., Inc., listed in the order requiring access issued by the FTC on July 23, 1974, for the purposes stated therein; and it is further

ORDERED that a certified copy of this Order be served forthwith upon respondents Glen E. Jorgensen and C.I.T. Financial Corporation by the United States Marshal.

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[9] *See Far East Confer.* v. *Federal Mar. Comm.*, 337 F.2d 146, 151 (D.C. Cir. 1964).

[10] Respondents have been advised that they need produce no documents previously produced. The scope of the specifications of both subpoena and access order have been altered to reduce possible overlap. *See* Memorandum of Points and Authorities in Support of Petition for an Order at 16-18.

FEDERAL TRADE COMMISSION v. CONSOLIDATED FOODS CORPORATION*

Civ. A. No. 74 Civ. 3094. F.T.C. Docket No. C-2454.

(United States District Court, Southern District of New York, May 21, 1975)

1. FINDING THAT RESPONDENT WAS IN VIOLATION OF F.T.C. ORDER OVER A 94 DAY PERIOD WAS NOT TANTAMOUNT TO FINDING RESPONDENT COMMITTING 94 SEPARATE VIOLATIONS.

Finding that corporation was in violation of Federal Trade Commission order between November 26, 1973 and March 1, 1974, made on Commission's motion for partial summary judgment in action to hold corporation in contempt for violation of order, was not tantamount to a finding that corporation was in violation of order for each of such 94 days, for purposes of assessing penalty against corporation under "continuing" violation provisions of Clayton Act and Federal Trade Commission Act.

2. SEPARATELY IDENTIFIABLE ACTS OF PRICE DISCRIMINATION NULLIFIED THE "CONTINUING" VIOLATION PROVISIONS OF THE F.T.C. AND CLAYTON ACTS.

"Continuing" violation provisions of Clayton Act and Federal Trade Commission Act were not applicable in determining penalties for violation of Commission order prohibiting price discrimination by means of illegal discounts in that granting of each illegal discount was wholly independent and separately identifiable act which ended as soon as specific transaction was consummated.

3. COURT WOULD, IN LIGHT OF CASE'S CIRCUMSTANCES, USE AFFIDAVITS INSTEAD OF HEARINGS TO TAKE JUDICIAL NOTICE OF A CONTINUING PATTERN OF VIOLATIONS NECESSITATING PENALTY ACTION.

Even though a hearing would ordinarily be necessary to determine how many separate violations defendant had committed of Federal Trade Commission order prohibiting price discrimination by means of illegal discounts and how much penalty to impose for each violation, in light of circumstances of case, court would not schedule such a hearing but, on basis of affidavits, would take judicial notice that there was a continuing pattern of violation which necessarily gave rise to sufficient number of individual incidents to justify a penalty.

4. RESPONDENT'S CONTENTION OF NEW COMPETITION WAS NOT A BASIS FOR MITIGATION OF PENALTIES.

Contention that corporation was faced not only with new competition from existing competitors but with new competitors offering new and lower prices to its customers after Federal Trade Commission order prohibiting corporation from engaging in price discrimination by use of illegal discounts had become final could not serve as basis for mitigating penalties to be imposed upon corporation for violations of order, where situations described by corporation, although new, did not involve circumstances different from those in existence prior to order.

5. WILFULNESS OF VIOLATION, GOOD OR BAD FAITH TO COMPLY WITH ORDER, PUBLIC HARM, RESPONDENT'S PROFIT FROM NON-COMPLIANCE AND ABILITY TO PAY PENALTIES ARE GROUNDS FOR DETERMINING AMOUNT OF PENALTY TO BE ASSESSED.

Amount of penalties to be assessed for violation of Federal Trade Commission order is to be determined by taking into account the willfulness of violation or the good or bad faith of defendant in meeting its obligation to comply with order, defendant's ability to pay penalties, degree of harm to public caused by defendant's failure to comply and extent to which defendant may have profited by failing or delaying to comply.

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* Reported in 396 F.Supp. 1353 (1975). See also, p. 1147 herein. For case before the Commission, see 83 F.T.C. 463.

6. NECESSITY OF VINDICATING COMMISSION'S AUTHORITY IS FACTOR TO CONSIDER IN ASSESSING PENALTIES.

Factor to be considered in determining penalty to be assessed for violation of Federal Trade Commission order is the necessity of vindicating the Commission's authority.

7. LACKING PLENARY POWER TO ENFORCE ITS ORDERS, F.T.C. MUST RELY ON FEDERAL DISTRICT COURTS.

Federal Trade Commission has no plenary power to enforce its own orders; thus, it must enlist aid of federal district courts for that purpose.

8. EVIDENCE ESTABLISHED RESPONDENT'S FAILURE TO COMPLY WITH ORDER WAS NOT WILLFUL OR IN BAD FAITH.

Evidence, in proceeding by Federal Trade Commission to determine penalties to be imposed for violation of order prohibiting price discrimination by use of illegal discounts, established that corporation's failure to comply with order was not willful or in bad faith.

9. DETERIORATING FINANCIAL CONDITION OF CORPORATION COULD BE CONSIDERED IN MITIGATION OF PENALTIES BUT DID NOT EXCUSE PAYMENT OF PENALTIES.

Fact that corporation which violated Federal Trade Commission order prohibiting price discrimination by use of illegal discounts was in deteriorating financial condition did not excuse corporation's payment of penalties for violation of order but could be considered in mitigation.

10. $25,000 MINIMUM PENALTY IMPOSED IN VINDICATION OF F.T.C.'S AUTHORITY.

Penalty of $25,000 should be imposed upon corporation which violated Federal Trade Commission order prohibiting price discrimination by use of illegal discounts, which did not act in bad faith in failing to comply with order, which was in deteriorating financial condition and which had not profited by noncompliance.

11. IN LIGHT OF LACK OF BAD FAITH, INJUNCTION COMMANDING OBEDIENCE WITH ORDER WAS NOT JUSTIFIED.

Injunction commanding corporation's obedience to Federal Trade Commission order prohibiting price discrimination by use of illegal discounts was not justified, in light of corporation's lack of bad faith in not complying with order and ongoing settlement negotiations between corporation and Commission.

(Syllabus, with substituted captions, taken from 396 F.Supp. 1353.)

On proceeding to assess penalties, court held "continuing" violation provisions were not applicable; financial deterioration did not excuse payment of penalties; $25,000 would be assessed in penalties; and injunction was unjustified considering ongoing settlement negotiations.

Injunction denied, judgment accordingly.

Joseph J. Gercke, Asst. Dir. for Compliance, Bureau of Competition, F.T.C., Washington, D.C. by *Salvatore F. Sangiorgi*, New York City, *R. Baylor Rowe*, Washington, D.C., of counsel, for plaintiff.

J. Wallace Adair, *Ray S. Bolze*, *Howrey, Simon, Baker & Murchison*, Washington, D.C., *George H. Colin*, *Baer & Marks*, New York City, for defendant.

Before WHITMAN KNAPP, *District Judge*.

Memorandum and Order

[1355] On December 16, 1974, this Court on plaintiff's motion for partial summary judgment found defendant "to have been in violation of the [Federal Trade Commission] order between November 26, 1973 and March 1, 1974." 396 F.Supp. 1344 at 1352 (S.D.N.Y.1974). Having determined liability, the issue of penalties remains. Plaintiff seeks civil penalties of at least $250,000 and an injunction commanding obedience to its Order. Defendant has requested a hearing on the issue, at which it proposes to demonstrate that only nominal penalties in the amount of $1.00 should be assessed and that no injunction is warranted.

The applicable statutes[1] entrust to the Court's discretion—within the upper limit of $5,000 for each violation[2]—the amount of the civil penalties to be imposed for noncompliance with final FTC orders. *United States* v. *Ancorp National Services, Inc.* (2d Cir. 1975) 516 F.2d 198, at 202; *United States* v. *J. B. Williams Company, Inc.* (2d Cir. 1974) 498 F.2d 414, 438. Section 11(*l*) of the Clayton Act, 15 U.S.C. § 21(*l*), provides as follows:

> Any person who violates any order issued by the commission or board under subsection (b) after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense.

[1,2] It is the plaintiff's position that substantial penalties are warranted by defendant's alleged "continuing failure or neglect to obey" its final order. It argues that this Court's finding—on the motion for partial summary judgment—that defendant was "in violation of the order between November 26, 1973 and March 1, 1974" was tantamount to a finding that defendant was in violation of the order for each of the 94 days of [1356] that time period.[3] Such was not our intention. Our focus on the motion for summary judgment was on whether there was any question of fact as to whether defendants had taken necessary steps to comply between November 1, 1973 and March 1, 1974, whereas now we must determine how many specific violations were committed. Moreover, the very language of the "continuing" violation provision and the interpretation given thereto by the courts preclude its application to the facts of this case. As the Supreme Court recently observed in *United States* v. *ITT Continental Baking Co.* (1975) 420 U.S. 223, 95 S.Ct. 926, 43 L.Ed.2d 148, this provision

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[1] 15 U.S.C. §§ 21(*l*) and 45(*l*).

[2] Section 5(*l*) of the Federal Trade Commission Act [15 U.S.C. § 45(*l*)] was amended as of November 16, 1973—ten days before the FTC order in the instant case became final—to enlarge the maximum penalty from $5,000 to $10,000 per violation. Plaintiff, however, has elected to proceed under the old $5,000 provision.

[3] If this were true, defendant would be liable for a maximum of $470,000.

> . . . intended to assure that the penalty provisions would provide a meaningful deterrence against violations whose *effect* is continuing and whose detrimental *effect* could be terminated or minimized by the violator at some time after initiating the violation. (emphasis in original)

As examples of behavior intended to be covered by this provision, the court listed continuing conspiracies to fix prices or control production, maintenance of a billboard in defiance of an order prohibiting false advertising, failure to dissolve an unlawful merger, failure to eliminate an interlocking directorate and the acquisition of assets of other companies in violation of an order. *Id.* at 95 S.Ct. 926. Each of these types of violation necessarily continue on a day-to-day basis until a specific act is taken in abatement. On the other hand, in a situation involving price discrimination by means of illegal discounts—which by definition are individual in nature—each discriminatory transaction or sale must be the measure, since the granting of each illegal discount is a wholly independent and separately identifiable act which ends as soon as the specific transaction is consummated.

[3] Having concluded that penalties cannot be assessed on a "continuing" violation basis we turn now to the question whether or not to hold a hearing as to how many separate violations of the order defendant committed and how much of a penalty to impose for each of those violations. Although ordinarily such a hearing would be necessary, in light of the peculiar circumstances of this case, I have determined not to schedule one. On the basis of defendant's own affidavits, the court can take judicial notice that there was a continuing pattern of violation which necessarily gave rise to a sufficient number of individual incidents to justify the penalty which it has determined to assess.

[4] In mitigation, defendant has raised the very interesting but belated argument that since the FTC order became final, not only was Conso faced with new competition from *existing* competitors but it was also faced with *new* competitors offering new and lower prices to its customers. As a result, defendant argues, it was forced to continue to grant discounts to its customers in an effort to retain their business in the face of the competition from new sources. Although evidence of such events was obviously not "available" to defendant prior to the entry of the FTC order [see *F.T.C.* v. *Ruberoid Co.* (1952) 343 U.S. 470, 476, 72 S.Ct. 800, 96 L.Ed. 1081], that is not the end of our inquiry. The Court very carefully indicated in *Ruberoid* (at 476, 72 S.Ct. at 804) that the post-order defense of meeting competition could only come into being if the defendant could demonstrate the existence of "a *new* competitive situation involving *different* circumstances" (emphasis supplied). The facts of the instant case do not satisfy this test, for although the situations described by defendant in its affidavits may be "new", they are no "different" in legal effect than before.

[5-7] The amount of penalties to be assessed in a case of this nature is normally determined by taking into account the following factors: (1) the wilful[1357]ness of the violation, or the good or bad faith of the defendant in meeting its obligation to comply with the order, (2) the ability of the defendant to pay the penalties, (3) the degree of harm to the public caused by defendant's failure to comply, and (4) the extent to which defendant may have profited by failing or delaying to comply. *United States* v. *J. B. Williams Company, Inc., supra,* 498 F.2d at 438; *United States* v. *Swingline, Inc.* (E.D.N.Y.1974) 371 F.Supp. 37, 46. One final factor implicit in all compliance actions and one which is particularly relevant to the instant action—is the necessity of vindicating the authority of the Federal Trade Commission. Since the Commission has no plenary power to enforce its own orders, it must enlist the aid of the federal district courts for that purpose. The penalty to be assessed must therefore be a significant one.

[8] Contrary to the plaintiff's assertion that defendant's failure to comply with its order was wilful and in bad faith, it is quite clear to the court that such was not the case. Defendant's reliance upon post-order defenses as to the availability of which there is a "substantial ground for difference of opinion"[4] cannot be deemed to have been wilful or in bad faith.

[9] In support of its argument for the assessment of nominal penalties only, defendant points to the deteriorating financial condition of its Conso Products Company Division—the real target of this action. As a result of its increasing losses—many of which it claims are directly linked to the market's reaction to the FTC order—defendant contends that it is financially unable to pay anything more than a nominal penalty. Be that as it may, the threatened financial position of a division of a company (albeit the division which is the subject of this order) cannot excuse payment of penalties by the company itself—the named defendant in this action.

With respect to the third factor to be considered—that of the degree of harm to the public caused by defendant's failure to comply—plaintiff has conceded that such a factor is not really relevant in a price discrimination case of this nature. Unlike the situation in *United States* v. *J. B. Williams Co., Inc., supra,* this case does not involve a consumer protection-oriented order where noncompliance would directly injure the public. Rather, orders such as in the instant case—are "inherently business—or competition—oriented matters and do not directly concern consumer protection considerations." Plaintiff's brief. at 8.

Finally, as to whether defendant may have benefited from its noncompliance, the record indicates that the opposite is true.

[10,11] It is apparent, therefore, that of the five factors to be

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[4] *F.T.C.* v. *Consolidated Foods Corporation*, Memorandum and Order at 1 (December 24, 1975) (unreported).

considered in determining the amount of penalty to assess, only that of the vindication of the Commission's authority is here pertinent. As to that factor no evidentiary hearing is necessary. In my judgment and based on the record before me, I have concluded to impose a penalty of $25,000, which amount is the minimum necessary to vindicate the Commission's authority in light of the seriousness of the matter involved. In addition, in light of our finding of good faith, the stepped up efforts of Conso's new management and the ongoing settlement negotiations between the parties, an injunction would not at this time be justified.

In summary, a penalty in the amount of $25,000 is assessed, and the motion for an injunction is denied without prejudice to a new motion based upon a showing that defendant is not acting in good faith.

So ordered.

ENCYCLOPAEDIA BRITANNICA, INC., et al. v. FEDERAL TRADE COMMISSION*

No. 75-1465. F.T.C. Docket No. 8908.

(United States Court of Appeals, Seventh Circuit, May 29, 1975)

1. EVEN ASSUMING PLAINTIFFS ESTABLISHED THEIR RIGHT TO DOCUMENT UNDER F.O.I.A., INJUNCTION WOULD NOT BE GRANTED SINCE COURT COULD FASHION REMEDY AFTER NORMAL STATUTORY PROCEDURES.

Plaintiffs-appellants would not be granted injunction pending appeal to restrain FTC from proceeding further until plaintiffs-appellants had adequate opportunity to pursue their remedies under Freedom of Information Act, even assuming that plaintiffs could establish their right to requested document and that document had been used in manner denying them fair and impartial hearing, since court could fashion remedy after normal statutory procedures had been pursued and in view of presumption that Commission would deal fairly.

2. TIME WAS INADEQUATE TO ASSEMBLE A PANEL OF JUDGES NECESSITATING DENIAL OF EMERGENCY MOTION FOR INJUNCTION BY SINGLE APPELLATE COURT JUDGE.

Single judge of Court of Appeals denied emergency motion for injunction pending appeal, filed on afternoon of day before oral argument was scheduled, where there was inadequate time to assemble a panel.

(Syllabus, with substituted captions, taken from 517 F.2d 1013.)

On request for motion for injunctive relief to restrain the F.T.C. from providing in its adjudicative case until plaintiffs-appellants had opportunity to pursue their remedies under F.O.I.A., Judge Stevens, as a single judge, denied emergency injunction on grounds that even if document was used in a manner denying them fair and impartial hearing, court could fashion remedy after normal statutory procedures.

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* Reported in 517 F.2d 1013 (1975). For case before the Commission, see 87 F.T.C. 421.

Motion denied.

Robert L. Stern, Bryson P. Burnham, John Bleveans, Kenneth J. Jurek, Chicago, Ill., for plaintiffs-appellants.

Robert E. Duncan, Robert J. Lewis, Gerald Harwood, W. Baldwin Ogden, F.T.C., Washington, D.C., *James R. Thompson,* U.S. Atty., *Gary L. Starkman* and *Jack M. Wesoky,* Asst. U.S. Attys., Chicago, Ill., for defendant-appellee.

STEVENS, *Circuit Judge.*

ORDER[1]

[1014] [1] At approximately 4:00 o'clock p. m. on May 28, 1975, plaintiffs-appellants filed in this court an "Emergency Motion for Injunction Pending Appeal" in which they sought to restrain the Federal Trade Commission from proceeding further in its Docket No. 8908 until after plaintiffs-appellants had an adequate opportunity to pursue their remedies under the Freedom of Information Act (5 U.S.C. § 552) in connection with a request for a copy of the Commission memorandum entitled "Analytical Program Guide for the Direct Selling Industry" dated July 28, 1972. Having considered plaintiffs' motion and the memorandum in support thereof filed in the district court, and the Commission's memorandum in opposition which was filed in that court, I have decided to deny the motion.

There is no need to issue an extraordinary writ in order to preserve the jurisdiction of the court of appeals ultimately to review the merits of either (a) the basic Commission proceeding against plaintiffs, or (b) the merits of plaintiffs' Freedom of Information Act claim which, as I understand the record, may be renewed in the district court after the normal statutory procedures have been pursued.

On the basis of the papers which I have reviewed, I am unable to form a firm opinion one way or the other with respect to the merits of plaintiffs' Freedom of Information Act claim. If it be assumed that there is no merit to that claim, plaintiffs are, of course, not entitled to any relief in this court at this time. For purposes of analysis, therefore, I make the following assumptions (without in fact having so concluded): (a) that in due course plaintiffs will establish their entitlement to the requested document; (b) that said document has in fact been reviewed by Commission personnel to such an extent that plaintiffs' right to a fair and impartial hearing before the Commission has been materially and adversely affected; and (c) that plaintiffs in due course will be able to so demonstrate.

On the foregoing assumptions, I have no doubt that upon review of the Commission determination in Docket No. 8908, assuming that a final Commission order eventually enters against the plaintiffs, that this court would have adequate power to fashion a remedy either setting aside the Commission order or directing such supplementary proceedings either before the Hearing Examiner or before the full Commission as may be necessary and appropriate to avoid injustice to any party.

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[1] This order was originally entered as an unpublished order pursuant to Circuit Rule 28. However, at the request of the Federal Trade Commission, and in the absence of any objection by the plaintiffs-appellants, the court, on June 6, 1975, authorized publication pursuant to said rule.

I am not persuaded that going forward with the oral argument will irreparably foreclose the possibility of adequate relief, even making all assumptions of fact and law favorable to the moving party's claim.

Plaintiffs argue that the Commission will not be irreparably injured by a modest delay in the oral argument which is scheduled to be held at 2:00 p.m. E.S.T. on this date. This may well be true. Nevertheless, there is significant public interest in permitting litigation to go forward on an orderly basis and in avoiding delays and interruptions to orderly procedure, which, experience teaches us, inevitably tend to be more prolonged than originally anticipated. Notwithstanding the assumptions which I have made for purposes of decision, I must also presume that the members of the Federal Trade Commission are fully conscious of the allegations made in the Freedom of Information Act complaint and that they are fully mindful of their obligation to accord plaintiffs a full and fair hearing and an adequate opportunity to comment on such relevant matter as may have been considered by the **[1015]** Commission, or its Hearing Examiner, in the course of its processing of Docket No. 8908.

[2] In sum, I am persuaded that the presumption that the Commission will deal fairly with the litigants before it heavily outweighs the likelihood of irreparable injury which may result from the denial of the pending motion. In view of the fact that the oral argument is scheduled to commence in about two hours, I have concluded that there is inadequate time to assemble a panel of more than one judge to consider the request and therefore am denying same as a single judge.

GER-RO-MAR, INC. trading as SYMBRA'ETTE, et al. v. F.T.C.*

No. 1066, Docket 74-2343. F.T.C. Docket No. 8872.

(United States Court of Appeals, Seventh Circuit, June 16, 1975)

1. SIMPLY BECAUSE F.T.C. HAD NOT PROCEEDED AGAINST COMPETITORS OF LINGERIE MANUFACTURER DID NOT MEAN F.T.C. ACTED CAPRICIOUSLY AGAINST PETITIONER IN ISSUING ORDER TO CEASE AND DESIST USING ITS MARKETING SCHEME.

   Federal Trade Commission did not act capriciously in proceeding against lingerie manufacturer to cause it to cease and desist in using its particular marketing system because the Commission had not yet proceeded against the manufacturer's competitors who were also using the same marketing scheme where the Commission had not given its blessing to the competitors and an affirmance in manufacturer's case might well trigger agency action against comparable selling plans.

2. UTILIZATION OF COMPARABLE SELLING SCHEME, IN VIOLATION OF F.T.C. ACT, BY VARIOUS MANUFACTURERS DOES NOT OBLIGATE F.T.C. TO FILE SIMULTANEOUS SUITS AGAINST ALL OFFENDERS.

   The Federal Trade Commission is under no obligation to start simultaneous suits against all alleged offenders which utilize comparable selling scheme.

3. FINDING THAT LINGERIE MANUFACTURER'S MULTILEVEL DISTRIBUTORSHIP HAD THE CAPACITY TO DECEIVE PROSPECTIVE DISTRIBUTORS WAS NOT SUPPORTED BY EVIDENCE.

   Evidence did not support finding of Federal Trade Commission that lingerie manufacturer's multilevel distributorship scheme had the capacity and potential for deception of prospective distributors.

4. WHAT CONSTITUTES UNFAIR COMPETITION IS FOR THE COURTS TO EVENTUALLY DETERMINE, NOT F.T.C.

   It is for the courts eventually and not the Federal Trade Commission to determine what unfair competition is.

5. EVIDENCE SUPPORTED F.T.C. FINDING THAT CERTAIN PROMOTIONAL CLAIMS WERE DECEPTIVE.

   Substantial evidence supported finding of Federal Trade Commission that claims in lingerie manufacturer's promotional literature and material for recruiting distributors that ascension up the marketing ladder was rapid, that all distributors had the potential of making large profits and that the supply of available participants was inexhaustible were deceptive.

(Syllabus, with substituted captions, was taken from 518 F.2d 33.)

On petition for review of F.T.C. order to cease and desist, court held the Commission's proceeding against manufacturer without proceeding against manufacturer's competitors was not capricious; evidence did not support finding the manufacturer's merchandising scheme was inherently unfair and deceptive; but evidence did support finding that certain claims in promotional literature and recruiting material were deceptive.

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* Reported in 518 F.2d 33 (1975). For case before the Commission, see 84 F.T.C. 95; petition for reconsideration denied, 84 F.T.C. 543; *modified*, 86 F.T.C. 143.

Order modified, and enforced as modified.

Jack M. Wiseman, San Jose, California (*Clifton H. Stannage*, New York City, of counsel), for petitioners.

W. Baldwin Ogden, Atty., F.T.C., Washington, D.C. (*Calvin J. Collier*, Gen. Counsel, *Gerald Harwood*, Asst. Gen. Counsel), for respondent.

Before MULLIGAN, TIMBERS and GURFEIN, *Circuit Judges.*

MULLIGAN, *Circuit Judge:*

This is a petition to review a cease and desist order issued by the Federal Trade [34] Commission against Ger-Ro-Mar, Inc., a California corporation doing business as Symbra'Ette, Inc., and Carl G. Simonsen, individually and as President of the said corporation.

Petitioners operate a family business which was organized in 1963 and is engaged in the manufacture and sale of brassieres, girdles, swimwear and lingerie. Its sales have grown from $36,832.91 in 1965 to $2,054,250.62 in 1969 but dropped to $1,195,465.75 in 1972. The FTC issued a complaint on November 24, 1971 which alleged that the petitioners' marketing system constituted unfair and deceptive acts and practices and unfair methods of competition in violation of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.[1] The FTC complaint contained five counts. Count I charged that the petitioners' merchandising program was in the nature of a lottery; Count II charged that the program, which depended upon the ability of distributors to recruit others, was an unfair method of competition as well as an unfair and deceptive act and practice in commerce; Count III charged that the representations and promotional materials of the petitioners were false, misleading and deceptive; Count IV charged unlawful vertical price fixing; and Count V claimed unlawful restrictions upon distributor resales.

After an answer and a hearing an administrative law judge rendered an Initial Decision dated October 11, 1973 which upheld the charges of violations contained in all five counts. The Commission on July 23, 1974 issued a Final Order and Opinion which reversed the administrative judge on the lottery count (Count I) and affirmed him on all the other counts. A motion for reconsideration filed by petitioners was denied by the Commission on October 1, 1974. This petition for review followed.

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[1] "(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * * * * * *

"(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

I

Since the Count I violation (lottery) was reversed below, that issue is not before us. Although the petitioners seek to have the order set aside in its entirety, no serious argument is made with respect to those parts of the Commission's order which require them to cease and desist from vertical price fixing (except in states having Fair Trade Laws) and from enforcing customer restrictions upon reselling. Petitioners have in any event agreed to discontinue such practices. Hence paragraphs 9, 10 and 11 of the Commission's order to cease and desist, which relate to these violations, are affirmed and enforced.

II

Before reaching the substance of this petition we should dispose of a major contention of the petitioners, namely, that the order be set aside because the Commission has acted arbitrarily and capriciously in taking action against them while taking none against their direct competitors who utilize comparable selling plans. Paragraph 10 of the Stipulation of Facts dated March 16, 1973 states:

> There are competitors of Symbra'ette selling brassieres, girdles, swim-wear and lingerie under similar marketing and sales programs. As of March 16, 1973, the Federal Trade Commission has instituted no formal proceedings against any of these competitors on the issues raised by the present complaint.

[35] [1,2] Petitioners argue that the FTC action against them, while leaving their competitors unscathed, is in direct conflict with the holding of this court in *Marco Sales Company* v. *FTC*, 453 F.2d 1 (2d Cir. 1971). We disagree. In *Marco*, the Commission had proceeded capriciously not because it had taken no action against others charged with utilizing the same selling device (punch boards), but rather because it had previously instituted a rule-making procedure which regulated the use of punch boards in the food retail and gasoline industries; that is, the Commission did not abolish punch board gambling in those industries, it was content merely to regulate. However, it proceeded by adjudicatory procedures against Marco Sales and the order under review prohibited the use of punch boards by Marco without condition. In sum, while others were regulated, Marco was annihilated. This we deemed to constitute an abuse of agency discretion. The situation here is distinguishable. The Commission has not given its blessings to Symbra'Ette competitors while condemning Symbra'Ette. It has not yet proceeded against others and an affirmance of this order might well trigger agency action against comparable selling plans. In *Marco*, we noted specifically that "[o]bviously, the Commission cannot be expected to bring simultaneous proceedings against all of those engaged in identical practices". 453 F.2d at 6. That proposition is well established. *FTC* v. *Universal-*

Rundle Corp., 387 U.S. 244, 251, 87 S.Ct. 1622, 18 L.Ed.2d 749 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413, 78 S.Ct. 377, 2 L.Ed.2d 370 (1958). We conclude that while petitioners may be unfortunate in being the first target of the Commission with respect to the selling practices in question, the Commission is under no obligation to start simultaneous suits against all alleged offenders and it did not abuse its discretion in any sense under the *Marco* holding.

III

The substantial questions before us are whether or not the Symbra'Ette mer[35]chandising scheme is an unfair method of competition and an unfair and deceptive practice, and the related question of whether or not petitioners' promotion of the plan was inherently deceptive. It is necessary at the outset to note that March 16, 1973 Stipulation of Facts (Para. 9) stated:

> There is no contention that any deception, fraud, unethical practice, misrepresentation, or improper conduct is present in the presentation of the products or their prices to customers. Therefore, according to the theory of the FTC complaint, it is not the purchaser, actual or prospective, of Symbra'Ette garments who is being gulled or put upon but rather the prospective distributor and his recruits. Since the Symbra'Ette merchandising scheme is elaborate, we must set it forth, unfortunately in some detail, to understand the Commission's misgivings.

The Marketing Plan

Petitioners, through their multi-level marketing program, seek to enlist the services of men and women throughout the country to sell their products at wholesale and retail, requiring distributors to buy an inventory of varying size before they may participate in the program. A potential distributor (also called a "consultant") may enter at one of three levels ("Key Distributor," "Senior Key," or "Supervisor"), and eventually work up to a fourth and fifth level (District Manager and Regional Manager). Entry into the program is effected by means of a non-refundable purchase of merchandise from the company or one of its distributors. All distributors except the lowest (Key) purchase directly from the company; a Key Distributor purchases from his sponsor. Initial purchase requirements for entry into the program are stated in terms of "Retail Purchase Volume" (RPV), i.e., the volume of merchandise expressed in terms of its suggested retail price. The initial purchase requirement for entry into the program is $300 in RPV for a Key, which at the allowed discount of 35% [36] amounts to an initial purchase requirement of around $215.

The initial RPV required for a Senior Key is $1,000, which, at the allowed discount of 40%, and including literature and sales aids, entails an initial purchase of around $700. The initial purchase required of a

Supervisor is around $1,950, resulting from a $3,000 RPV requirement at a 45% discount, plus sales aids.

A Key Distributor may engage in unlimited recruiting of other distributors, and advance to the level of Senior Key if his retail purchase volume and that of his recruits amount to $1,000 in one calendar month. Similarly, Senior Keys and Supervisors may rise to higher levels by achieving the requisite Retail Purchase Volume, through a combination of their own retail sales and those of their "personal group" (their recruits and recruits' recruits).

A Key Distributor's profit is the difference between the prices paid the Key's sponsor for products, and the prices at which the Key resells. The profit for consultants at higher levels in the program consists of the margin on the consultant's own retail sales, a percentage profit on purchases made by his recruits, and various commissions, overrides, and other compensation related to the purchase volume of directly and indirectly sponsored consultants.

To induce individuals to become consultants, petitioners distributed various promotional materials which recited the details of the marketing system, and illustrated, how, both by building a large personal group of salespeople via recruitment, and by selling at retail, an individual could earn large sums of money, ranging in the illustrations up to $56,400 per year for District Managers and $90,600 yearly for Regional Managers. Of the Regional Manager position, petitioners' promotional "flip chart" promised "ANYONE CAN ACHIEVE THIS LEVEL." According to the Commission, individuals were induced by these promotional materials, and the prospect of earning large amounts of money via retailing and recruiting activities, to purchase the requisite volume of Symbra'Ette products for the level at which they wished to enter.

IV

The marketing plan thus described is characterized by the Commission as inherently unfair and deceptive because it had "the substantial tendency, capacity, and potential to mislead." It supposedly caused participants to invest their money in the hope of realizing income which was impossible for all to achieve: the laws of geometrical progression would make it impossible to recruit continually since inevitably a point of saturation would be reached which would defeat the plan and thwart the ambitions of those who had been promised profits.

[3] It is unquestioned that under its own rules (Rule 3.43(a), Rules of Practice of the Federal Trade Commission, 16 C.F.R. § 3.43(a) (1974)) and pertinent cases (e. g., *Montgomery Ward & Co.* v. *FTC*, 379 F.2d 666, 670 (7th Cir. 1967); *Carter Products, Inc.* v. *FTC*, 268 F.2d 461, 487 (9th Cir.), *cert. denied*, 361 U.S. 884, 80 S.Ct. 155, 4 L.Ed.2d 120 (1959)),

the Commission has the burden of establishing a section 5 violation. Petitioners urge that there is no showing of any actual deception or actual injury. The only witness produced by the Commission did not testify that he was misled or deceived and in fact testified that he and his wife had profited by the distributorship.[2] However, it is settled that the Commission need not show actual deception or actual damage; rather, a business method having only the *capacity* to deceive can violate section 5. E. g., *FTC* v. *Algoma Lumber Co.*, 291 U.S. 67, 81, 54 S.Ct. 315, 78 L.Ed. 655 (1934); [37] *Charles of the Ritz Distributors Corp.* v. *FTC*, 143 F.2d 676, 680 (2d Cir. 1944). The theory upon which the Commission proceeds, then, is that the plan had the capacity and potential for deception. The question before us becomes whether or not the finding of potential deception is supported by substantial evidence in the record. See *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 487-88, 71 S.Ct. 456, 95 L.Ed. 456 (1951); cf. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, 85 S.Ct. 1035, 13 L.Ed.2d 306 (1965).

The sole evidence to support the Commission's holding that the plan is inherently unfair and deceptive is a mathematical formula,[3] which shows that if each participant in the plan recruited only five new recruits each month and each of those in turn recruited five additional recruits in the following month, and this process were allowed to continue, at the end of only 12 months the number of participants would exceed 244 million, including presumably the entire staff of the FTC. The Commission concludes that this, in effect, is the impossible dream and that the siren song of Symbra'Ette must be stilled. We find no flaw in the mathematics or the extrapolation and agree that the prospect of a quarter of a billion brassiere and girdle hawkers is not only impossible but frightening to contemplate, particularly since it is in excess of the present population of the Nation, only about half of whom hopefully are prospective lingerie consumers. However, we live in a real world and not fantasyland.

As indicated by the record, the fact is that Symbra'Ette, which commenced business in 1963, did not reach its peak in distributorships until 1972 when it had attracted some 3,635 distributors. The record does not indicate the geographical distribution of these vendors, and we have no study or analysis in the record which would realistically establish that some recruiting saturation exists which would make the entry of additional distributors and the recruitment of others potentially impossible in any practical sense. While the Commission need not establish actual deception by the testimony of disappointed entrepreneurs, it has failed entirely to establish a potential threat. Not all Americans aspire to the calling in issue and not all who are attracted will continue indefinitely.[4]

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[2] The Commission's witness testified that, during the first year of their Symbra'Ette business, his wife's profit on the sale of merchandise to ultimate consumers was approximately $1,500; he did so well he reordered petitioners' merchandise over 50 times, although much of their merchandise was sold to recruits.

[3] [37] For the mathematically curious, the formula for calculating the number of participants at any level "n" is $n=x^{i}$, where "x" is the number of recruits per participant per level, and "i" is the level. Because of the exponential function, the number of recruits would, in theory at least, expand quite rapidly. For example, to use the Commission's hypothetical figures of 5 for x (the number of recruits per participant per level) and 12 for i (the number of levels), the formula becomes $n=5^{12}$, or 244,140,625.

[4] The cases relied upon by the Commission to establish that potential injury is sufficient to constitute a section 5 violation involve false advertising claims where the Commission has established by evidence that the claims made in the material *are* false and hence the courts have not required proof of actual deception.[5] Even then the courts have [38] often not talked about a theoretical possibility but rather, as Judge Kaufman noted in *FTC* v. *Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963), the situation where "the representations made have a capacity or tendency to deceive, i. e., when there is a *likelihood* or *fair probability* that the reader will be misled" (emphasis added). Here there is no showing at all that even the most credulous prospective distributor was likely or probably gulled by the plan discussed. The validity of the rule of mathematical progression must, in our view, not be considered *in vacuo* but must be put in the context of actual competitive conditions, see *Columbia Broadcasting System, Inc.* v. *FTC*, 414 F.2d 974, 978 (7th Cir. 1969), *cert. denied*, 397 U.S. 907, 90 S.Ct. 903, 25 L.Ed.2d 88 (1970); *Korber Hats, Inc.* v. *FTC*, 311 F.2d 358, 360-61 (1st Cir. 1962); *Ford Motor Co.* v. *FTC*, 120 F.2d 175, 181 (6th Cir.), *cert. denied*, 314 U.S. 668, 62 S.Ct. 130, 86 L.Ed. 535 (1941), where whatever expertise the Commission may have in determining possible adverse competitive injury or consumer deception will weigh heavily with us. However, here it has relied solely upon an abstract mathematical theorem without any attempt to relate the theory to the marketplace. The Commission has made no study, offered no analysis and has no greater familiarity with the law of geometric progression

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[4] For example, a Dr. Dirk Wassenaar, a witness for petitioners, testified on cross-examination that "in practice . . . distributors go into this for a while and they get tired of it or they find greener pastures or they get pregnant or they get married or they get transferred and they give up this particular kind of program. So you have to consider a drop-out rate. . . . So as the company grows, the number of people that will join the company will become smaller, the number of people dropping will probably increase and this thing will balance out to some kind of an equilibrium."

[5] For example, in *FTC* v. *Algoma Lumber Co.*, 291 U.S. 67, 54 S.Ct. 315, 78 L.Ed. 655 (1934), "Western Yellow Pine" was sold under the trade name of "California White Pine," though it was in fact inferior to true white pine lumber; furthermore, the Court found that the misleading trade name caused confusion among consumers. In *Montgomery Ward & Co.* v. *FTC*, 379 F.2d 666 (7th Cir. 1967), the Commission attacked advertising which represented that merchandise was guaranteed without specifying the nature and extent of the guarantees; in fact, there was a deviation between the advertised and actual guarantees since the latter were subject to limitations and conditions not revealed in the advertisements. [38] This circuit, in denying a temporary injunction in *FTC* v. *Sterling Drug, Inc.*, 317 F.2d 669 (2d Cir. 1963), ruled that the Commission *failed* to show it had reason to believe that the public would be misled by advertising concerning the results of a medical study on pain relievers. In *Charles of the Ritz Distrib. Corp.* v. *FTC*, 143 F.2d 676 (2d Cir. 1944), the Commission found that the petitioner's "Rejuvenescence Cream" and its accompanying advertising falsely represented that the product would rejuvenate and restore the appearance of youth to the skin, whereas in fact such was a medical impossibility. Finally, in *Ford Motor Co.* v. *FTC*, 120 F.2d 175 (6th Cir.), *cert. denied*, 314 U.S. 668, 62 S.Ct. 130, 86 L.Ed. 535 (1941), petitioner's advertisement of a "6%" plan to finance sales of its cars was found to be misleading on its face because no description was given of the actual financing practice, which did not calculate interest on a declining balance and hence really produced a simple annual interest rate of 11 1/2%.

than the court. It is for the courts eventually and not the Commission to determine what unfair competition is. *FTC* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 453, 42 S.Ct. 150, 66 L.Ed. 307 (1922).

The per se condemnation of the recruiting scheme disclosed here is not supported by substantial evidence or even a scintilla. Cf. *Callaghan & Co.* v. *FTC*, 163 F.2d 359, 372 (2d Cir. 1947). Hence, we vacate and set aside paragraphs 1 and 2 of the trial order of the Commission.[6]

V.

[5] It does not follow of course that the failure of the Commission to establish that the plan in question is violative of section 5 means that the petitioners are free to advertise it in their promotional literature in deceptive terms. Here, the Commission did rely upon sales manuals and other specific representations made by the petitioners that ascension up the marketing ladder was rapid, **[39]** that all had the potential of making large profits and that the supply of available participants was inexhaustible. There is sufficient evidence in the record to support the finding that these *claims* were deceptive. In *FTC* v. *Colgate-Palmolive Co., supra*, 380 U.S. at 385, 85 S.Ct. 1035, we are told that the Commission's judgment with respect to allegedly deceptive advertising is to be given great weight. We further note that the petitioners, in their reply brief, have conceded that "[I]f there be any questionable conduct on the part of Symbra'Ette, it must be in the alleged misrepresentations in its advertising. The ends of justice will be met and any misconduct will be obviated by merely prohibiting misrepresentations in the advertising." We are inclined to agree and affirm and enforce paragraphs 3, 4, 5, 6, 7 and 8 of the final order.[7]

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[6] "1. Offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program wherein a participant gives a valuable consideration in return for the opportunity to receive compensation for inducing other persons to become participants in the plan or program; provided that "compensation" as used in this paragraph only does not mean any payment based on actually consummated sales of goods or services to persons who are not participants in the plan or program, and who do not purchase goods or services in order to participate in the plan or program.

"2. Offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program wherein the financial gains to participants are, or are represented to be, based in any manner or to any degree upon their recruiting of other participants who obtain the right under the plan or program to recruit yet other participants, whose function during their first year in the plan or program includes, in any respect whatsoever, the recruitment of participants."

[7] "3. Operating any marketing or sales plan or program unless respondents agree to and notify participants that they will promptly repurchase all or any part of any initial order of merchandise made by any participant, upon written request of the participant mailed within 30 days (or a greater period of time if respondents elect) of the receipt of the initial order by the participant, at the price actually paid by the participant for the merchandise, provided, however, that respondents may insist that prior to making repurchase, the merchandise be returned to respondents' place of business, postage or shipping prepaid, in a resaleable condition, said merchandise to be shipped within 30 days (or a greater period of time if respondents elect) of the date on which written request for repurchase is received.

"4. Representing, directly or by implication, or by use of hypothetical examples or representations of past earnings of participants, that participants in any marketing or sales program will earn or receive, or have the reasonable expectancy of earning or receiving, any stated gross or net amounts, unless in fact, a majority of participants in the community or geographic area in which such representations are made, have achieved the stated gross or net amounts represented, and the representations accurately reflect the amount of time required by such

(Continued)

The order is modified by the deletion of paragraphs 1 and 2, and is enforced as modified.

ASH GROVE CEMENT COMPANY v. FEDERAL TRADE COMMISSION*

Nos. 73-2212, 74-1144. F.T.C. Docket No. 8795.

(United States Court of Appeals, District of Columbia Circuit, June 23, 1975)

1. "POLICY DETERMINATION" UNDER F.O.I.A. JURISDICTION IS SUBJECT TO DISCLOSURE AS A FINAL AGENCY ACTION USED AS TOUCHSTONE FOR FUTURE ACTIONS.

   "Policy determination" subject to public disclosure under Freedom of Information Act is final agency decision which is utilized as touchstone for future administrative action.

2. F.O.I.A. EXEMPTION COVERING INTER- AND INTRA-AGENCY MEMOS AND LETTERS DOES NOT APPLY TO FINAL OPINIONS BUT DOES COVER MEMOS AND RECORDS OF ORAL DISCUSSIONS LEADING TO FINAL OPINION.

   Exemption under Freedom of Information Act for inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency can never apply to "final opinions," whereas memoranda and records or oral discussions leading up to final opinion or binding decision are protected from disclosure by such exemption.

(Syllabus, with substituted captions, taken from 519 F.2d 934.)

In response to petition for rehearing of decision of April 16, 1975, p. 1321 herein, court held, inter alia, that a "policy determination" subject to disclosure under the Freedom of Information Act was a final agency action.

Petition for rehearing denied.

Before DANAHER, *Senior Circuit Judge*, WILKEY, *Circuit Judge*, and JUSTICE** *U.S. District Judge* for the Eastern District of Texas.

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participants to achieve such gross or net amounts.

"5. Misrepresenting in any manner, directly or by implication, or placing in the hands of others the means or instrumentalities for misrepresenting, the financial gains reasonably achievable by participants in any marketing or sales plan or program, of the commercial feasibility thereof.

"6. Failing to maintain adequate records (a) which disclose the facts upon which any claims of the type discussed in paragraphs 4 and 5 of this Order are based; and (b) from which the validity of any claim of the type discussed in paragraphs 4 and 5 of this Order can be determined.

"7. Requiring that an individual pay a valuable consideration in return for the right to participate in any marketing or sales program, without first disclosing to such prospective participant in writing the number of other participants in the marketing area in which such prospect plans to operate."

We note that paragraph 3 does not involve misrepresentation but rather imposes a repurchase obligation upon the petitioners. Since they indicated on the argument of this appeal that they have instituted this practice, there is no existing dispute about the matter.

* Reported in 519 F.2d 934 (1975). See also pp. 565, 796, 815, 1321, and 1533 herein.

** Judge Justice did not participate in this opinion.

ORDER

[935] On consideration of appellees' petition for rehearing, it is Ordered by the Court that appellees aforesaid petition is denied.

PER CURIAM:

[1] Appellees have filed a petition for rehearing of our 16 April 1975 decision in this case. They take primary issue with our ruling that those portions of the Commission's chronological minutes which it described to the District Court as containing "policy determinations" must be disclosed to the appellant. We deny appellees' petition. To our mind, a "policy determination" denotes a final agency decision which is utilized as a touchstone for future administrative action. Such decisions must be made available to the public, as this court held in *Sterling Drug, Inc.* v. *Federal Trade Commission*, "to prevent the development of secret law within the Commission."[1]

[2] We take this opportunity to emphasize, however, that our opinion leaves open the possibility on remand that the District Court may find, with the benefit of a more adequate record, that the Commission's own characterization of the chronological minutes as containing "policy *determinations*" was inaccurate. Nothing in our opinion requires that the policy *discussions* or recommendations of FTC Commissioners be revealed to the public.[2] If the agency, in spite of its own description of portions of the chronological minutes as "policy determinations," can satisfy the District Court—through the procedure outlined in our opinion—that no final agency opinions or binding decisions are found therein, the disclosure rationale of *Sterling Drug* will not be applicable to this case. For, as the Supreme Court so recently held in *NLRB* v. *Sears, Roebuck & Co.*,[3] Exemption 5 can never apply to "final opinions," whereas memoranda (and records of oral discussions) leading up to a final opinion or binding decision are protected from disclosure by Exemption 5.

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[1] 146 U.S.App.D.C. 237, 247, 450 F.2d 698, 708.

[2] *Cf. Renegotiation Board* v. *Grumman*, 421 U.S. 168, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975).

[3] 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975).

STATE OF CALIFORNIA ex rel. C.B. CHRISTENSEN, et al.

v.

FEDERAL TRADE COMMISSION, et al.*

Civ. A. No. C-74-1927 RHS. F.T.C. Docket No. 8988.

(United States District Court, Northern District of California, June 25, 1975)

On motion for summary judgment, court held that plaintiffs are entitled to a permanent injunction prohibiting the Commission from proceeding further against them in Docket 8988; and plaintiffs are entitled to a declaratory judgment that the F.T.C. has no jurisdiction to proceed against them under the F.T.C. Act with respect to matters contained in the Commission's complaint.

Before SCHNACKE, *District Judge.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This action is brought by the State of California on behalf of its Director of Food and Agriculture (a civil executive officer of the State); the California Milk Producers Advisory Board (established pursuant to the California Marketing Act of 1937 [Cal. Food & Ag. Code §§58601-59293] to assist the Director of Food and Agriculture in the administration of a marketing order, issued on October 8, 1969, for research, education, and promotion of market milk and dairy products in California); and Cunningham and Walsh, Inc. (an advertising agency which in all matters here involved, has acted as the agent of the State). The defendant Federal Trade Commission (hereinafter, FTC) is an independent agency of the United States Government, and the individual defendants in this action are the current members of the FTC and an administrative law judge thereof, who are sued solely in their official capacities.

2. On August 1, 1974, an administrative complaint was issued by the FTC, Docket No. 8988, naming as respondents the California Milk Producers Advisory Board and Cunningham and Walsh, Inc. In the FTC complaint certain advertisements promoting the sale of milk were alleged by the FTC to be false and misleading in violation of Sections 5 and 12 of the Federal Trade Commission Act (hereinafter, FTC Act). Plaintiffs here seek a permanent injunction and a declaratory judgment against the FTC's proceeding with its administrative complaint in Docket No. 8988, on the grounds that Congress has not granted the

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* Not otherwise reported. See also p. 1118 herein.

FTC jurisdiction over states, state agencies, state instrumentalities, or state officers acting in their official capacities.

3. On September 11, 1974, this Court granted a temporary restraining order enjoining the FTC from proceeding for a period of 10 days. A preliminary injunction was granted on September 23, 1974. Findings of fact and conclusions of law were filed on October 29, 1974.

4. Defendants have filed a motion to dismiss herein and, in the alternative, a motion for summary judgment. Plaintiffs have filed a cross-motion for summary judgment. Both plaintiffs and defendants have filed lengthy affidavits and exhibits in connection with these motions which supplement the affidavits and exhibits filed in connection with the hearing on the preliminary injunction granted herein. Based on the affidavits and exhibits filed herein and the provisions of the California Marketing Act of 1937 [Cal. Food & Ag. Code §§58601-59293], the Court finds the facts set forth below are established and undisputed in this record.

5. The California Milk Producers Advisory Board is an instrumentality of the State of California established to assist and advise the Director of Food and Agriculture in fulfilling his statutory duties under the California Marketing Act of 1937. The Director of Food and Agriculture and the State of California are the real parties in interest herein. The advertising being challenged by the FTC in Docket No. 8988 is part of the marketing order of October 8, 1969, effectuated by the Director of Food and Agriculture, pursuant to the California Marketing Act of 1937, which specifically authorizes such advertising.

6. No facts have been adduced in this record to contradict the affidavit of Gordon B. Reuhl, dated March 13, 1975, which provides:

> (5) With respect to the promotional activities of the Advisory Board, all budgets, programs, and specific advertising copy are recommended by the Board, to the Director of Food and Agriculture for his specific approval prior to their implementation. From time to time the Director has specifically disapproved certain promotional materials recommended by the Board. In such cases, the proposed program or materials have not been used. In addition to requiring the approval of the Director of Food and Agriculture on all programs and materials, the Board has, since 1972, submitted all nutritional material to Dr. George Briggs of the University of California for his approval prior to the use of such material.
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> (6) In my capacity as Manager of the Board, I am required to submit all recommendations by the Board to the Director of Food and Agriculture of the State for his approval, and this procedure has been followed.

7. Cunningham and Walsh, Inc., at all times relevant herein, to the extent that it has participated in the creation, preparation, or dissemination of the advertising materials challenged by the FTC, has acted as the agent of the State.

8. The Court finds that there are no material issues of fact between the parties herein and that the aggregate effect of the delay, expense, and uncertainty which would result from resort to the administrative

process herein would result in irreparable injury to plaintiffs herein, for which they would have no adequate remedy at law. The importance of the question presented relating to state-federal relations indicates that prompt judicial resolution of this jurisdictional dispute by the courts at this time is required.

CONCLUSIONS OF LAW

1. The jurisdiction of the FTC under the FTC Act extends to "persons, partnerships, or corporations" [15 U.S.C. §45(a)(6)]. The definition of corporation includes an "association, incorporated or unincorporated . . . which is organized to carry on business for its own profit or that of its members" [15 U.S.C. §44]. Neither the FTC Act nor its legislative history indicates that states, state agencies, state instrumentalities, or state officers in their official capacities were intended by Congress to be included within the terms "persons, partnerships, or corporations."

2. The FTC Act was designed to supplement and bolster the Sherman Act, to stop in their incipiency acts and practices which, when full blown, would violate the Sherman Act [*FTC* v. *Motion Picture Adv. Co.*, 344 U.S. 392, 394-395 (1953)]. In view of the close relationship between the two Acts, the fact that action by states, state agencies, state instrumentalities, and state officers in their official capacities is not subject to the Sherman Act [*Parker* v. *Brown*, 317 U.S. 341 (1943); *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974)] indicates that it is not subject to the FTC Act either.

3. The FTC may not proceed against a private corporation—here, Cunningham and Walsh, Inc.-merely aiding the State in carrying out the conduct in question [*E.W. Wiggins Airways, Inc.* v. *Massachusetts Port Auth.*, 362 F.2d 52, 56 (1st Cir. 1966)].

4. Ordinarily, courts won't interfere with an administrative agency until it has completed its action, and administrative remedies may not be bypassed [*Borden, Inc.* v. *FTC*, 495 F.2d 785, 786-787 (7th Cir. 1974)]. However, the FTC here clearly lacks jurisdiction under the FTC Act over the State and the other plaintiffs, and there is no specialized administrative understanding required to determine that this is so, such as would be required to decide, for example, the factual question of whether a private entity was engaged in interstate commerce; this case involves only a question of statutory construction. For the foregoing reasons, requiring exhaustion of administrative remedies is inappropriate [see *Lone Star Cement Corporation* v. *FTC*, 339 F.2d 505, 510 (9th Cir. 1964); *Leedom* v. *Kyne*, 358 U.S. 184, 188-189 (1958)].

5. There are no material disputed issues of fact. Defendants' motions to dismiss and for summary judgment herein are denied.

Plaintiffs' motion for summary judgment is hereby granted. Plaintiffs are entitled to a permanent injunction prohibiting defendants, their agents and employees, from proceeding further against plaintiffs in Docket No. 8988, presently pending before the FTC. Plaintiffs are further entitled to a declaratory judgment that the FTC has no jurisdiction to proceed against them under the FTC Act with respect to the matters complained of by the FTC in Docket No. 8988. Judgment shall be entered accordingly. Costs shall not be assessed against defendants herein.

CONSUMER FEDERATION OF AMERICA et al. v. FEDERAL TRADE COMMISSION*

ITT CONTINENTAL BAKING COMPANY v. FEDERAL TRADE COMMISSION

TED BATES & COMPANY, INC. v. FEDERAL TRADE COMMISSION

Nos. 73-1574, 73-2138, 73-2239, 74-1172 to 74-1174, 74-1199. F.T.C. Docket No. 8860.

(United States Court of Appeals, District of Columbia Circuit, June 30, 1975)

1. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IS THE RULE IN ABSENCE OF STATUTORY PROHIBITION OF JUDICIAL REVIEW, UNDER THE ADMINISTRATIVE PROCEDURE ACT.

   Under Administrative Procedure Act, judicial review of administrative action is the rule unless there is statutory prohibition of judicial review or unless agency action is committed to agency discretion by law.

2. ONLY PARTIES SUBJECT TO F.T.C. CEASE AND DESIST ORDER ARE ENTITLED TO JUDICIAL REVIEW OF SUCH ORDER.

   Because only parties subject to Federal Trade Commission cease and desist order are entitled to judicial review of such order, consumers organization was not entitled to review of action of FTC in refusing to order corrective advertising after it found that baking company and its advertising agency had falsely and deceptively advertised nutritive properties of baking company's bread.

3. LEGISLATIVE HISTORY MAY BE USED TO SHOW LEGISLATIVE INTENT.

   While statutory prohibition of judicial review will be found only upon showing of clear and convincing evidence of legislative intent to prohibit review, prohibition need not be express and legislative intent to prohibit review may be shown by legislative history.

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* Reported in 515 F.2d 367 (1975). For case before the Commission, see 83 F.T.C. 865; modifying order and denial of petitions for review, 83 F.T.C. 1105.

(Syllabus, with substituted captions, taken from 515 F.2d 367.)

On petition for review of F.T.C. action, court held that only parties subject to cease and desist order are entitled to review of such order; third party was not entitled to review.

Petitions by Consumers Federation of America, et al. dismissed, and remaining petitions for review transferred to the Second Circuit.

Victor H. Kramer, Washington, D.C., with whom *Richard B. Wolf* and *John H. Harwood, II*, Washington, D.C., was on the brief for petitioners in Nos. 73-2138 and 73-2239. *Larry P. Ellsworth*, Washington, D.C., and *Alan Mark Silbergeld* also entered appearances for petitioners in No. 73-1574.

John H. Schafer, III, Washington, D.C., with whom *Stephen C. Rogers*, Washington, D.C., was on the brief for petitioners in Nos. 74-1172 and 74-1174 and intervenor, ITT Continental Baking Co., Inc., in Nos. 73-2138 and 73-2239.

Marshall Cox, Washington, D.C., with whom *Donald J. Mulvihill*, Washington, D.C., and *Laurence T. Sorkin*, New York City, were on the brief for petitioner in Nos. 74-1173 and 74-1199.

Denis E. Hynes, Atty., F.T.C., with whom *Gerald Harwood*, Asst. Gen. Counsel and *James P. Timony*, Atty., F.T.C., were on the brief for respondent.

Thomas R. Trowbridge, III, New York City filed a brief on behalf of American Association of Advertising Agencies, Inc., as amicus curiae in Nos. 74-1173 and 74-1199.

Before ROBINSON and ROBB, *Circuit Judges*, and SOLOMON,* *Senior United States District Judge* for the District of Oregon.

[368] Opinion for the Court filed by *Senior District Judge* SOLOMON.

SOLOMON, *Senior District Judge:*

The Consumer Federation of America (Consumers),[1] ITT Continental Baking Company, Inc. (ITT Continental), and Ted Bates & Company, Inc. (Bates) petition this Court to review a Federal Trade Commission (FTC or Commission) order. For reasons set forth below, we dismiss for lack of jurisdiction the petitions of Consumers and we transfer the petitions of ITT Continental and Bates to the Court of Appeals for the Second Circuit.

In August, 1971, the FTC issued a complaint against ITT Continental and its advertising agency, Bates. The complaint alleged that ITT Continental and Bates violated Sections 5 and 12 of the Federal Trade Commission Act (FTCA), 15 U.S.C. §§ 45, 52, by falsely and deceptively advertising Wonder Bread and Hostess Snack Cakes, two of ITT

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] The Consumer Federation of America was joined by the Consumers Union of the United States and the Federation of Homemakers, Inc.

Continental's products. The complaint proposed "corrective advertising" as a remedy for the deceptive advertising.

In June, 1972, the Administrative Law Judge began extensive hearings on the complaint. On December 18, 1972, he issued an initial decision recommending that the complaint be dismissed. The FTC complaints counsel appealed to the full Commission.

On January 5, 1973, Consumers moved to intervene as a party to support the complaint before the full Commission.[2] The Commission denied the motion,[3] but allowed Consumers to file a brief and present oral argument as amici curiae. Consumers urged the Commission to re[369]verse the initial decision and to order extensive corrective advertising.

On October 19, 1973, the FTC, in its final order on the merits, dismissed most of the complaint. Nevertheless, it sustained an allegation that ITT Continental and Bates had misrepresented Wonder Bread as "an extraordinary food for producing dramatic growth in children". The FTC issued a broad cease and desist order but did not order corrective advertising.

On November 5, 1973, Consumers petitioned this Court to review the FTC's refusal to order corrective advertising.[4] Shortly thereafter, ITT Continental and Bates petitioned the United States Court of Appeals for the Second Circuit to review the FTC's cease and desist order. On December 11, 1973, the Second Circuit, pursuant to 28 U.S.C. § 2112(a), transferred those cases to this Court.[5]

During November, 1973, ITT Continental and Bates filed motions to reconsider with the FTC. On December 14, 1973, the Commission issued an order which revised its October 19th order. Consumers petitioned this Court for review of the December 14th order.[6] ITT Continental and Bates again filed for review in the Second Circuit; that Court again transferred the cases here.[7] The petitions of ITT Continental, Bates, and Consumers were consolidated here.

ITT Continental and Bates were granted leave to intervene in the petitions for review filed by Consumers. On January 21, 1974, the intervenors filed a motion to dismiss Consumers' petitions; they also filed a motion to transfer their petitions back to the Second Circuit.

We grant both motions.

This Court does not have jurisdiction to hear Consumers' petitions. Section 5(c) of the FTCA, 15 U.S.C. § 45(c), provides that:

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[2] Consumers were aware of the proceedings before the Administrative Law Judge, but they did not seek to participate in them.

[3] In May, 1973, Consumers filed a petition to review that denial. D.C. Cir. No. 73-1574. The FTC's motion to dismiss was not opposed; the motion is granted.

[4] D.C. Cir. No. 73-2138.

[5] D.C. Cir. Nos. 74-1172 and 74-1173.

[6] D.C. Cir. No. 73-2239.

[7] D.C. Cir. Nos. 74-1174 and 74-1199.

> Any person, partnership, or corporation required by an order of the [Federal Trade] Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States . . . .

Consumers concede that Section 5(c) does not grant this Court jurisdiction to hear their petition. They contend, however, that we have jurisdiction under Section 10(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 702:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

[1,2] Under the APA, judicial review of administrative action is the rule, *Barlow* v. *Collins*, 397 U.S. 159, 166, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970), unless there is a statutory prohibition of judicial review or unless agency action is committed to agency discretion by law. Section 10(a), 5 U.S.C. § 701. ITT Continental and Bates contend that Section 5(c) of the FTCA only allows judicial review for parties subject to an FTC cease and desist order and therefore Consumers are not entitled to review under the APA. We agree.

Consumers rely on language in *Pepsico, Inc.* v. *FTC*, 472 F.2d 179, 185-86 (2d Cir. 1972), which suggests that a non-party to FTC proceedings may be entitled to seek review of an FTC order in a district court. This, Consumers contend, supports their argument that Section 5 does not limit judicial review to parties subject to FTC orders. We disagree.

The issue before the *Pepsico* Court was whether the FTC's denial of motions to dismiss a complaint for failure to join indispensible parties was "final agency action" subject to judicial review under Section 10(c) of the APA, 5 U.S.C. § 704. In its analysis, the Court referred to a cease and desist order as a clear example [370] of final FTC action. The Court noted that in that hypothetical situation, not before the Court, a party subject to a cease and desist order could seek review in a court of appeals; the Court went on to suggest that even a non-party who was "adversely affected or aggrieved" by the agency action, 5 U.S.C. § 702, could seek review in a district court.

The *Pepsico* Court was not required to nor did it decide whether Section 5(c) of the FTCA precludes judicial review for a person not subject to an FTC cease and desist order. The issue was whether the FTC's denial of motions to dismiss was final agency action, not whether persons not named in a cease and desist order were entitled to review.

[3] A statutory prohibition of judicial review will be found only upon a showing of "clear and convincing evidence" of legislative intent to prohibit review. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Nevertheless, the prohibition need not be express. Legislative intent to prohibit review may be shown by legislative history. *Air Line Dispatchers Association* v. *National*

Mediation Board, 89 U.S.App.D.C. 24, 189 F.2d 685, 688 (1951); *see also National Welfare Rights Organization* (*NWRO*) v. *Finch*, 139 U.S. App.D.C. 46, 429 F.2d 725, 736 (1970).[8]

We believe that the legislative history of Section 5(c) presents clear and convincing evidence of a legislative intent to allow review of FTC cease and desist orders only on the petition of parties subject to the orders.

Section 5, as originally drafted, precluded anyone other than the Commission itself from seeking judicial review of an FTC order.[9] Several Senators proposed amendments which included provisions to expand the class of persons entitled to review.

The principal amendments on judicial review were proposed by Senators Cummins and Pomerene. The main difference between their proposals was the broad review under the Pomerene amendment and the narrow review under the Cummins amendment.[10] The amendments differed on who were entitled to initiate review proceedings and the scope of such review.

The narrow amendment, proposed by Senator Cummins, authorized the FTC to bring an enforcement action; it also allowed judicial review of an FTC order for any "person, partnership, or corporation named in the complaint."[11] Com[371]plainants were not entitled to review.[12] Senator Cummins thought that this restriction was proper because he believed that the FTC would protect both the rights of persons injured by unfair competition and the rights of society in general.[13]

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[8] We recognize that a statutory grant of review to one class of persons does not necessarily signify a legislative intent to deny review to all others. *NWRO* v. *Finch*, supra at 735-36; *Peoples* v. *United States Department of Agriculture*, 138 U.S.App.D.C. 291, 427 F.2d 561, 565 (1970). Here, unlike in those cases, the legislative history is not silent on the right of review by parties not mentioned in the statute.

[9] The House bill, H.R. 15613, did not provide for judicial review except for enforcement actions by the Commission. 51 Cong.Rec. 14922 (September 10, 1914); *see also id.* at 14931 (remarks of Representative Covington). The House passed that bill on June 5 and sent it to the Senate.

Rather than consider amendments to the House bill, the Senate Committee on Interstate Commerce reported to the Senate an entirely new bill. *Id.* at 14921. As initially reported to the Senate floor by the Committee on Interstate Commerce, the bill provided only for enforcement by the FTC: "Whenever the commission, after the issuance of such order, shall find that such corporation has not complied therewith, the commission may petition the district court . . . praying the court to issue an injunction to enforce such order of the commission; and the court is hereby authorized to issue such injunction." H.R. 15613, 63d Cong., 2d Sess. (1914); 51 Cong.Rec. 11181 (June 26, 1914). *See* 51 Cong.Rec. 13066 (July 31, 1914) (remarks of Senator Newlands).

[10] *See, e. g.*, 51 Cong.Rec. 13045 (July 31, 1914) (remarks of Senator Cummins); *id.* at 13052 (remarks of Senator Walsh); *id.* at 13066 (remarks of Senator Newlands); *id.* at 13107 (remarks of Senator White) (August 1, 1914).

[11] "If upon such hearing the commission shall find that the person, partnership, or corporation named in the complaint is practicing such unfair competition, it shall thereupon enter its findings of record and issue and serve upon the offender an order requiring . . . that the offender shall cease and desist from such unfair competition . . . Any suit brought by any such person, partnership, or corporation to annul, suspend, or set aside, in whole or in part, any such order of the commission shall be brought against the commission in a district court of the United States . . . ." *Id.* at 12873 (July 28, 1914); *id.* at 13045 (July 31, 1914).

[12] On the day before the Senate adopted the Cummins amendment, the question of whether an FTC complainant could seek review was discussed:

> "MR. CLAPP. What instrument, then, is there . . . so certain to lead to the enforcement of the law as the right of the individual upon whom the unjust practice has fallen to have a review of the decision, the action, the order of the commission?
>
> "I believe . . . the party who complains of an unfair practice should have the same opportunity for a review in the courts as the party against whom the unfair practice is alleged."
>
> "MR. CUMMINS. . . . [W]hat he suggests destroys entirely the value of the order of the commission. . . .". . . It seems to be founded upon good reason, and yet, however advantageous it might be to allow an appeal of that kind in a particular case, you must put over against it the disadvantage of permitting a court to

(Continued)

The broader amendment, proposed by Senator Pomerene, extended review to FTC complainants and to the Attorney [372] General of the United States.[14] Before the Senate voted on Section 5, the Committee on Interstate Commerce withdrew its original Section 5[15] and inserted the Pomerene amendment.[16]

On August 1, 1914, the Senate, as in Committee of the Whole, rejected the Pomerene amendment and adopted the Cummins amendment.[17]

Several days later, Senator Pomerene again proposed an amendment

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review or retry every case brought and determined by the commission . . . ." *Id.* at 13050 (July 31, 1914).

Later that day, Senator Walsh referred to the differences between the Pomerene and Cummins amendments. He said:

> ". . . [U]nder the amendment offered by [Senator Cummins], if one complains before the commission of unfair practices pursued against him by which his business is being ruined, by which he is being wrongfully driven out of the market, and the commission decides against him, determining that the practice complained of is not unlawful, that it is not unfair competition, and dismisses his complaint, that ends the matter as to him. He can never be heard in a court at all upon his complaint. On the other hand, if the decision goes against the corporation and it is adjudged to be guilty of unfair practices in violation of the law it may have a review in the court . . . .
>
> ". . . I feel that we ought carefully to guard the rights of the party making the complaint lest at some time or other we should have a commission that has no interest in the maintenance of the law; a commission not desirous of enforcing it against the great combinations, not desirous of enforcing it against those who may sustain friendly relations with members of the commission or those influential with it." *Id.* at 13053-54.

[13] On August 1, 1914, less than an hour before the Senate voted to adopt the Cummins amendment, the right to review by complainants was again discussed:

> "MR. PITTMAN. Mr. President, I should like to ask [Senator Cummins] if his amendment provides for any form of appeal by one making complaint to the trade commission, in the event that the trade commission does not grant the remedy to which the complainant believes he is entitled?
>
> "MR. CUMMINS. It does not. As I said yesterday, that involves opening up everything for a trial de novo. It is impossible to avoid that, if one who is denied relief is given the right to appeal; but I may say that this is not an adversary proceeding. The complaint is initiated by the commission and not by a third person.
>
> "MR. PITTMAN. Is there any provision for a complaint being made by a third person?
>
> "MR. CUMMINS. Oh, certainly; anyone has a right to file a complaint with the commission, and if the commission has reason to believe that this section of the law is being violated, it then serves notice of the complaint upon the person or corporation violating it and calls him or it before the commission.
>
> "MR. PITTMAN. What would be the remedy of the complainant—that is, the individual or corporation suffering from oppressive acts complained of—if it should transpire that the trade commission had tendencies in favor of the oppressive corporation?
>
> "MR. CUMMINS. Such a person would sue the offending corporation or association to recover damages.
>
> "MR. PITTMAN. But he would have no remedy through the proposed commission?
>
> "MR. CUMMINS. I think not; I hope not. This is a proceeding, as I said yesterday, for the benefit of the people of the country. It is intended to prevent unfair competition. Its enforcement is precisely like that of a criminal statute; society enforces the statute; society, through the commission or through the Government, enforces the law, leaving each individual to the recovery of his damages according to the law, but not through the commission, which is the representative of the Government. That is the theory . . . of this proposed law." 51 Cong.Rec. 13102 (August 1, 1914).

[14] "Any party to any proceedings brought under the provisions of this section, including the person upon whose complaint such proceedings shall have been begun, if begun on such complaint, as well as the United States, by and through the Attorney General thereof, may obtain a review of any final order made by such commission . . . ." *Id.* at 12993 (July 30, 1914).

[15] See footnote 9.

[16] *Id.* at 13111 (August 1, 1914) (remarks of The President pro tempore); *id.* at 13044 (July 31, 1914) (remarks of Senator Newlands); *id.* at 13045 (remarks of Senator Cummins).

[17] *Id.* at 13109.

to Section 5 which contained a provision allowing review for persons other than those subject to an FTC order.[18] The debate on the amendment focused on whether a complainant had a right to review.[19] The Senate, as in Committee of the Whole, again defeated the amendment.[20] The Senate did adopt another amendment proposed by Senator Pomerene to permit a complainant to participate in judicial proceedings brought by a person subject to the FTC order.[21] The Senate passed the bill[22] and sent it to the House-Senate Conference Committee.

Section 5 of the bill reported out of the Conference Committee[23] differed significantly from the Senate bill. The Conference Committee version was the one enacted into law. September 26, 1914, ch. 311, 38 Stat. 719. It provided that both enforcement proceedings brought by the FTC and petitions for review by those subject to cease and desist orders could be heard in courts of appeals, rather than in district courts.[24] **[373]** Senator Pomerene's provision allowing limited participation in judicial proceedings by a complainant was deleted.

In our view the Conference Committee changes negative any intent by the conferees to broaden the category of persons who could seek judicial review. Apparently Senator Cummins was of the same opinion. In reporting the Conference bill to the Senate, Senator Cummins, who was on the Conference Committee, discussed both the substantive and language changes in the review provisions.[25] Because of his strong opposition to the Pomerene amendment, it is significant that Senator Cummins did not object to any change in the provisions for review.

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[18] "Any party to any proceedings brought under the provisions of [Section 5], including the person, partnership, or corporation upon whose complaint such proceedings shall have been begun, if begun on such complaint, as well as the United States, by and through the Attorney General thereof, may obtain a review of the findings or final order made by such commission in any district court having jurisdiction to enforce any order . . . ." *Id.* at 13315 (August 5, 1914).

[19] In introducing the amendment, Senator Pomerene said:

> "My purpose in offering this amendment again is to call attention briefly to the very great difference between the provisions of the amendment offered by [Senator Cummins] and the provisions of that offered by myself in this respect. Under the amendments of [Senator Cummins] there is no provision whereby the complainant before the commission can have any hearing whatsoever if the decision of the commission is against him.
>
> * * * * * * *
>
> "It is just as likely that the commission will be wrong in dismissing the complaint as it is that it will be wrong in finding against the accused. To my mind it is un-American to say of two persons to a controversy that one may have a right of review and the other may not . . . ." *Id.* at 13315.

Senator Saulsbury thought that allowing a right of review by a complainant would protect against the possibility that the FTC might rule in favor of defendants in order to avoid judicial reversal. *Id.* at 13315. Senators Walsh and Myers also argued vigorously for a right of review for complainants. *Id.* at 13316-17.

[20] *Id.* at 13317-18.

[21] *Id.* at 13318.

[22] *Id.* at 13319.

[23] *Id.* at 1476-66 (September 5, 1914).

[24] "If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States . . . for the enforcement of its order . . . ."

"Any party required by such order of the commission to cease and desist from using such [unfair] method of competition may obtain a review of such order in said circuit court of appeals . . . ." *Id.* at 14766.

[25] *Id.* at 14768-69.

This legislative history is clear and convincing evidence that Congress intended to allow judicial review of FTC cease and desist orders only for parties subject to the orders. Competitors who had suffered direct and tangible injury from unfair competition were twice denied the right to seek review. The legislative history of Section 5 shows that Congress did not intend to permit persons and organizations like Consumers, who suffer only remote and intangible injury, to obtain judicial review of FTC orders.

None of the amendments to the FTCA removed any of the limitations on who could seek review. The Wheeler-Lea Amendments, March 21, 1938, ch. 49, § 3, 52 Stat. 111, changed the wording of Section 5(c) to its present form; they also made FTC orders final and eliminated the need for commission enforcement proceedings. But these changes did not expand or alter the class of persons who could petition to review an FTC cease and desist order. *Cf. Holloway* v. *Bristol-Myers Corporation*, 158 U.S.App.D.C. 207, 485 F.2d 986, 997 (1973).

Section 10(b) of the APA does not give this Court jurisdiction to hear Consumers' petitions because Section 5(c) of the FTCA, together with Section 10(a) of the APA, denies judicial review to parties not subject to an FTC cease and desist order.[26]

We grant the motion to dismiss Consumers' petitions.

Consumers filed their petitions in this Court before ITT Continental and Bates petitioned to the Second Circuit. These cases were transferred to this Court only because of the prior filings by Consumers. Because we hold that this Court has no jurisdiction to hear Consumers' petitions, we grant the motion of ITT Continental and Bates to transfer their cases to the Second Circuit.

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[26] We need not reach such issues as whether the Consumers have standing here, whether Consumers are "persons aggrieved" within the meaning of Section 10(b), and whether Section 10(b) grants jurisdiction to a court of appeals, as distinguished from a district court.

NATIONAL PETROLEUM REFINERS ASSOCIATION ET AL.

v.

FEDERAL TRADE COMMISSION ET AL.*

Civ. A. No. 1180-71.

(United States District Court, District of Columbia, July 1, 1975)

William Simon, *John Bodner, Jr.*, and *Roger C. Simmons*, of *Howrey, Simon, Baker & Murchison*, Washington, D.C., for plaintiffs.

Calvin J. Collier, Gen. Counsel, F.T.C., and *Stuart E. Schiffer*, Dept. of Justice, for defendants.

Gladys Kessler, of *Berlin, Roisman* and *Kessler*, for intervenors.

Before ROBINSON, *District Judge*.

ORDER

Upon consideration of Intervenors' Motion for Summary Judgment, Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, Plaintiff's Opposition thereto, and upon consideration of the amended complaint, exhibits, documents and all other papers of record filed in this case, and upon consideration of oral argument by counsel for all parties, it is this 1st day of July, 1975,

Ordered, that this case be remanded to the Defendant Federal Trade Commission for preparation of an Environmental Impact Statement in accordance with Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.;* and it is

Further Ordered, that the Octane Posting Trade Regulation Rule be reconsidered by the Defendant Federal Trade Commission in light of said Environmental Impact Statement; and it is

Further Ordered, that such Environmental Impact Statement and reconsideration of the Octane Posting Trade Regulation Rule be completed within a period of sixty (60) days from the date of this Order, that the Defendant Federal Trade Commission file such Environmental Impact Statement, such reconsideration of the Octane Posting Trade Regulation Rule, and any documents related thereto with this Court and on all parties within ten (10) days from the completion of the aforementioned sixty (60) day period; and it is

Further Ordered, that decision on the portions of Intervenors' Motion for Summary Judgment which pertain to procedural regularity and to whether the Octane Posting Trade Regulation Rule is arbitrary or capricious is deferred pending completion of Defendant Federal Trade Commission's decision-making process.

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* Not reported in Federal Reporter. Reported Trade Reg. Rep. ¶ 60, 392 at 66,728 (1975-2 Trade Cases). See also p. 1410 herein.

ATLANTIC RICHFIELD COMPANY v. FEDERAL TRADE COMMISSION, et al.*

Civ.A.No. 75-H-884. F.T.C. File No. 99-239.

(United States District Court, Southern District of Texas, Houston Division, July 3, 1975)

1. ACTION FOR DECLARATORY RELIEF AND INJUNCTION AGAINST F.T.C. SUBPOENA WAS NOT WITHIN "UNITED STATES AS DEFENDANT" JURISDICTION OF COURT WHERE U.S. WAS NOT A PARTY TO THE ACTION.

[1] Where United States was not a party to the action, oil company's action for declaratory relief and injunction against enforcement and compliance with Federal Trade Commission subpoenas was not within "United States as defendant" jurisdiction of district court.

2. JURISDICTION OF U.S. COURTS TO HEAR SUITS AGAINST FEDERAL OFFICERS ON WRIT OF MANDAMUS COMMANDING PERFORMANCE OF MINISTERIAL DUTY IS CONFERRED BY STATUTE.

Statute giving district court jurisdiction over actions to compel officers to perform their duties confers jurisdiction on courts of the United States outside the District of Columbia to hear a suit against a federal officer on a writ of mandamus to command him to perform a ministerial duty owed to the plaintiff.

3. STATUTE GIVING DISTRICT COURT JURISDICTION OVER ACTION TO COMPEL OFFICERS TO PERFORM THEIR DUTY DID NOT GIVE DISTRICT COURT JURISDICTION OVER ACTION ENJOINING ENFORCEMENT OF AND COMPLIANCE WITH F.T.C. SUBPOENA.

District court did not have jurisdiction over action to enjoin enforcement of and compliance with Federal Trade Commission subpoenas on basis of statute giving district courts jurisdiction over actions to compel officers to perform their duties.

4. COURT LACKED JURISDICTION OF ACTION AS ONE ARISING UNDER ACT OF CONGRESS REGULATING COMMERCE AND TRADE WHERE, IN ACTION SEEKING TO ENJOIN ENFORCEMENT OF AND COMPLIANCE WITH F.T.C. SUBPOENA, ALLEGATION COMPLAINED OF PROCEDURAL DEFECTS IN RULES AND REGULATIONS REQUIRING PROMULGATION UNDER ADMINISTRATIVE PROCEDURE ACT.

[2] Where allegations of oil company which sought to enjoin enforcement of and compliance with Federal Trade Commission subpoena complained of defects in procedures which allegedly violated rules and regulations required to be promulgated under the Administrative Procedure Act, district court did not have jurisdiction over the action as one arising under an act of Congress regulating commerce and trade.

5. IN ACTION BROUGHT TO ENJOIN SUBPOENA ENFORCEMENT AND COMPLIANCE, FEDERAL DISTRICT COURT HAD FEDERAL QUESTION JURISDICTION OVER ACTION.

Federal district court had federal question jurisdiction over action brought to enjoin enforcement of and compliance with Federal Trade Commission subpoenas.

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* Reported in 398 F.Supp. 1 (1975). Motion for injunction pending appeal denied July 8, 1975; see p. 1407 herein. Atlantic Richfield filed notice of appeal July 8, 1975, denied 5 Cir., July 18, 1975.

6. JURISDICTION OF FEDERAL DISTRICT COURTS ONLY EXTENDS TO ADJUDICATION OF CASES OR CONTROVERSIES.

Federal district court's jurisdiction extends only to the adjudication of cases or controversies.

7. INTERESTS OF ALL PARTICIPANTS WAS NOT SUFFICIENTLY ADVERSE AS TO A JUSTICIABLE CASE OR CONTROVERSY WHERE COMPLIANCE WOULD PROVE JUST AS BURDENSOME TO ALL PARTIES AND WHEN THIRD PARTIES STIPULATED THEY WOULD NOT COMPLY WITH F.T.C. SUBPOENA BEFORE COURT RULED ON VALIDITY OF SUBPOENA ISSUED TO PLAINTIFF.

Where three oil companies which were members of joint venture had stipulated with fourth oil company involved in venture that they would not comply with Federal Trade Commission subpoenas until the fourth oil company had obtained a court ruling as to the validity of the subpoenas, and where compliance with subpoenas would prove just as burdensome to the other three oil companies as to the fourth, interests of the fourth oil company and the other three were not sufficiently adverse so as to give rise to a justiciable case or controversy with respect to fourth oil company's request for injunction prohibiting the other three from complying with subpoenas.

8. F.T.C. SUBPOENAS ARE NOT SELF-ENFORCING: PENALTIES FOR FAILURE TO COMPLY ARE ONLY JUSTIFIED WHERE COURT HAS DIRECTED COMPLIANCE.

Subpoenas issued by the Federal Trade Commission pursuant to an investigation are not self-enforcing, so that one who is subject of a subpoena is under no duty to comply with the subpoena until after enforcement has been ordered by court upon application of the Attorney General, and subject of the subpoena is liable for penalties for failure to comply only if it fails to obey an order of a court which directs compliance.

9. WRITTEN REQUEST TO ADMINISTRATIVE LAW JUDGE, DEMONSTRATION OF RELEVANCY AND REASONABLENESS OF SCOPE OF SUBPOENA ARE NECESSARY REQUIREMENTS FOR APPLICATION FOR ISSUANCE OF F.T.C. ADJUDICATIVE SUBPOENA DUCES TECUM.

Application for issuance of adjudicative subpoena duces tecum by Federal Trade Commission requires that the requesting party submit a written request to the administrative law judge, specifying the material to be produced and demonstrating the relevancy of the requested material and reasonableness of the scope of the subpoena; motion to quash may be filed in response to the application and the administrative law judge thereafter determines propriety of permitting the requested discovery.

10. ADMINISTRATIVE LAW JUDGE'S DECISION TO ISSUE SUBPOENA IS APPEALABLE TO THE FULL COMMISSION: DECISION OF COMMISSION IS APPEALABLE TO U.S. COURT OF APPEALS.

After administrative law judge has ruled on whether adjudicative subpoena duces tecum should be issued by Federal Trade Commission, the decision may be appealed to the full Commission and the Commission may adopt, modify, or set aside the findings and conclusions of the administrative law judge; decision of the Commission is appealable to the United States Court of Appeals.

11. SUBJECT OF SUBPOENA HAD NO STANDING TO ENJOIN F.T.C. FROM ATTEMPTING TO ENFORCE ITS SUBPOENA SINCE THE SUBPOENA WAS NOT SELF-ENFORCING: IT REQUIRED COURT DIRECTION OF COMPLIANCE.

Since subpoena duces tecum issued by the Federal Trade Commission investigative staff and approved by members of the Commission is not self-enforcing, oil company which was subject of subpoena but which was under no court order to comply with the subpoena, and thus under no duty to do so, did not have standing to bring action against Federal Trade Commission to enjoin an attempt to enforce the subpoena.

12. IN DETERMINING WHETHER SUBPOENA SHOULD BE ENFORCED, ONE CRITERIA COURT MUST CONSIDER IS F.T.C.'S AUTHORITY TO SUBPOENA INFORMATION.

[3] Federal Trade Commission authority to subpoena information during an investigation is one of the criteria to be evaluated by court in determining whether subpoena should be enforced.

13. STATUTORY RIGHT TO REVIEW CONSTITUTES SPEEDY AND ADEQUATE REMEDY AT LAW.

All constitutional, jurisdictional, substantive, and procedural issues arising in Federal Trade Commission proceedings may be considered in an appeal to the Court of Appeals from action of FTC; statutory right to review constitutes a speedy and adequate remedy at law.

14. WHERE NO FINAL AGENCY ACTION HAD BEEN TAKEN, ACTION WAS NOT RIPE FOR REVIEW BY PLAINTIFF.

Oil company's contention that adjudicative proceeding would be infected with procedural irregularities by garnering of pertinent information in extrajudicial proceedings through Federal Trade Commission subpoena, which oil company sought to enjoin, was not ripe for review where no final agency action had been taken and administrative law judge had not yet reviewed the oil company's contentions regarding impropriety and irregularities surrounding the issuance of the subpoena.

15. REQUIREMENT THAT LITIGANT EXHAUST ADMINISTRATIVE REMEDIES BEFORE SEEKING JUDICIAL REVIEW IS A COROLLARY TO PERMITTING JUDICIAL REVIEW OF ONLY FINAL AGENCY ACTION.

Corollary to permitting judicial review of only final agency action is the requirement that a litigant exhaust administrative remedies before seeking judicial review.

16. LACK OF EXHAUSTION OF ADMINISTRATIVE ACTION PRECLUDES JUDICIAL RELIEF FROM SUPPOSED OR THREATENED INJURY FROM AGENCY ACTION.

No one is entitled to judicial relief from supposed or threatened injury from agency action until the prescribed administrative remedy has been exhausted.

17. POSSIBILITY OF COMPLAINING PARTY ULTIMATELY PREVAILING IN ADMINISTRATIVE PROCEEDING; QUESTIONS REQUIRING FACTUAL DETERMINATION ARISING; AND RESOLUTION OF FACT QUESTIONS DURING PROCEEDINGS, ALL OF WHICH MAY CANCEL NEED FOR JUDICIAL REVIEW, ARE GROUNDS FOR EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE.

Doctrine of exhaustion of administrative remedies is grounded upon considerations that the complaining party may ultimately prevail in the administrative proceeding, that fact questions may be presented which require factual determinations more properly addressed to the expertise of an agency than to a federal district court, and that resolution of the fact questions by the agency may effectively reduce or eliminate the need for judicial review.

18. WHERE AVOIDANCE OF NORMAL COST OF ADMINISTRATIVE LITIGATION IS ONE MERIT OF REQUEST FOR JUDICIAL REVIEW, INTERVENTION BY COURT IS UNJUSTIFIED.

Judicial intervention is not justified where the merits of a jurisdictional attack on agency action are far from clear and one of the injuries sought to be avoided is the normal cost of administrative litigation.

19. PLAINTIFF FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES WHERE NO FINAL AGENCY ACTION HAD OCCURRED IN PROCEEDINGS.

Oil company which sought to enjoin any attempts of Federal Trade Commission to enforce subpoena directed against the oil company had not yet suffered any legal wrong giving it standing to complain about the issuance of the investigative subpoena as, where administrative law judge had not yet ruled on contentions of the oil company regarding the subpoena, no final agency action had occurred in the adjudicative proceeding for which judicial review was appropriate; oil company had not exhausted its administrative remedies.

20. ALLEGED RELATIONSHIP BETWEEN ADJUDICATIVE AND INVESTIGATORY PROCEEDINGS DOES NOT EXCUSE PLAINTIFF FROM DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES.

Where Federal Trade Commission had violated no rights secured by statute or regulation by merely issuing investigative subpoena, which it had not attempted to enforce, against oil company which, in addition to being subject of the investigation, was also subject of an adjudicative proceeding, and where judicial review of any agency action relating to the adjudicative proceeding remained [4] available, oil company was not excused from requirement of exhausting administrative remedies merely because of the alleged relationship between the adjudicative proceeding and the investigative proceeding.

21. AGENCY DENIES ITSELF OF RIGHT TO VIOLATE RULES OF PROCEDURE ONCE THOSE RULES ARE PROMULGATED.

When an administrative agency promulgates rules to govern its proceedings, those rules must be scrupulously observed and, once the agency has created procedural rules under which its actions are to be judged, it denies itself the right to violate those rules.

22. PREJUDICE ARISING FROM VIOLATION OF PROCEDURAL RULES PRECLUDES ANY ACTION TAKEN AS A RESULT OF STANDING.

Agency's violation of its own procedural rules, from which prejudice results, precludes any action taken as a result of the proceedings from standing.

23. REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF WAS RIPE FOR JUDICIAL REVIEW WITH RESPECT TO VIOLATION OF DUE PROCESS OR REGULATORY PROCEDURAL RIGHTS WHERE PLAINTIFF WAS SUBJECT TO BOTH ADMINISTRATIVE AND INVESTIGATORY PROCEEDINGS AND SUBPOENA REQUIRED INFORMATION AGRUABLY RELATED TO PREVIOUSLY CONVENED ADJUDICATORY PROCEEDING.

Where oil company was subject of both Federal Trade Commission adjudicative proceeding and FTC investigative proceeding, with respect to which subpoena duces tecum had been issued, oil company's request for declaratory and injunctive relief prohibiting enforcement of the subpoena was ripe for judicial review with respect to question of whether, once investigative proceeding has been commenced by an agency after the institution of an adjudicative proceeding, the agency violates due process of regulatory procedural rights of the adjudicative respondent by issuing a subpoena duces tecum which requires production of information arguably related to the previously convened adjudicative proceeding.

24. JURISDICTION TO GRANT OR DENY PRELIMINARY INJUNCTION RESTS WITHIN THE COURT'S DISCRETION.

Granting or denying preliminary injunction rests within the discretion of the court.

25. LIKELIHOOD OF PREVAILING ON MERITS, IRREPARABLE HARM, POTENTIAL HARM TO PLAINTIFF IF INJUNCTION IS DENIED AND PUBLIC INTEREST ARE FACTORS TO BE CONSIDERED IN DETERMINING WHETHER INJUNCTIVE RELIEF IS WARRANTED.

Factors to be considered in determining whether preliminary injunctive relief is appropriate are whether plaintiff is likely to prevail on the merits, whether plaintiff is in danger of suffering irreparable harm, whether potential harm to defendants from issuance of the injunction outweighs possible harm to plaintiff if injunctive relief is denied, and whether issuance of preliminary injunction will serve the public interest.

26. F.T.C. MAY CONDUCT INVESTIGATIONS AND ADJUDICATIONS SIMULTANEOUSLY BECAUSE OF F.T.C.'S BROAD INVESTIGATIVE POWER.

Investigative power of the Federal Trade Commission is very broad; FTC may conduct investigations and adjudications simultaneously.

27. WHILE F.T.C. INVESTIGATION IS SIMILAR TO GRAND JURY SEARCH FOR INFORMATION; F.T.C. ADJUDICATION TESTS SUCH EVIDENCE AS RESULTS FROM SUCH INVESTIGATION BEFORE AN INDEPENDANT EXAMINER.

Investigation by Federal Trade Commission is similar to search by a grand jury for information, and FTC may pursue production of information by subpoena, while an adjudication by the FTC tests such evidence as results from an investigation upon a record in an adversary proceeding before an independent examiner.

28. PROTECTION OF DUE PROCESS CLAUSE OF FIFTH AMENDMENT IS AFFORDED TO PARTY OF F.T.C. ADJUDICATIVE PROCEEDING.

Party to an adjudicative proceeding conducted by the Federal Trade Commission is afforded the protection of the due process clause of the Fifth Amendment.

29. F.T.C. MAY USE ANY INFORMATION PRODUCED DURING INVESTIGATIVE PROCEEDINGS IN ANY RESULTING ADJUDICATIVE PROCEEDING.

Information which is produced during investigative proceedings conducted by the Federal Trade Commission may be used by the Commission in any adjudicative proceeding which may result.

30. F.T.C. REGULATION MAKING INFORMATION OBTAINED FROM INVESTIGATIVE PROCEEDINGS ADMISSIBLE IN ADJUDICATORY PROCEEDING.

Federal Trade Commission regulation which specifically makes informa[5]tion obtained in investigations admissible in an adjudicative proceeding is valid.

31. A "CORDON SANITAIRE" IS NOT ESTABLISHED MERELY BY PENDENCY OF F.T.C. ADJUDICATORY PROCEEDING.

Mere pendency of Federal Trade Commission adjudicative proceeding does not establish a "cordon sanitaire" of permissible discovery, impeding the progress of other related investigative proceedings; party which is subject of adjudicative proceedings, although entitled to due process concerning that proceeding, is not protected from issuance of FTC subpoena duces tecum requiring it to produce documents in connection with a related investigative proceeding merely because the investigation is on a subject related to the adjudicative proceeding.

32. F.T.C. IS PRESUMED TO ABIDE BY ITS REGULATIONS ONCE AN ADJUDICATORY PROCEEDING IS INITIATED.

Once an adjudicative proceeding begins, Federal Trade Commission is presumed to abide by its regulations and should not thereafter be restricted to investigate in only totally distinguishable industries or companies which have no relation whatsoever to any adjudicative respondent.

33. PLAINTIFF WAS NOT ENTITLED TO INJUNCTION AGAINST ENFORCEMENT OF SUBPOENA WHERE PLAINTIFF FAILED TO MEET FACTORS CONSIDERED IN DETERMINING WHETHER INJUNCTIVE RELIEF IS WARRANTED

Where oil company which was subject of adjudicative proceeding and investigative proceeding was not likely to suffer any harm, where there would be substantial potential harm to Federal Trade Commission and to the public interest if oil company's request for injunction against attempt to enforce the subpoena were issued, and where oil company was not likely to succeed on the merits, it was not entitled to injunction against any FTC attempt to enforce the subpoena in connection with the investigative proceeding merely because the oil company was a subject of, and the information sought was arguably related to, an FTC adjudicative proceeding.

On Motion for Injunction Pending Appeal

34. LIKELIHOOD OF SUCCESS ON MERITS, IRREPARABLE HARM, HARM TO OTHER INTERESTED PARTIES, AND PUBLIC INTEREST ARE CONSIDERATIONS IN CONNECTION WITH MOTION FOR INJUNCTION AGAINST SUBPOENA ENFORCEMENT PLAINTIFF MUST MEET.

Considerations in connection with motion for injunction against enforcement of court order and final judgment pending appeal to Court of Appeals are that the applicant make a strong showing that it is likely to succeed on the merits of the appeal, that the applicant establish that, unless a stay is granted, it will suffer irreparable injury, that no substantial harm will come to other interested parties, and that a stay will do no harm to the public interests.

35. WHERE PLAINTIFF FAILED TO MEET CONSIDERATIONS NECESSARY FOR INJUNCTIVE RELIEF FROM SUBPOENA ENFORCEMENT ACTION, PLAINTIFF WAS NOT ENTITLED TO SUCH INJUNCTIVE RELIEF.

Where oil company which sought to enjoin Federal Trade Commission from attempting to enforce subpoena duces tecum was not likely to succeed on the merits where oil company was not under any present duty to comply with the subpoena, so that it would not be irreparably harmed if injunction pending appeal were denied, and where administrative remedies continued to be available to the oil company, oil company was not entitled to injunction against enforcement of district court order pending appeal.

(Syllabus, with substituted captions, taken from 398 F.Supp. 1.)

On motion for preliminary injunction, court held there was no justiciable controversy between joint ventures; administrative remedies had not been exhausted; that F.T.C. was not procluded from obtaining information relative to adjudicatory proceeding through an investigatory proceeding; and plaintiff failed to meet criteria necessary for injunctive relief.

Preliminary injunction and injunction pending appeal denied.

Michael R. Waller, Childs, Fortenback, Beck & Guyton, Houston, Tex., for plaintiff.

Robert E. Duncan, Washington, D.C., for defendant Federal Trade Commission.

Robert Craft, Houston, Tex., for defendant Continental Oil Co.

Russell H. Smith, Tulsa, Okla., for defendant Cities Service Co.

Cloy D. Monzingo and *Jack L. Brandon*, Houston, Tex., for defendant Getty Oil Co.

MEMORANDUM AND OPINION

CARL O. BUE, JR., *District Judge.*

I. INTRODUCTION

[6] Plaintiff has filed suit in this Court seeking to enjoin the defendant Federal Trade Commission ("FTC") and defendant members of the Commission from attempting to enforce a subpoena duces tecum issued to plaintiff pursuant to an investigation of the natural gas

industry being conducted by the FTC. Plaintiff also seeks to enjoin three other corporations, defendants Getty Oil Company ("Getty"), Continental Oil Company ("Conoco") and Cities Service Company ("Citgo"), from complying with similar FTC subpoenas issued to them which arise out of the same investigation. Plaintiff and the three corporate defendants are joint venturers in "CAGC", a joint venture formed for the purpose of conducting offshore explorations for natural gas and oil.

For the reasons stated herein, the Court concludes that no justiciable case or controversy is presented between plaintiff and the corporate defendants. As to the controversy between plaintiff and the FTC, to the extent that the issues are now ripe for adjudication on the merits, the equities clearly preponderate in favor of the FTC. The plaintiff's motions for preliminary injunction and declaratory relief are therefore denied.

II. FACTS

Plaintiff is a respondent in an adjudicative proceeding[1] now pending before an Administrative Law Judge. *In the Matter of Exxon Corporation*, FTC Docket No. 8934 (July 17, 1973) ("Exxon proceeding"). The proceeding was initiated by the FTC against plaintiff and seven other major oil producing companies in the United States on July 17, 1973. The complaint filed by the FTC alleges violations by the respondents of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a),[2] in that the respondents are allegedly: (1) performing acts or practices which constitute a combination or agreement to monopolize the refining of crude oil into petroleum products; (2) maintaining monopoly power over the refining of crude oil into petroleum products; and (3) restraining trade and maintaining a noncompetitive market structure in the refining of crude oil into petroleum products. The relevant market includes the northeastern, southeastern and southwestern United States. Plaintiff's Complaint for Declaratory and Injunctive Relief at 4 (June 3, 1975).

Subsequent to initiating this adjudicative proceeding, the FTC undertook a study of the conduct, performance and structure of the natural gas industry on April 16, 1974. FTC File 741 0019. The study was commenced at the direction of the Congress, pursuant to P.L. 93-135, in order to supplement an ongoing study previously limited to the petroleum industry and to document the impact of the effects of decisions by government departments and agencies on the price and supply of energy. H.R. No. 93-520, 93rd Cong., 1st Sess. (September 20, 1973). The Congressional mandate authorized an appropriation for the study, and the FTC was directed to report its findings at the earliest practicable time to the Congress. *Id.* at 24.

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[1] An adjudicative proceeding is a formal proceeding conducted under one or more of the statutes administered by the FTC which is required by statute to be determined on the record after opportunity for an agency hearing. 16 C.F.R. § 3.2; 15 U.S.C. § 45(b).

[2] "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." 15 U.S.C. § 45(a)(1).

On March 13, 1975, the staff conducting the FTC investigation issued subpoenas duces tecum to plaintiff and the three corporate defendants, as joint venturers in CAGC, a sample entity doing business in the energy industry, to require disclosure of the manner in which joint venturers explore for, develop, pro[7]duce and sell natural gas. Plaintiff moved to quash the subpoenas duces tecum on several grounds on April 11, 1975, but the defendant members of the Commission denied the motion by order of May 12, 1975,[3] and established June 9, 1975, as the deadline for compliance with the subpoenas.[4] Plaintiff filed suit in this Court on June 3, 1975, to avoid having to comply with its subpoena.

III. JURISDICTION

The Court turns first to the question of subject matter jurisdiction. Plaintiff alleges that jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1337, 1346, 1361, and 5 U.S.C. § 704. The matter in controversy allegedly exceeds the sum of $10,000, and declaratory relief thus is rested upon 28 U.S.C. § 2201. Plaintiff further contends that the action is brought to remedy alleged violations of the Fifth Amendment, the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and its rules of procedure, 16 C.F.R. Parts 0-4 (1975).

[1-3] As this Court views these contentions, jurisdiction is not proper under 28 U.S.C. § 1346 because the United States is not a party to this action. Furthermore, jurisdiction is not proper under 28 U.S.C. § 1361. That statute confers jurisdiction on courts of the United States outside of the District of Columbia to hear a suit against a federal officer on a writ of mandamus to command him to perform a ministerial duty owed to plaintiff. *E. g., Jarrett* v. *Resor*, 426 F.2d 213 (9th Cir. 1970). Section 1361 was not meant to confer authority in the instant situation. Plaintiff points to no "ministerial" duty owed to it, but rather alleges that its own rights before an administrative law judge may conceivably be violated. *Prairie Band of Potawatomie Tribe of Indians* v. *Udall*, 355 F.2d 364, 367 (10th Cir. 1966); Davis, Administrative Law Treatise, § 23.10 at 805-06 (1970 Supp.). *But cf.* Byse and Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L.Rev. 308 (1967).

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[3] The Commission did modify the subpoena to permit coordination of effort between joint venturers so as to eliminate duplicative compilations of material possessed by more than one joint venturer.

[4] The deadline has been re-set to July 7, 1975, without opposition in order to accommodate the docket of this Court.

[4] Based on the allegations contained in plaintiff's complaint, *Phillips Petroleum Co.* v. *Texaco, Inc.*, 415 U.S. 125, 94 S.Ct. 1002, 39 L.Ed.2d 209 (1974), jurisdiction is not proper under 28 U.S.C. § 1337. Plaintiff's allegations relate to defects in procedure which allegedly violate rules and regulations required to be promulgated under the APA. The suit as framed does not arise under the Federal Trade Commission Act, 15 U.S.C. § 45, and jurisdiction therefore cannot rest on 28 U.S.C. § 1337.

[5] Plaintiff's allegations do state a cause of action which arises under the Constitution and laws of the United States. The Court therefore views jurisdiction as proper under 28 U.S.C. § 1331. 13 Wright, Miller & Cooper, Federal Practice and Procedure: Civil § 3562 (1975).[5]

IV. JUSTICIABILITY: CASE OR CONTROVERSY

[8] [6] This Court's jurisdiction extends only to the adjudication of cases or controversies. In this case, there is a serious question as to whether a proper case or controversy is presented between plaintiff and the three corporate defendants. These defendants were served by the FTC with investigative subpoenas similar to the one issued to plaintiff. Aside from its Fifth Amendment due process contention, plaintiff also objects to the subpoenas on the grounds of irrelevancy, overbreadth and confidentiality of material requested. The Court also notes that the FTC resolution authorizing the instant investigation pursuant to Congressional mandate explicitly recites that any information received during the investigation may be utilized by the FTC to conduct investigations of possible violations of the Clayton Antitrust Act, 15 U.S.C. § 21, and the Federal Trade Commission Act, 15 U.S.C. § 45.

Within the confines of this suit, plaintiff seeks to put distance between itself and the other joint venturers by pointing out their presumably dissimilar positions. Their interests allegedly are adverse to plaintiff's solely because they are not respondents as is plaintiff in the Exxon proceeding, and because their possible compliance with the investigative subpoenas could result in a disclosure of information damaging to plaintiff, since they possess some information which duplicates that which is in plaintiff's files.

[7] The Court concludes that the interests of plaintiff and the corporate defendants in the instant suit are not sufficiently adverse so as to give rise to a justiciable case or controversy. Plaintiff asserts on

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[5] [7] Plaintiff's complaint alleges that more than $10,000 is in controversy. However, plaintiff's complaint nowhere else mentions any amount in controversy, nor does plaintiff sue for any damages, except to pray for "other relief as may be just and proper". Commentators have suggested that federal question cases involving interpretation of the APA obviate the need for the presence of a jurisdictional amount when a review of agency action is involved. Davis, Administrative Law Treatise, *supra*, § 23.02 at 789-91; *e. g.*, *Rusk* v. *Cort*, 369 U.S. 367, 82 S.Ct. 787, 7 L.Ed.2d 809 (1962). The Court concludes from the pleadings that jurisdiction is proper in this case under 28 U.S.C. § 1331.

the one hand that the corporate defendants will comply with the subpoenas issued by the FTC, but plaintiff also has succeeded in gaining stipulations from them whereby they agree to withhold compliance until plaintiff can obtain a ruling from this Court resolving the matters at issue. The three corporate defendants have filed no brief or otherwise indicated any opposition to plaintiff's position. Realistically, their positions cannot be viewed as inconsistent with the arguments advanced by plaintiff to the FTC in April, especially with respect to the contention that the investigative subpoenas are irrelevant, overbroad, or request confidential information. Certainly, compliance with allegedly irrelevant and overbroad subpoenas would prove just as burdensome to Getty, Conoco and Citgo as to plaintiff. Additionally, it simply cannot be assumed that these three joint venturers are more anxious than plaintiff to submit information which may prompt an investigative agency to spearhead further inquiries into possible statutory violations.

In short, this Court concludes, as has the United States Supreme Court in another context, *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47, 91 S.Ct. 1292, 28 L.Ed.2d 590 (1971), that both plaintiff and the corporate defendants seek the same or a similar result from this litigation. There is, therefore, no present case or controversy between them, and for that reason the three corporate defendants are hereby dismissed from this action.

V. JUSTICIABILITY: STANDING AND RIPENESS

A. *Introduction*

The APA confers standing to sue upon a person or organization which has suffered a legal wrong because of agency action. 5 U.S.C. § 702. Additionally, the APA defines those actions which are reviewable by a court of the United States, including "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

Taken together, these statutory requirements contribute to a determination as to whether plaintiff has standing to bring this action and whether the action is ripe for judicial review. Conceptually, "standing" and "ripeness" represent different legal notions and occupy [9] different spheres in the realm of justiciability. Within the context of judicial review of administrative actions, however, those distinctions become somewhat blurred. In this case, standing and ripeness must be evaluated against the mechanism of review already provided by the statutes and regulations.

B. *Review of the Issuance of an FTC Subpoena Duces Tecum*

1. Enforcement of the FTC Subpoena

[8] Subpoenas issued by the FTC pursuant to an investigation are not self-enforcing. Only courts of the United States may enforce such subpoenas upon application by the Attorney General. 15 U.S.C. § 49. Thus, plaintiff is under no present duty to comply with the subpoena and is subject to penalties for failure to comply only if it fails to obey the order of a court which subsequently directs compliance at the conclusion of a hearing instituted by the FTC. *Id.*

2. Requests for Information in the Exxon Proceeding

[9] Pretrial discovery in an adjudicative proceeding brought by the FTC is circumscribed by detailed agency rules. 16 C.F.R. §§ 3.31-3.39. Application for issuance of an adjudicative subpoena duces tecum, described in 16 C.F.R. § 3.34(b), requires that the requesting party submit a written request to the Administrative Law Judge, specifying the material to be produced and demonstrating the relevancy of the requested material and the reasonableness of the scope of the subpoena. 16 C.F.R. § 3.34(b)(1). A motion to quash may be filed in response to this application, *Id.*, and the Administrative Law Judge thereafter determines the propriety of permitting the requested discovery. 16 C.F.R. § 3.35.

The rules further describe the procedures to be followed during the course of the hearing on the substantive charges. 16 C.F.R. §§ 3.41-3.46. Information obtained in investigations is specifically made admissible in an adjudicative proceeding. 16 C.F.R. § 3.43(c).

3. Appeal of a Decision in the Exxon Proceeding

[10] At the conclusion of the adjudicative hearing, a decision is rendered by the Administrative Law Judge. 16 C.F.R. § 3.51. This decision may be appealed to the Commission, 16 C.F.R. § 3.52, and the Commission may adopt, modify or set aside the findings and conclusions of the Administrative Law Judge. 16 C.F.R. § 3.54. Additionally, the rules provide for an interlocutory appeal of a decision by the Administrative Law Judge prior to the time of the hearing. 16 C.F.R. § 3.23(b).

Once the Commission has completed its review of the adjudicative proceedings, it decides whether cease-and-desist orders should be issued for those actions which are proved to be in violation of a statute. 15 U.S.C. § 45(b). This decision is appealable to a United States Court of Appeals, which has exclusive jurisdiction to review the orders of the

FTC. 15 U.S.C. §§ 45(c) and (d). The Court of Appeals may affirm, enforce, modify or set aside orders of the Commission. *Id.*

C. *Standing and Ripeness in the Instant Case*

Recognizing the different statutory and regulatory characteristics of adjudicative versus investigative proceedings, the Court first isolates each proceeding under the scope of the APA to determine whether judicial review is appropriate at this time. On this basis, plaintiff does not now appear to have standing to challenge any alleged irregularity in the conduct of the natural gas investigation; and alleged irregularities in the conduct of pretrial discovery in the Exxon adjudicative proceeding do not now appear to be ripe for judicial review. This latter conclusion is reached not only upon considerations of "ripeness," but also upon a consideration of the doctrine of exhaustion of administrative remedies.

1. The Investigative Proceeding

[10] [11] As noted previously, a subpoena duces tecum issued by the FTC investigative staff and approved by the members of the Commission is not self-enforcing. Plaintiff is under no present duty to comply with the instant investigative subpoena, in light of the necessity for a determination by a court of the United States as to whether the subpoena is worthy of enforcement. The FTC must request the Attorney General of the United States to seek such enforcement, and the burden of proof rests with the Government.

[12] Plaintiff does not appear to have standing to sue in the present posture of the case. Being under no present duty to comply, plaintiff has as yet suffered no legal wrong because of the issuance of the investigative subpoenas. Also, plaintiff has an adequate judicial forum in which to challenge the subject subpoenas on the same grounds proffered in the instant case because of the requirements of 15 U.S.C. § 49. Indeed, adjudication of enforcement at this stage would completely duplicate and preempt the breadth and depth of a proper judicial inquiry conducted pursuant to 15 U.S.C. § 49. Agency authority to subpoena information during an investigation is one of the criteria to be evaluated by the "enforcement" court to determine whether the subpoena should be enforced. *Adams* v. *F.T.C.*, 296 F.2d 861 (8th Cir.), *cert. denied*, 369 U.S. 864, 82 S.Ct. 1029, 8 L.Ed.2d 83 (1961).

2. The Adjudicative Proceeding

[13] Jurisdiction to review agency action taken as the result of findings of an adjudicative proceeding reposes exclusively with the United States Court of Appeals. 15 U.S.C. §§ 21(d), 45(b). As the

United States Court of Appeals for the Fifth Circuit has emphasized, all constitutional, jurisdictional, substantive and procedural issues arising in Commission proceedings may be considered in an appeal, and this statutory right to review has long been viewed as constituting a speedy and adequate remedy at law. *Frito-Lay, Inc.* v. *F.T.C.*, 380 F.2d 8, 9-10 (5th Cir.1967).

[14] Plaintiff's contention that the adjudicative proceeding will be infected with procedural irregularities by the garnering of pertinent information in extra-judicial proceedings does not now appear ripe for review. Jurisdiction of complaints about alleged adjudicative irregularities usually resides exclusively with the Court of Appeals. Additionally, no final agency action has been taken within the context of the adjudicative proceeding, 5 U.S.C. § 704, since the Administrative Law Judge has not yet had any opportunity to review the instant contentions.

FTC rules and regulations provide plaintiff with ample opportunities to object to the manner in which the FTC Complaint Counsel conducts discovery, obtains documents, or otherwise allegedly attempts to circumvent administrative procedures during the Exxon proceeding. A finding by the Administrative Law Judge that members of the Complaint Counsel's staff conducted themselves improperly during the discovery stage of the adjudication would merit exclusion of evidence so discovered or even dismissal of the complaint. 5 U.S.C. § 556. Further, the order and findings rendered by the judge and approved by the Commission are subject to review by the Court of Appeals. 16 C.F.R. § 3.54; *see Borden, Inc.* v. *F.T.C.*, 495 F.2d 785, 787 & n.5 (7th Cir. 1974). An allegation of denial of due process can be raised properly at that time with full relief available to plaintiff.

D. *Exhaustion of Administrative Remedies Doctrine*

[15] The corollary to permitting judicial review of only final agency action is the requirement that a litigant exhaust administrative remedies before seeking judicial review, a doctrine well established in the jurisprudence of administrative law. *McKart* v. *United States*, 395 U.S. 185, 89 S.Ct. 1657, 23 [11] L.Ed.2d 194 (1969); *American General Ins. Co.* v. *F.T.C.*, 496 F.2d 197 (5th Cir. 1974).

[16,17] As the United States Court of Appeals for the Fifth Circuit has recognized, *e.g.*, *Bokat* v. *Tidewater Equipment Co.*, 363 F.2d 667 (5th Cir. 1966), no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. 363 F.2d at 671 *quoting Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S.Ct. 459, 82 L.Ed. 638 (1938). The doctrine is grounded upon several considerations: (1) the complaining party may ultimately prevail in the administrative proceeding; (2) fact questions

may be presented which require factual determinations more properly addressed to the expertise of an agency than to a federal district court; and (3) resolution of these fact questions by the agency may effectively reduce or eliminate entirely the need for judicial review. 363 F.2d at 671-72.

[18] Since the doctrine represents a general guideline rather than an inflexible command, it is not without exceptions. *Bristol-Myers Co.* v. *F.T.C.*, 469 F.2d 1116, 1118 (2d Cir. 1972). Several courts have reached the merits of questions not exhausted by administrative review,[6] and at least three pertinent exceptions have come to be recognized: (1) where the agency has clearly violated a right secured by statute or agency regulation, *Leedom* v. *Kyne*, 358 U.S. 184, 188-89, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958); (2) where the issue involved is a strictly legal one, *McKart* v. *United States*, *supra*, 395 U.S. at 197-99, 89 S.Ct. 1657; or (3) where the issue cannot be raised upon judicial review of a later order of the agency, *Jewel Companies, Inc.* v. *F.T.C.*, 432 F.2d 1155, 1159 (7th Cir. 1970).[7]

E. *Propriety of Reviewing Plaintiff's "Unexhausted" Claims*

[19] Plaintiff has not yet suffered any legal wrong which gives it standing to complain about the issuance of the investigative subpoenas. 5 U.S.C. § 702. No final agency action has yet occurred in the adjudicative proceeding for which judicial review is now appropriate. 5 U.S.C. § 704.

With no justiciable case or controversy now available to plaintiff as to the conduct of either the investigative or the adjudicative proceedings when viewed separately, plaintiff focuses on the alleged interaction of these two proceedings to suggest the presence of justiciability by fusion. Plaintiff contends that as a respondent in the *Exxon* adjudicative proceeding, it is entitled to certain procedural protections during the course of pretrial discovery, 5 U.S.C. § 555(d), and that the procedural rules pertinent to adjudicative proceedings, especially 16 C.F.R. § 3.34 (subpoenas duces tecum to issue during adjudicative proceeding only on showing of good cause) and § 4.7 (ex parte communications prohibited between members of FTC investigative and adjudicative staffs and Administrative Law Judge during an adjudicative proceeding), establish a "cordon sanitaire" around the *Exxon* proceeding.

The purportedly inviolate borders of such a proceeding were allegedly overrun in this case when FTC investigative staff counsel subpoenaed information from the members of CAGC. Such subpoenaed information is alleged to be so closely related to matters being adjudicated in the *Exxon* proceeding that com[12]pliance by plaintiff or the three corporate defendants with the investigative subpoenas would allegedly permit the FTC to obtain information useful to its pretrial preparation in the *Exxon* proceeding without first having to justify such a request before the Administrative Law Judge. A denial of due process allegedly results.

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[6] For an abridged listing of such cases, *see Bannercraft Clothing Co.* v. *Renegotiation Board*, 151 U.S.App.D.C. 174, 466 F.2d 345, 354 n. 7 (1972).

[7] The Fifth Circuit has somewhat blunted the thrust of these exceptions. Judicial intervention is not justified where the merit of a jurisdictional attack is far from clear and one of the injuries sought to be avoided is the normal cost of administrative litigation. *Frito-Lay, Inc.* v. *F.T.C.*, *supra*, 380 F.2d at 10.

[20] Analyzing plaintiff's unexhausted claims strains the concept of judicial reviewability to its natural limits. First, no exception to exhaustion seems applicable here: (1) the agency has violated no right secured by statute or regulation merely by issuing an investigative subpoena that it has not yet attempted to enforce;[8] (2) the issue presented is not strictly a legal one because the fact of extensive similarity between investigative and adjudicative information is presumed to exist *arguendo* by plaintiff; (3) clearly, judicial review of any agency action related to the *Exxon* proceeding remains available, pursuant to 15 U.S.C. § 45(b).

Second, and more importantly, the hypothetical nature of plaintiff's thesis cannot be avoided. Plaintiff contends that prejudice amounting to a denial of due process *will occur* because the sanctity of an already pending adjudicative proceeding *will be violated* by the receipt of information through an investigation. Such a prognosis of prejudicial error and potential violation of constitutional rights presumes that the information sought in the investigation will be directly pertinent to the adjudicative proceeding. The prognosis further presumes that FTC adjudicative and investigative staffs will engage in mutual conduct violative of agency rules and the APA, and that illicit ex parte communications will be attempted. Finally, the Court is asked to presume that improper agency conduct at the outset caused the investigative subpoena to be issued: the agency's investigative efforts directed at CAGC are alleged to be taken in bad faith, considering the pendency of the *Exxon* adjudicative proceeding, and plaintiff's involvement therein.

[21, 22] These presumptions do not properly warrant judicial recognition at this time. When an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed. *Pacific Molasses Co.* v. *F.T.C.*, 356 F.2d 386, 389 (5th Cir. 1966). Once the agency creates procedural rules under which its actions are to be judged, it denies itself the right to violate these rules. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1957). A violation of procedural rules by an agency from

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[8] The United States Court of Appeals for the Fifth Circuit has characterized the *Leedom* v. *Kyne* exception as being very narrow and rarely successfully invoked. *United States* v. *Feaster*, 410 F.2d 1354 (5th Cir.), *cert. denied*, 396 U.S. 962, 90 S.Ct. 427, 24 L.Ed.2d 426 (1969).

which prejudice results dictates that any action taken as a result of the proceedings cannot stand. *Pacific Molasses Co.* v. *F.T.C., supra,* 356 F.2d at 390.

When a similar due process attack was levelled against the National Labor Relations Board, the United States Court of Appeals for the Fifth Circuit declared:

> The fact that the attack is voiced in conclusory language of a denial of due process and like constitutional rights does not warrant stopping the Board in its tracks. As have others, we have recognized constitutional claims and have accordingly denied enforcement of the Board orders when the Board order comes up for enforcement.

Bokat v. *Tidewater Equipment Co., supra,* 363 F.2d at 672.

F. *Doctrine of Abbott Laboratories v. Gardner*

Having examined in detail the plaintiff's arguments as set forth above, this Court is reluctant to conclude that plaintiff has standing at this time to com[13]plain of the decision by the Commission to issue the subpoena, or that the propriety of issuance is now ripe for adjudication, whether the two agency proceedings are viewed separately or together. *See generally* Annotation, *Jurisdiction of Federal District Court to Entertain Attacks on Federal Trade Commission's Actions,* 16 A.L.R. Fed. 361 (1973).

The Court would conclude its inquiry at this point and dismiss this case for lack of justiciability were it not for the decisions by the United States Supreme Court in a trilogy of cases headed by *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Plaintiff alludes to these authorities in support of its position. The cases dealt with the issue of pre-enforcement judicial review of challenged agency regulations. Propriety of the issuance of an investigative subpoena was not at issue there, but the Court addressed the question of the ripeness of a challenge to agency action in broad terms.

In the *Abbott Laboratories* case, the Government propounded several contentions on which to support its position that a challenge to the regulations was not then ripe for review: (1) that the agency could not implement the subject regulations directly, but rather had to rely upon an authorization from the Attorney General of the United States to institute criminal and seizure actions for violations of the statute; (2) that the subject regulations did not have an immediate impact on the companies involved; (3) that the subject regulations could properly be challenged in a subsequent judicial proceeding for enforcement; and (4) that incurring mere financial expense in complying with, or challenging, the regulations did not confer standing on the companies.

The Court rejected all of these contentions and held that: (1) the regulations did not advise the Attorney General of violations, but purported to state directly what was a violation as authorized by statute, 387 U.S. at 151, 87 S.Ct. 1507; (2) the regulations were clear-cut, were effective immediately upon publication and were expected to be complied with, 387 U.S. at 152, 87 S.Ct. 1507, and failure to comply would potentially subject the companies to serious criminal and civil penalties, *Id.* at 153, 87 S.Ct. 1507; (3) severe and unnecessary harm would befall the companies if they were permitted to raise their challenges to the regulations only as a defense to an action brought by the Government, *Id.;* and (4) plaintiffs have standing because the regulations are directed specifically at them, *Id.* at 154, 87 S.Ct. 1507.

The challenged agency action in the instant case is directed at plaintiff, is expected to be complied with and is purported to be directly authorized by statute. Additionally, there is a suggestion in the *Abbott Laboratories* opinion that allegations of denial of procedural due process by an agency may raise problems particularly appropriate for pre-enforcement judicial review under certain circumstances. This was the interpretation that Mr. Justice Fortas put on the majority opinion. In dissent, he stated: "At least in cases where the claim is of erroneous action *rather than* the lack of jurisdiction or *denial of procedural due process*, a suit for injunctive or declaratory relief will not lie . . ." 387 U.S. at 178, 87 S.Ct. at 1532 (Fortas, J., dissenting) (emphasis added). Although he contested the propriety of pre-enforcement judicial review of erroneous agency action, Justice Fortas apparently acknowledged the propriety of such review when an allegation is made that procedural due process has been denied.[9]

[14] Considering the broad language utilized by the Supreme Court in the *Abbott Laboratories* case, this Court concludes, out of an abundance of caution, that a limited portion of the instant case is arguably ripe for consideration at this time. The standard established for determining ripeness requires an evaluation of the hardship to the parties of withholding court consideration. 387 U.S. at 148, 87 S.Ct. 1507; *see* Davis, Administrative Law Treatise, *supra*, chapter 21.

[23] The agency has formalized its position regarding the investigative subpoena; the source of authority on which it bases its actions is clear; and there is no question but that it will seek to enforce the subpoena pursuant to 15 U.S.C. § 49. Considering the manner in which the *Abbott Laboratories* majority viewed the available statutory penalties for noncompliance, 15 U.S.C. § 50, there is arguably a hardship on plaintiff if plaintiff ultimately refuses to comply with the

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[9] In another case in the triology, *Toilet Goods Assoc.* v. *Gardner*, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967), the Supreme Court affirmed a decision which held that pre-enforcement judicial review was not ripe under the circumstances presented in that case. The differences which the Court saw between the *Abbott Laboratories* and *Toilet Goods* cases focused on the Court's inability, in the latter case, to determine: (1) precisely [14] what the agency's position was on the regulations in issue there; (2) when the companies involved would be required to comply; and (3) whether prompt determination of the agency's authority to promulgate the regulations in question was possible on the available record. 387 U.S. at 163, 87 S.Ct. 1507.

subpoena request. More importantly, the Commission may also suffer hardship if plaintiff seeks to enjoin the subpoena by an action similar to the one filed here in other federal district courts.[10]

The Court's consideration of the propriety of declaratory and injunctive relief is thus limited to a single inquiry: when an investigative proceeding has been commenced by an agency after the institution of an adjudicative proceeding, does the agency violate due process and regulatory procedural rights of an adjudicative respondent, also a subject of the investigation, by issuing a subpoena duces tecum to it or any entity which might possess information about its operations, which requires production of documented information that is arguably material to the earlier-convened adjudicative proceeding?[11]

VI. PROPRIETY OF INJUNCTIVE OR DECLARATORY RELIEF

[15] [24,25] Granting or denying a preliminary injunction rests within the discretion of this Court. 11 Wright & Miller, Federal Practice and Procedure: Civil § 2948, at 427 (1973). The factors to be considered in determining whether preliminary injunctive relief is appropriate are: (1) whether the plaintiff is likely to prevail on the merits; (2) whether the plaintiff is in danger of suffering irreparable harm; (3) whether the potential harm to the defendants from issuance of the injunction outweighs the possible harm to the plaintiff if injunctive relief is denied; (4) whether issuance of a preliminary injunction will serve the public interest. *Blackshear Residents Organization* v. *Romney*, 472 F.2d 1197 (5th Cir. 1973).

Applying this test to the facts and arguments now before the Court, the Court concludes that no preliminary injunction should issue and that plaintiff is not entitled to declaratory relief.

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[10] That venue is proper to bring this type of action in various courts of the United States is not at all certain. Plaintiff invoked 28 U.S.C. § 1391 as the statute making venue proper in this Court. But on the face of plaintiff's complaint, 28 U.S.C. § 1391 would not seem to apply: (1) § 1391(b) does not apply because not all of the defendants named in the complaint reside in the Southern District of Texas; (2) § 1391(c) does not apply because both corporations and a United States agency (and its officers) are parties; (3) § 1391(e) does not apply because not all of the defendants named in the complaint are officers of a United States agency.

Even if the complaint is viewed with the corporate defendants deleted in the absence of a justiciable case or controversy as to them, § 1391(e) would still not apply in this case. None of the four places where the action may be brought under § 1391(e) is the Southern District of Texas: (a) no agency defendant resides here; (b) the cause of action did not arise here; (c) no real property is involved in this action; and (d) plaintiff does not reside here for purposes of venue because plaintiff was not incorporated in this State.

While § 1391(c) makes the proper venue of a corporation sued any judicial district in which it is licensed to do business, the courts have unanimously held that such a definition of residence does not apply to corporate plaintiffs, and venue as to them is proper only in the district(s) in which they were incorporated. *American Cyanamid Co.* v. *Hammond Lead Products, Inc.*, 495 F.2d 1183, 1185 (3rd Cir. 1974); *Manchester Modes, Inc.* v. *Schuman*, 426 F.2d 629 (2d Cir. 1970). The Supreme Court expressly declined to rule upon this issue in *Abbott Laboratories* v. *Gardner*. *See* 387 U.S. at 156 n. 20, 87 S.Ct. 1507.

Despite the probable absence of proper venue in this district, defendants have raised no objection at this time, and the Court will proceed to rule on the issues presented.

[11] The Court emphasizes the limited nature of the inquiry on the merits exercised in this case. The Court still is of the opinion that the case is probably not ripe for review insofar as the issues are framed in plaintiff's complaint and supporting memoranda. However, stripped of allegations of agency conduct taken in bad faith during the investigation and potential illegal actions by agency counsel during pretrial procedures in the *Exxon* adjudicative proceeding, plaintiff's complaint presents the narrow, arguably justiciable, question framed above.

[26] It is well settled that the investigative power of the FTC, exercised pursuant to § 6 of the Federal Trade Commission Act, 15 U.S.C. § 46, is very broad. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950). The United States Court of Appeals for the Fifth Circuit has held that the FTC may conduct investigations and adjudications simultaneously. *Genuine Parts Co.* v. *F.T.C.*, 445 F.2d 1382, 1388 (5th Cir. 1971) *citing Lehigh Portland Cement Co.* v. *F.T.C.*, 291 F.Supp. 628 (E.D.Va.1968), *aff'd per curiam*, 416 F.2d 971 (4th Cir. 1969).

[27-29] In the *Genuine Parts* case, the Court of Appeals delineated the different functions served by investigative and adjudicative proceedings. The investigation has been likened to the search by a grand jury for information, *cf. Sutro Bros. & Co.* v. *S.E.C.*, 199 F.Supp. 439 (S.D.N.Y.1961), and the FTC may pursue production of information by subpoena. *F.T.C.* v. *Tuttle*, 244 F.2d 605, 609 (2d Cir.), *cert. denied*, 354 U.S. 925, 77 S.Ct. 1379, 1 L.Ed.2d 1436 (1957). The adjudication tests such evidence as results from an investigation upon a record in an adversary proceeding before an independent hearing examiner. *Genuine Parts Co.* v. *F.T.C.*, *supra*, 445 F.2d at 1388. A party to an adjudicative proceeding is afforded the protection of the due process clause of the Fifth Amendment. *Hannah* v. *Larche*, 363 U.S. 420, 80 S.Ct. 1502,4 L.Ed.2d 1307 (1960). Information which is produced during an investigative proceeding may be used by the Commission in any adjudicative proceeding which may result.

The regulations of the FTC authorize the use of information gleaned from an investigation during an adjudicative proceeding. 16 C.F.R. § 3.43(c). Plaintiff essentially attacks the validity of this regulation. In doing so, plaintiff also attacks the propriety of the institution of an investigation on one subject after an adjudicative proceeding has commenced on a different, though arguably related, subject. To this end, plaintiff's due process argument logically points to the conclusion that the authority of the FTC, as an investigative agency, must be restricted as to subject matter and scope where the agency attempts to glean information from an investigatee which is also a respondent, and from any organization which may possess information generated by, or pertaining to, that respondent.

[30] The Court concludes that 16 C.F.R. § 3.43(c) is valid and should be upheld. The FTC investigation will not be halted at this stage solely because of the simultaneous occurrence of adjudicative and investigative proceedings. *Genuine Parts Co.* v. *F.T.C.*, *supra*. There is nothing in the record to suggest any irregularity in the manner in which the investigation is being conducted, and the FTC actions are entitled to a

presumption of regularity. *United States* v. *Morgan*, 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 (1941); *United States* v. **[16]** *Chemical Foundation*, 272 U.S. 1, 47 S.Ct. 1, 71 L.Ed. 131 (1926). From an examination of the present record it is apparent that the boundaries of the broad framework provided by the Congress within which the FTC is to conduct this study of the energy industry have not been violated.

[31] The mere pendency of an adjudicative proceeding does not establish a cordon sanitaire of permissible discovery, impeding the progress of any other proceeding in its path. Clearly, the authority of the agency to utilize information derived from an investigation in a subsequent adjudication, *United States* v. *Litton Industries, Inc.*, 462 F.2d 14 (9th Cir. 1972), defeats a suggestion of the total sanctity of adjudicative discovery. Plaintiff as an adjudicative respondent is entitled to due process during the pendency of the *Exxon* proceeding, but such due process is not violated, nor are its safeguards diminished, solely because an investigation is subsequently commenced on a related subject.

[32] The interdependence of business entities in our economy and the interrelation of many types of business transactions which are subject to regulation and review by agencies substantially reduce those areas of inquiry which are so isolated as to have no effect on other markets, companies or transactions. Once an adjudicative proceeding begins, the FTC is presumed to abide by its regulations and should not thereafter be restricted to investigating only totally distinguishable industries or companies which have no relation whatsoever to any adjudicative respondent.[12] *Anheuser-Busch, Inc.* v. *F.T.C.*, 359 F.2d 487 (8th Cir. 1966).

VII. CONCLUSION

[33] No injunctive relief is proper at this time. *Cf. F.T.C.* v. *Waltham Watch Co.*, 169 F.Supp. 614 (S.D.N.Y.1959). On the basis of principles established by the United States Court of Appeals for the Fifth Circuit, *Genuine Parts Co.* v. *F.T.C.*, *supra*, 445 F.2d 1382, and other Courts of Appeals, *e.g.*, *United States* v. *Litton Industries, Inc.*, *supra*, 462 F.2d 14, plaintiff is not likely to prevail on the merits of this case. Plaintiff will not now suffer irreparable harm because it is under no

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[12] The investigative authority of the FTC and, concomitantly, the power of Congress to order such investigations, would be severely reduced if plaintiff's argument were to be enforced to its logical conclusion. Plaintiff's suggested interpretation of administrative procedure would be that no company could be investigated if it possessed any information which could possibly have relevance to activities of any company currently involved in an adjudication. Joint venturers would conceivably fall within plaintiff's protected group, as would suppliers, manufacturers, and customers of plaintiff, since all of these entities on the vertical scale of those businesses in the natural gas industry may possess business records revealing information about plaintiff.

Also, an agency such as the FTC would be precluded from conducting any investigation which arguably overlapped with an already pending adjudicative proceeding, since a request for information of appropriate breadth during the investigation would overlap areas of information pertinent to the adjudication. Such a result cannot have been contemplated by the Congress.

present duty to comply. There would be substantial potential harm to the agency defendants, to the Congressional mandate at issue, and to the public interest if plaintiff's requested injunction were issued at this time. The motion for preliminary injunction is therefore denied. The motion for declaratory relief is also denied.

ON MOTION FOR INJUNCTION PENDING APPEAL

Plaintiff's Motion for Injunction Pending Appeal is denied. On July 3, 1975, this Court entered an order denying plaintiff's motions for injunctive and declaratory relief. Since plaintiff filed suit only to seek to enjoin attempts at compliance with investigative subpoenas duces tecum, the Court also entered [17] a final judgment on that date. Plaintiff has now moved, pursuant to Fed.R.Civ.P. 62(c), to enjoin enforcement of this Court's order and final judgment pending appeal to the United States Court of Appeals for the Fifth Circuit. On the record now before this Court, and in view of standards which have been enunciated by the Court of Appeals to be applied to motions of this type, *Belcher* v. *Birmingham Trust National Bank*, 395 F.2d 685 (5th Cir. 1968), the Court concludes that no injunction pending appeal should issue.

[34] As the Court of Appeals and the commentators have noted, the governing considerations in a motion filed pursuant to Rule 62(c) are: (1) that the applicant make a strong showing that it is likely to succeed on the merits of the appeal; (2) that the applicant establish that unless a stay is granted it will suffer irreparable injury; (3) that no substantial harm will come to other interested parties; and (4) that a stay would do no harm to the public interest. 11 Wright & Miller, Federal Practice and Procedure: Civil § 2904 at 316 (1973); *Belcher* v. *Birmingham Trust National Bank, supra; Blackshear Residents Organization* v. *Romney*, 472 F.2d 1197 (5th Cir. 1973).

The Court of Appeals in the *Belcher* case made clear that granting an injunction pending appeal is an extraordinary remedy. 395 F.2d 685. Such relief should be sparingly granted. *F.M.C.* v. *New York Terminal Conference*, 373 F.2d 424, 426 (2d Cir. 1967).

[35] The equities preponderate strongly against the applicant in the instant motion. The Court made this identical determination on July 3 in deciding whether a requested injunction should issue at that time. Since the request for injunction at this time arguably interjects additional considerations, including maintenance of the status quo, the Court re-evaluates the four criteria in this context. In this case, the Court was confronted with a complaint against the Federal Trade Commission ("FTC") and its members, and against three corporations which are joint venturers with plaintiff in "CAGC", a joint venture organized for the purpose of conducting offshore explorations for

natural gas. The Court held: (1) that there was no justiciable case or controversy between plaintiff and the three corporate defendants; (2) that the Court could not find a justiciable case or controversy between plaintiff and the remaining defendants because of problems with standing and ripeness, but that out of an abundance of caution in view of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), the Court, for purposes of resolving whether an injunction should issue, would reach the merits of a limited question framed on page 16 of its opinion of July 3, *see* Memorandum and Opinion of the Court (July 3, 1975), at 14, *supra;* and (3) that an evaluation of this limited inquiry caused the Court to conclude that plaintiff was not entitled to injunctive or declaratory relief.

The Court determined at that time, and continues to hold, that plaintiff is not likely to prevail on the merits, that substantial harm will be worked upon defendants and upon the public interest if an injunction were to be issued, and that no irreparable injury will be worked upon plaintiff. Viewing such findings against the backdrop of the considerations prompted by the instant motion, this Court holds that the decision rendered in the July 3 opinion is to continue in full force and effect.

The Court further concludes that no injunction is necessary to preserve the status quo. The Court outlined in detail the judicial and administrative remedies available to plaintiff in contesting the agency action challenged in the instant case, the issuance of an investigative subpoena duces tecum during the pen[18]dency of an adjudicative proceeding in which an investigatee was involved. *See* 16 C.F.R. §§ 3.31-3.39; 15 U.S.C. § 49. Indeed, the availability of these remedies caused the Court to have serious reservations about the issues of standing to sue and ripeness for adjudication. Such remedies continue to operate with full force in the context of protecting those constitutional and procedural rights to which plaintiff is entitled as an adjudicative respondent. Plaintiff is under no present duty to comply with the instant subpoenas; if a court of the United States, pursuant to 15 U.S.C. § 49, determines that plaintiff should comply, plaintiff will still have the opportunity to contest any pretrial improprieties in the conduct of discovery in the adjudicative proceeding before the Administrative Law Judge presiding over that proceeding. Similarly, even if this Court is found to have decided incorrectly the issue of justiciable case or controversy between plaintiff and the three corporate defendants, the fact of compliance by those three corporations will still not work to prejudice plaintiff. The presence of administrative protections will continue to operate and be at plaintiff's disposal if agency improprieties surface or are even suspected.

The Court emphasized in its opinion of July 3, and it reiterates here, the hypothetical nature of the thesis upon which plaintiff bases its complaint and its request for an injunction pending appeal. Because such a rationale does not persuade this Court that plaintiff is entitled to injunctive relief at this stage, and because maintenance of the status quo is not a compelling consideration in this case as it has been in others, *cf. J. Weingarten, Inc.* v. *Potter*, 233 F.Supp. 833 (S.D.Tex.1964), the Court concludes that plaintiff's motion should be, and it hereby is, denied. *See Bayless* v. *Martine*, 430 F.2d 873, 879 (5th Cir. 1970); *cf. Crown Zellerbach Corp.* v. *F.T.C.*, 156 F.2d 927 (9th Cir. 1946).

ATLANTIC RICHFIELD COMPANY v. FEDERAL TRADE COMMISSION, ET AL.*

Civ. A. No. 75-H-884. F.T.C. File No. 99-239.

(United States District Court, Southern District of Texas, July 8, 1975)

Michael R. Waller, Childs, Fortenbach, Beck & Guyton, Houston, Texas, for plaintiff.

Robert E. Duncan, Washington, D.C., for defendant Federal Trade Commission.

Robert Craft, Houston, Texas, for defendant Continental Oil Company.

Russell H. Smith, Tulsa, Oklahoma, for defendant Cities Service Company.

Cloy D. Monzingo and *Jack L. Brandon*, Houston, Texas, for defendant Getty Oil Company.

Before BUE, JR., *District Judge*.

MEMORANDUM AND ORDER

Plaintiff's Motion for Injunction Pending Appeal is denied. On July 3, 1975, this Court entered an order denying plaintiff's motions for injunctive and declaratory relief. Since plaintiff filed suit only to seek to enjoin attempts at compliance with investigative subpoenas duces tecum, the Court also entered a final judgment on that date. Plaintiff has now moved, pursuant to Fed. R. Civ. P. 62(c), to enjoin enforcement of this Court's order and final judgment pending appeal to the United States Court of Appeals for the Fifth Circuit. On the record now before this Court, and in view of standards which have been enunciated by the Court of Appeals to be applied to motions of this type, *Belcher* v.

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* Not otherwise reported. For July 3, 1975 case, see p. 1385 herein. Appeal filed July 8, 1975 by plaintiff in Court of Appeals, Fifth Cir.; denied July 18, 1975.

Birmingham Trust National Bank, 395 F.2d 685 (5th Cir. 1968), the Court concludes that no injunction pending appeal should issue.

As the Court of Appeals and the commentators have noted, the governing considerations in a motion filed pursuant to Rule 62(c) are: (1) that the applicant make a strong showing that it is likely to succeed on the merits of the appeal; (2) that the applicant establish that unless a stay is granted it will suffer irreparable injury; (3) that no substantial harm will come to other interested parties; and (4) that a stay would do no harm to the public interest. 11 Wright & Miller, Federal Practice and Procedure: Civil § 2904 at 316 (1973); *Belcher* v. *Birmingham Trust National Bank, supra; Blackshear Residents Organization* v. *Romney*, 472 F.2d 1197 (5th Cir. 1973).

The Court of Appeals in the *Belcher* case made clear that granting an injunction pending appeal is an extraordinary remedy. 395 F.2d 685. Such relief should be sparingly granted. *F.M.C.* v. *New York Terminal Conference*, 373 F.2d 424, 426 (2d Cir. 1967).

The equities preponderate strongly against the applicant in the instant motion. The Court made this identical determination on July 3 in deciding whether a requested injunction should issue at that time. Since the request for injunction at this time arguably interjects additional considerations, including maintenance of the status quo, the Court re-evaluates the four criteria in this context. In this case, the Court was confronted with a complaint against the Federal Trade Commission ("FTC") and its members, and against three corporations which are joint venturers with plaintiff in "CAGC", a joint venture organized for the purpose of conducting offshore explorations for natural gas. The Court held: (1) that there was no justiciable case or controversy between plaintiff and the three corporate defendants; (2) that the Court could not find a justiciable case or controversy between plaintiff and the remaining defendants because of problems with standing and ripeness, but that out of an abundance of caution in view of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), the Court, for purposes of resolving whether an injunction should issue, would reach the merits of a limited question framed on page 16 of its opinion of July 3, *see* Memorandum and Opinion of the Court at 16 (July 3, 1975); and (3) that an evaluation of this limited inquiry caused the Court to conclude that plaintiff was not entitled to injunctive or declaratory relief.

The Court determined at that time, and continues to hold, that plaintiff is not likely to prevail on the merits, that substantial harm will be worked upon defendants and upon the public interest if an injunction were to be issued, and that no irreparable injury will be worked upon plaintiff. Viewing such findings against the backdrop of the considerations prompted by the instant motion, this Court holds that the decision rendered in the July 3 opinion is to continue in full force and effect.

The Court further concludes that no injunction is necessary to preserve the status quo. The Court outlined in detail the judicial and administrative remedies available to plaintiff in contesting the agency action challenged in the instant case, the issuance of an investigative subpoena duces tecum during the pendency of an adjudicative proceeding in which an investigatee was involved. *See* 16 C.F.R. §§ 3.31-3.39; 15 U.S.C. § 49. Indeed, the availability of these remedies caused the Court to have serious reservations about the issues of standing to sue and ripeness for adjudication. Such remedies continue to operate with full force in the context of protecting those constitutional and procedural rights to which plaintiff is entitled as an adjudicative respondent. Plaintiff is under no present duty to comply with the instant subpoenas; if a court of the United States, pursuant to 15 U.S.C. § 49, determines that plaintiff should comply, plaintiff will still have the opportunity to contest any pretrial improprieties in the conduct of discovery in the adjudicative proceeding before the Administrative Law Judge presiding over that proceeding. Similarly, even if this Court is found to have decided incorrectly the issue of justiciable case or controversy between plaintiff and the three corporate defendants, the fact of compliance by those three corporations will still not work to prejudice plaintiff. The presence of administrative protections will continue to operate and be at plaintiff's disposal if agency improprieties surface or are even suspected.

The Court emphasized in its opinion of July 3, and it reiterates here, the hypothetical nature of the thesis upon which the plaintiff bases its complaint and its request for an injunction pending appeal. Because such a rationale does not persuade this Court that plaintiff is entitled to injunctive relief at this stage, and because maintenance of the status quo is not a compelling consideration in this case as it has been in others, *cf. J. Weingarten, Inc.* v. *Potter*, 233 F. Supp. 833 (S.D. Tex. 1964), the Court concludes that plaintiff's motion should be, and it hereby is, denied. *See Bayless* v. *Martine*, 430 F.2d 873, 879 (5th Cir. 1970); *cf. Crown Zellerbach Corp.* v. *F.T.C.*, 156 F.2d 927 (9th Cir. 1946).

DONE at Houston, Texas, this *8th* day of July, 1975.

NATIONAL PETROLEUM REFINERS ASSOCIATION ET AL. v. FEDERAL TRADE COMMISSION ET AL.*

Civ. A. No. 1180-71.

(United States District Court, District of Columbia, July 28, 1975)

J. Wallace Adair and *William Simon*, Washington, D.C., for plaintiffs.

Stuart E. Schiffer and *James Rutherford*, Washington, D.C., for Federal Trade Commission; *Gladys Kessler*, Washington, D.C., for Environmental Defense Fund, Consumers Union, and Consumer Federation of America.

Before ROBINSON, *District Judge*.

ORDER

Upon consideration of the motion of the Federal Trade Commission for reconsideration of this Court's Order dated July 1, 1975, and memorandum in support of said motion, and upon consideration of all papers in opposition to or in reply to said motion, it is now by the Court on this 28th day of July, 1975,

Ordered, that the motion of the Federal Trade Commission be, and the same is, hereby granted, and it is

Further Ordered, that this Court's Order of July 1, 1975, is hereby modified by deleting therefrom the first paragraph at page 2 of said Order and inserting in lieu of said paragraph the following paragraph:

> Further Ordered, that the Commission shall file within 60 days of this date a report on the status of its preparation of an environmental impact statement, and shall file further status reports every 60 days thereafter until completion of the Commission's consideration of the environmental impact statement and reconsideration of the octane posting rule, and the Commission shall, not later than 10 days after completion of the Commission's reconsideration of its octane posting rule supplement the record previously filed in this action to reflect the promulgation of an environmental impact statement and the Commission's reconsideration of its Rule.

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* Not reported in Federal Reporter. Reported Trade Reg. Rep. ¶60,414 at 66,812 (1975-2 Trade Cases). See also p. 1384 herein.

F.T.C. v. TEXACO, INC.*

No. 74-1547. F.T.C. File No. 99-152.

F.T.C. v. STANDARD OIL COMPANY*

No. 74-1548. F.T.C. File No. 99-153.

F.T.C. v. THE SUPERIOR OIL COMPANY, INC.*

No. 74-1549. F.T.C. File No. 99-154.

F.T.C. v. EXXON CORPORATION*

No. 74-1550. F.T.C. File No. 99-155.

F.T.C. v. SHELL OIL COMPANY*

No. 74-1551. F.T.C. File No. 99-156.

F.T.C. v. STANDARD OIL COMPANY OF CALIFORNIA*

No. 74-1553. F.T.C. File No. 99-158.

F.T.C. v. MOBIL OIL CORPORATION*

No. 74-1554. F.T.C. File No. 99-159.

(United States Court of Appeals, District of Columbia Circuit, August 8, 1975)

1. **GRANT OR DENIAL OF PETITION FOR ENFORCEMENT OF SUBPOENA BY DISTRICT COURT ORDER IS A FINAL, APPEALABLE DECISION.**

   District court order granting or denying petition of agency for enforcement of an administrative subpoena is final, appealable decision.

2. **INDICATIONS BY DISTRICT COURT OF ITS WILLINGNESS TO RECONSIDER CERTAIN ASPECTS OF ORDER UPON ADEQUATE SHOWING DID NOT DEPRIVE ORDER OF ITS FINAL, APPEALABLE CHARACTER.**

   Mere fact that district court indicated that it might be persuaded to reconsider certain aspects of order for enforcement of administrative subpoena issued by Federal Trade Commission if Commission was able to make adequate showing after examining documents to be produced did not deprive order of its final, appealable character.

3. **FOR APPEALABILITY PURPOSES, FINAL DECISION IS NOT NECESSARILY LAST ORDER POSSIBLE.**

   Final decision, for purposes of appealability, is not necessarily the last order possible to be made in the case.

4. **ORDER APPEARING TO BE FINAL RESOLUTION OF CONTROVERSY, GIVEN PRACTICAL VS. TECHNICAL CONSTRUCTION, WAS APPEALABLE.**

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* Reported in 517 F.2d 137 (1975). For district court judgment, see page 905 herein. Petition for rehearing and suggestion for rehearing *en banc* filed by the Commission in D.C. Cir. October 3, 1975, and granted on February 6, 1976, with the August 8, 1975, opinion and judgment being vacated.

Federal Trade Commission was entitled to appeal order which, given practical rather than technical construction, [138] showed every sign of being final resolution of its controversy with producers.

5. DOCTRINE OF COLLATERAL ESTROPPEL PRECLUDES RELITIGATION BY F.T.C. WHERE F.T.C. KNEW OF F.P.C. ADJUDICATORY PROCEEDING AND COULD HAVE INTERVENED.

Where, at time Federal Trade Commission initiated its own proceeding to investigate reporting of natural gas reserves, it knew of Federal Power Commission's adjudicatory proceeding and could have intervened, and where Power Commission had particular expertise on the factual issue involved, i.e., accuracy of industry's figures on proved natural gas reserves, and where proceeding before Power Commission was conducted in adversarial environment wherein third parties with adverse economic interests participated at all stages, doctrine of collateral estoppel was applicable to preclude relitigation by Trade Commission.

6. DISTRICT COURT'S DECISION COULD ONLY BE REVERSED IF CLEARLY ERRONEOUS.

District court's determination of essentially factual issue whether Federal Power Commission actually determined an issue which Federal Trade Commission sought to relitigate could be reversed only if clearly erroneous.

7. DETERMINATION OF VIOLATIONS OF ANTITRUST LAWS OR F.T.C. ACT IS WITHIN F.T.C.'S JURISDICTION.

Federal Trade Commission has jurisdiction to determine whether the antitrust laws or Federal Trade Commission Act has been violated.

8. DISTRICT COURT LIMITATION ON PRODUCTION OF DOCUMENTS BALANCED INVESTIGATORY NEEDS OF F.T.C. AND PRODUCERS' CLAIMS ARISING OUT OF F.P.C.'S PRIOR INVESTIGATIONS.

Where district court on contention of collateral estoppel reasonably concluded (1) that Federal Trade Commission desired all natural gas reserve data in possession of producers, etc., in order to recompute independently certain reserves, and (2) that Federal Power Commission on basis of contested adversary hearing had found that industry's figures were accurate, court by limiting production of documents to those documents concerning or underlying proof of natural gas reserve estimates reasonably balanced investigatory needs of Trade Commission and producers' claims arising out of prior Power Commission's investigations.

9. JUDICIAL FUNCTION, IN ENFORCEMENT PROCEEDINGS, IS NEITHER MINISTERIAL NOR MINOR.

Judicial function in determining, in an enforcement proceeding, whether documents sought by an administrative subpoena are relative to agency's inquiry is to be considered neither minor nor ministerial.

10. UNLESS CLEARLY ERRONEOUS, COURT OF APPEALS MUST DEFER TO DISTRICT COURT'S FINDINGS.

Question whether documents sought by administrative subpoena are relevant to agency's inquiry is essentially factual in nature, and Court of Appeals must defer to district court's finding unless it is clearly erroneous.

11. DISTRICT COURT'S FINDING THAT F.T.C.'S REQUEST FOR NATURAL GAS PRODUCERS' BID FILES WAS IRRELEVANT TO INQUIRY INTO REPORTING OF PROVED NATURAL GAS RESERVES WAS PROPER.

In enforcement proceeding, district court properly found that natural gas producers' bid files, containing information based upon limited, geophysical information and usually not upon actual exploration, were not relevant to Federal Trade Commission's inquiry into the reporting of proved natural gas reserves in certain area.

12. SUBPOENAS FOUND UNDULY BURDENSOME MAY BE LIMITED BY ENFORCING COURT; SUCH RULING CAN ONLY BE OVERTURNED ON APPEAL FOR ABUSE OF DISCRETION.

Enforcing court may limit, through modification or partial enforcement, subpoenas which it finds to be unduly burdensome; such modification or partial enforcement is exercise of district court's sound discretion and will only be overturned on appeal for abuse of discretion.

13. DISTRICT COURT ABUSED ITS DISCRETION IN LIMITING F.T.C.'S INVESTIGATION TO YEARS 1969, 1970, AND 1971 WHERE F.T.C. APPARENTLY NEEDED DATA FOR PREVIOUS PERIOD TO MAKE COMPARISON.

[139] In enforcement proceeding, district court had discretion to limit production of documents sought in Federal Trade Commission's proceeding to investigate reporting of proved natural gas reserves, to a random sampling of fields, but limitation to years 1969, 1970 and 1971 was abuse of discretion where the Commission apparently needed data for period of time preceding reported drop in reserves, to make comparison.

14. DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN PLACING CERTAIN CONDITIONS UPON DISCLOSURE OF CONCEDEDLY CONFIDENTIAL DOCUMENTS.

In requiring production of documents which were concededly of confidential nature, district court did not abuse its discretion in attaching certain conditions upon disclosure as against contention of Federal Trade Commission that Federal Trade Commission Act and Commission's rules of practice provided adequate protection.

15. PROVIDING OPTION OF PERMITTING PRODUCTION OF DOCUMENTS FOR INSPECTION AT PLACE OF STORAGE WAS NOT AN ABUSE OF COURT'S DISCRETION.

In requiring production of documents for use by Federal Trade Commission, district court did not abuse discretion in providing option of permitting production of documents for inspection where they were stored.

16. SPECIFICATIONS OF SUBPOENA RELEVANT TO MEMBERS OF TRADE ASSOCIATION WAS PROPERLY LIMITED WHERE ONE PRODUCER WAS NOT A MEMBER OF THE SUBJECT TRADE ASSOCIATION.

In enforcement proceeding, scope of subpoena duces tecum was properly limited as against one of several natural gas producers where, because such producer was not member of producers' trade association, specifications relating to reporting and participating in association were not relevant to such producer.

17. APPELLATE TRIBUNALS SHOULD BE WARY OF SECOND-GUESSING WHERE QUESTIONS OF SUBPOENA RELEVANCE AND BURDENSOMENESS ARE PECULIARLY WITHIN KEN OF TRIAL COURT.

Petition for enforcement of an administrative subpoena duces tecum must be judged by district court on case-by-case basis, and because questions of relevance and burdensomeness are peculiarly within ken of trial court, appellate tribunals should be wary of second-guessing.

(Syllabus, with substituted captions, taken from 517 F.2d 137.)

On appeal from partial enforcement order of U.S. District Court for the District of Columbia, page 905 herein, Court of Appeals held that the district court properly refused to enforce portions of subpoenas not relevant to F.T.C. investigation; limited production of documents properly, but abused its discretion in limiting F.T.C. to discovery of years 1969, 1970, and 1971; and that district court did not abuse its discretion in attaching conditions to production of documents in effort to protect confidentiality.

Affirmed in part and reversed in part.

Robert E. Duncan, Atty., F.T.C., with whom *Gerald Harwood*, Asst.

Gen. Counsel, *William A. Cerillo*, Atty., F.T.C., *Howard E. Shapiro* and *Robert B. Nicholson*, Attys., Department of Justice, were on the brief for appellant.

William Simon, Washington, D.C., with whom *Roger C. Simmons*, Washington, D.C., was on the brief for appellee Exxon Corp., in No. 74-1550 also argued for appellees Shell Oil Co., Standard Oil Co. (Indiana) and Texaco, Inc.

J. Wallace Adair, *Terrence C. Sheehy*, Washington, D.C., and *Thomas G. Johnson*, Houston, Tex., were on the brief for appellee, Shell Oil Co. in No. 74-1551.

John W. Howard, was on the brief for appellee, Standard Oil Co. (Indiana) in No. 74-1548.

Robert F. McGinnis, was on the brief for appellee, Texaco, Inc., in No. 74-1547. *W. C. Weitzel, Jr.*, entered an appearance for appellee, Texaco, Inc., in No. 74-1547.

Abe Krash, Washington, D.C., with whom *Paul A. Porter*, *Daniel A. Rezneck*, Washington, D.C., and *Herbert W. Varner*, Houston, Tex., were on the brief for appellee, The Superior Oil Co., Inc., in No. 74-1549.

Lee Loevinger, Washington, D.C., with whom *Martin Michaelson*, Washington, D.C., was on the brief for appellee Standard Oil Co. of California in No. 74-1553.

Harry M. Reasoner, Houston, Tex., with whom *Michael J. Henke*, Washington, D.C., was on the brief for appellee Mobil Oil Corp. in No. 74-1554.

Before MAC KINNON and WILKEY, *Circuit Judges* and JAMESON,* *Senior United States District Judge* for the District of Montana.

WILKEY, *Circuit Judge:*

[140] This litigation is an outgrowth of a Federal Trade Commission (FTC) investigation into the reporting of natural gas reserves by natural gas producers in Southern Louisiana.[1] Specifically, we have before us seven consolidated appeals by the FTC from orders entered by the District Court granting enforcement in part and denying enforcement in part of subpoenas *duces tecum* issued by the Commission to appellees, seven large natural gas producers, in connection with its investigation. The subpoena issued to each of the appellees and the orders issued by the District Court are reproduced as appendices to this opinion.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] Southern Louisiana as used throughout this opinion includes the offshore producing area (seaward from the Louisiana coastline) and that portion of Louisiana defined as the "South Louisiana District." Joint Brief for Appellees Texaco, Inc., Standard Oil Co. (Indiana), Shell Oil Co., and Exxon Corp. [hereinafter Common Counsel Brief], p. 3 n. 4. Southern Louisiana is recognized as the most important gas-producing area in the country. *Southern Louisiana Area Rate Cases*, 428 F.2d 407, 418 (5th Cir.), *cert. denied*, 400 U.S. 950, 91 S.Ct. 243, 27 L.Ed.2d 257 (1970).

I. The Facts and the Issues

The American Gas Association (AGA) is a trade association of producers, distributors, and marketers of natural gas. Through its Committee on Natural Gas Reserves, the AGA has since 1946 been providing the industry, the Government, and the general public with annual estimates of the *proved* natural gas and natural gas liquid reserves of the United States.[2] For the purposes of gathering reserve data, the nation is divided into ten geographical districts. A member of the Committee on Natural Gas Reserves is assigned to each district; the committee member in turn appoints a subcommittee to assist him in gathering reserve data within the district. The FTC's investigation focuses on the activities of the South Louisiana subcommittee.

In May 1969 when the AGA reported its 1968 figures, they indicated a decline in proved reserves nationally, the first such decline ever reported. Before the year was out, this and other information reaching the Federal Power Commission prompted a reopening of its just-concluded Southern Louisiana Area Rate Pro[141]ceeding. Those proceedings will be discussed in more detail below. The May 1970 report for 1969 showed even further declines for total United States reserves and total Southern Louisiana reserves.

In late 1970 the Federal Trade Commission began an investigation into the reporting of proved natural gas reserves in Southern Louisiana. In June 1971 the investigation took on more formal status when the Trade Commission issued a resolution authorizing the use of compulsory process in furtherance of a nonpublic investigation. In that resolution the nature and scope of the investigation was defined as follows: The purpose of the authorized investigation is to develop facts relating to the acts and practices of . . . [certain named corporations] to determine whether said corporations, and other persons and corporations, individually or in concert are engaged in conduct in the reporting of natural gas reserves for Southern Louisiana which violates Section 5 of the Federal Trade Commission Act, or are engaged in conduct or activities relating to the exploration and development, production, or marketing of natural gas, petroleum, and petroleum products, and other fossil fuels in violation of Section 5 of the Federal Trade Commission Act.[3]

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[2] Throughout this opinion we will use the term "proved reserves." The following is the definition of proved reserves adopted by the AGA in its annual publication, "Reserves of Crude Oil, Natural Gas Liquids, and Natural Gas in the United States and Canada and United States Productive Capacity," Volume 28, June 1974. The first two paragraphs of the following definition appear on page 103 of this publication, the third paragraph is derived from page 99 and the last paragraph is derived from pages 96 and 97:

Proved Reserves are the estimated quantity of natural gas which analysis of geologic and engineering data demonstrate with reasonable certainty to be recoverable in the future from known oil and gas reservoirs under existing economic and operating conditions. Reservoirs are considered proved that have demonstrated the ability to produce by *either actual production or conclusive formation test.*

The area of a reservoir considered proved is *that portion delineated by drilling* and defined by gas-oil, gas-water contacts or limited by the structural deformation or lenticularity of the reservoir. In the absence of fluid contacts, the lowest known structural occurrency of hydrocarbons controls the proved limits of the reservoir. The proved area of a reservoir may also include the *adjoining portions* not delineated by drilling but which can be evaluated as economically productive on the basis of geological and engineering data available at the time the estimate is made. Therefore, the reserves reported should include total proved reserves which may be in either the drilled or the undrilled portions of the field or reservoir.

Natural gas reserves take into account the shrinkage of the reservoir gas volume resulting from the removal of the liquefiable portions of the hydrocarbon gases and the reduction of volume due to the exclusion of non-hydrocarbon gases where they occur in sufficient quantity to render the gas unmarketable.

The proved reserves estimated are to include all gas reserves regardless of size, availability of market, ultimate disposition or use.

From the beginning of its investigation the AGA had been cooperating with the Trade Commission on a voluntary basis. As a result the Commission was able to obtain the field-by-field estimates of proved reserves made by each Southern Louisiana subcommittee member for the years 1966 through 1970.[4] The Commission had also obtained reserve information from Form 15 reports filed with the Federal Power Commission. These reports are filed by interstate natural gas pipelines and list recoverable, saleable gas reserves committed to, collected by, or held by reporting pipelines.

Approximately one year after beginning its investigation, on 24 November 1971, the Commission's staff issued identical administrative subpoenas *duces tecum* to eleven natural gas producers. All eleven producers moved to quash the subpoenas. The motions to quash or limit were denied by the Commission on 27 June 1972.[5] Following the Commission's denial, the Trade Commission's staff, after negotiations with the gas producers, offered additional safeguards for the confidentiality of information to be supplied. As a result two producers agreed to comply fully with the subpoenas and [142] one agreed to comply in part. (Soon after petitions for enforcement were filed in the District Court, one more firm agreed to comply with the subpoena.)

Petitions for enforcement of the remaining subpoenas were filed in the District Court on 4 June 1973. On 30 July 1973 the District Court held a hearing on preliminary motions and also heard a preliminary presentation of the issues posed by the case. Subsequently evidentiary materials and briefs were filed by all parties. A second hearing was held on 13 December 1973 at which time the issues were fully argued to the court over a period of several hours.

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[3] Appendix [hereinafter App.] III 497a.

[4] These statistics were made available to the FTC subject to an agreement restricting access to and disclosure of the data. The agreement provided, *inter alia*, that:

(2) Representatives of your Bureau [i. e., the Commission's Bureau of Competition] will make use of such reports only in connection with its current investigation into the reporting of natural gas reserves by the American Gas Association, and for the purpose of verification of natural gas reserves estimates reported by the A.G.A. Committee on Natural Gas Reserves; and shall not release, disclose, disseminate or publicize in any manner, to any person, any statistic or data contained in such reports, unless otherwise available in published records or documents, without twenty days prior notice, and opportunity to seek appropriate legal protection or relief, to A.G.A. and to each member of the South Louisiana Subcommittee whose statistics are to be disclosed by the Commission. Supplemental Reply Brief, pp. 3-4. The agreement also provided that custody of the documents be maintained by a neutral third party, Price Waterhouse & Co.

The producers have alleged in supplemental filings before this court that the FTC breached this agreement by releasing to a Congressman certain staff and working papers containing excerpts from the AGA reserve statistics after less than 72 hours' notice. In a reply the Commission conceded that it had released the information to the Congressman, who by a phone call "required that the documents be immediately released" to him. The Commission argues, however, that the above paragraph was intended to prohibit disclosure of the data to the public or to competitors, and was not meant to cover the case where a Member of Congress or Congressional committee might immediately require use of the data. In addition, the Trade Commission argues that it lacks the statutory power to keep the data confidential to begin with.

[5] App. III 498a-525a.

The two orders here under review were filed on 22 March 1974. One order covered the subpoenas issued to appellees Texaco, Inc., Standard Oil Co. (Indiana), Shell Oil Co., Exxon Corp., Standard Oil Co. of California, and Mobil Oil Corp. The other order related to the subpoena issued to the Superior Oil Co., Inc. (hereinafter Superior). The former order enforced specifications A, B, C, D, E, and F in full; however, it only granted partial enforcement of the remaining specifications, G through L.

The District Court found the subpoenas to be overly broad and unduly burdensome because they sought to duplicate activities of the Federal Power Commission which had already resulted in a finding that AGA proved reserve estimates were valid and accurate. As a result, specifications G through L were modified so that raw field data, bid calculation data, and bid calculation files need not be produced. However, all documents containing or underlying *proved* reserve estimates in the offshore Southern Louisiana area are to be produced.

The court, in an attempt to make the subpoenas less burdensome, limited production of these documents to a random sample of 100 out of approximately 225 relevant fields and to the years 1969, 1970, and 1971. Specifications J, K, and L were similarly modified so that only documents relating to proved natural gas reserve estimates in the offshore Southern Louisiana area need be submitted. However, the court enforced the subpoena as regards any documents prepared between 1966 and 1971, inclusive, "which were exchanged between or among, or constitute, contain or refer to any agreement, arrangement or communication between or among, respondents or others, including the American Gas Association." The subpoenas were also modified so that additional protections were afforded to confidential information. In addition, producers were accorded the option of producing records for inspection where they were stored.

Superior was in a different position from the other six producers. Superior had never been a member of the AGA nor had it ever furnished proved reserve figures to the AGA. Superior's employees also had not participated in the work of AGA's committees or subcommittees. As a result, the District Court enforced specifications A through F and K through L in full and denied enforcement of specifications G, H, I, and J. Identical confidentiality protections were afforded Superior.

Because the producers have not cross-appealed, the issues before us relate solely to the limiting modifications made by the District Court. For the purposes of this opinion, we have formulated those issues as follows:

(1) Was the District Court in error in refusing to enforce those portions of the subpoenas that called for documents which did not relate to estimates of proved reserves?

(2) Did the District Court abuse its discretion in limiting production of documents to a random sample of fields and to the years 1969, 1970, and 1971?

(3) Did the District Court abuse its discretion in attaching conditions to disclosure to insure confidentiality and in permitting documents to be produced for inspection at their situs?

(4) Was the District Court in error in affording Superior Oil differing treatment?

[143] [1-4] We proceed now to deal with these issues.[6]

II. Documents Which Did Not Relate to Proved Reserves

A. *The Arguments*

The producers have never quarreled with the power or the right of the Federal *Trade* Commission to investigate the natural gas industry to uncover violations of the antitrust laws or unfair trade practices. However, they argue that there can be no possible reason for wanting documents that do not relate to proved reserve estimates because it is only *proved* reserve estimates that are taken into account by the Federal *Power* Commission in the setting of area rate ceilings. In addition, they argue that the Federal Power Commission, the only agency possessing the requisite expertise, has determined that AGA proved reserve data is accurate. Therefore, the FTC is collaterally estopped from relitigating the issue.

The Trade Commission, on the other hand, points out that there is no provision in the Federal Trade Commission Act (FTCA) excepting gas producers from the coverage of the Act, as there is for banks and certain common carriers, and that therefore jurisdiction to investigate exists. They argue that such jurisdiction is broad, "reaching not only existing violations of . . . [the Sherman and Clayton Acts], but trade practices which conflict with their basic policies."[7] The Trade Commission goes on to argue that, as a factual matter, its investigation does not duplicate studies made by the Federal Power Commission and that, even if it did, collateral estoppel would be inapplicable because its purpose in determining the accuracy of reserve data is different from the Power Commission's purpose in determining accuracy.[8]

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[6] Standard Oil Co. of California argues that the six producers order is not a final decision within the meaning of 28 U.S.C. § 1291 and therefore is not appealable. We disagree. It is well established that an order of a District Court granting or denying a petition of an agency for enforcement of an administrative subpoena is a final decision and hence appealable. *Ellis* v. *ICC*, 237 U.S. 434, 442, 35 S.Ct. 645, 59 L.Ed. 1036 (1915); *Int'l Brotherhood of Electrical Workers* v. *EEOC*, 398 F.2d 248, 251 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1021, 89 S.Ct. 628, 21 L.Ed. 565 (1969); *Martin* v. *Chandis Securities Co.*, 128 F.2d 731, 734 (9th Cir. 1942). The mere fact the District Court indicated that it might be persuaded to reconsider certain aspects of the order if the Commission were able to make an adequate showing *after* examining the documents to be produced does not deny the order of its final character. A final decision is not necessarily "the last order possible to be made in a case. . . ." *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152, 85 S.Ct. 308, 311, 13 L.Ed.2d 199 (1964). A "practical rather than a technical construction" of the District Court's order, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949), indicates that the Trade Commission should be entitled to appeal an order which shows every sign of being a final resolution of its controversy with the six producers.

[144] Although the producers may be correct in arguing that data relating to any reserves other than *proved* reserves would be irrelevant, our reading of the transcript of the 10 December 1973 hearing indicates to us that the District Court had not reached the issue of relevance in regard to the totality of all documents subpoenaed. The court believed that the Trade Commission had subpoenaed *all* reserve records in order to determine independently the total gas reserves of the area. Since the Power Commission had already determined that AGA figures were accurate, the court was of the view that the Trade Commission could not force the producers to relitigate the matter and that, in any event, it would be unduly *burdensome* to permit yet another plenary investigation (for the third time in two years) of natural gas reserves.

In order to fully understand the District Court's ruling on this aspect of the case, it is necessary for us to discuss the previously alluded to Power Commission investigations.

B. *The Federal Power Commission Investigations*

Although the Federal Power Commission (FPC) began area rate proceedings in 1961 for the Southern Louisiana area, it was not until 1968 that the Commission rendered a final decision, which in turn was modified in early 1969. Even before oral argument could be heard before the Fifth Circuit on petitions for review sought by producers, pipeline companies, and consumers, the FPC had instituted new proceedings (*So La II*) "to reconsider all major actions it had taken" in the prior proceeding.[9] As the FPC stated in its order instituting *So La II*, Phase I of its new proceeding "should include evidence with respect to the adequacy of gas supply and adequacy of service to consumers, the demand for gas, the gas shortage, if any, the effect of price on gas supply and demand, and other relevant economic evidence . . . ."[10]

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[7] Appellant's Brief, pp. 17-18.

[8] We are fully cognizant of section 15(b) of the Federal Energy Administration Act of 1974, P.L. 93-275, 88 Stat. 96, 109 (7 May 1974), which provides:

"(b) Not later than one year after the effective date of this act, the Administrator shall submit a report to the President and Congress which will provide a complete and independent analysis of actual oil and gas reserves and resources in the United States and its Outer Continental Shelf, as well as of the existing productive capacity and the extent to which such capacity could be increased for crude oil and each major petroleum product each year for the next ten years through full utilization of available technology and capacity. The report shall also contain the Administration's recommendations for improving the utilization and effectiveness of Federal energy data and its manner of collection. The data collection and analysis portion of this report shall be prepared by the Federal Trade Commission for the Administration. Unless specifically prohibited by law, all Federal agencies shall make available estimates, statistics, data and other information in their files which, in the judgment of the Commission or Administration, are necessary for the purposes of this subsection." The FTC has never argued that this statute provides independent justification for their subpoenas, since, of course, the subpoenas were issued three years before the statute was [144] enacted. The Commission has, however, used the statute in its briefs as evidence of the fact that "Congress . . . considers the Federal Trade Commission to have a major role in determining the extent of natural gas reserves." Appellant's Brief, p. 22.

In furtherance of its duties under section 15(b), the Trade Commission has prepared yet another questionnaire concerning proved reserves and has sent it to "60 selected natural gas producers." - Letter of 28 April 1975 from Commission to the court. The Commission's staff intends to use the responses along with information gathered by the Federal Power Commission and other government agencies in preparing its natural gas study and in aiding the Federal Energy Administrator in the preparation of its energy report. *Ibid.*

The FPC was concerned in *So La II* with complaints that adequate supplies of natural gas were not being produced and would not be produced under the recently ordered area rate ceilings. More important for present purposes, the FPC during *So La II* was presented with the argument by Municipal Distributors Group (MDG), an intervenor which represented the interests of municipal and other publicly owned gas distribution systems, that the supply shortage was more apparent than real. It was argued that "the sharp decline in the supply picture in 1968-69 is revealed by the above record evidence to be caused . . . largely by revisions in the estimates" of proved reserves reported by the American Gas Association (AGA).[11] Such a contention went to the heart of the Power Commission investigation. If it were true that the decline in reserves was a matter of definition and not of economics, the concern of the FPC that new area rates might be required to encourage production would be obviated.

In its final opinion in *So La II* the FPC discussed testimony which was used by MDG to impeach AGA data. The testimony outlined several methods by [145] which producers could withhold reserves from the AGA. Discussed also were MDG's arguments relating to discrepancies between figures gathered by the FPC and those submitted by the AGA. The FPC also referred in some detail to the testimony and exhibits supporting the reliability of AGA data. As a result, it reached the following conclusions:

> AGA and Form 15 data show similar trends of reserves and reserve-to-production (R/P) ratios. AGA data indicates a steady decline in the national R/P ratio from 19 in 1963 to 13 in 1969. Form 15 data indicates a similar decline in the national R/P ratio from 20 in 1963 to 14 in 1969. The American Gas Association reserve data is not impeached, in our opinion, in this discrepancy.[12]
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> For the reasons stated herein, we find the AGA reserve data is reasonably reliable for

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[9] *Southern Louisiana Area Rate Cases*, *supra*, at 421.

[10] Order Enlarging Investigation and Proposed Rulemaking Area Rate Proceeding (Southern Louisiana Area), 42 F.T.C. 1110, 1112 (15 December 1969).

[11] MDG's Initial Brief in *So La II*, p. 15.

[12] Order and Opinion Determining Just and Reasonable Rates for Natural Gas Produced in the Southern Louisiana Area, 46 F.P.C. 86, 113 (16 July 1971)(footnotes omitted).

> the purposes used herein. Accordingly, and because petitioner has not raised any new evidence, we deny the petition to reopen.[13]

In other words, while AGA data started with 19 years of reserves and the Form 15 data started with 20 in 1963, by 1969 each calculation had dropped 6 years off its proved reserve figure, so the two calculations were comparable. Thus, AGA data was shown to be reliable.

The issue was raised again on review before the Fifth Circuit and received the following extensive rebuttal in a footnote:

> [13] As might be expected, there is some controversy over this. Standing virtually alone against the National (and record) judgment of a near energy calamity, the American Public Gas Association (APGA) contends that the current critical shortage of natural gas is but a pretextual "cry of wolf" calculated to mislead FPC into establishing artificially high rates in the producers' behalf. APGA would have us believe that the energy crisis is a mirage—indeed, a hoax! APGA claims that "there appear to be adequate supplies of gas in the domestic United States to satisfy the projected demands of U. S. consumers well into the 21st Century." APGA Supp. Brf. at 5 n. 9. But to talk of "Supplies" of gas is a misleading oversimplification. Obviously, the gas is not presently available. At most, if there is appropriate exploration, the demonstrable reserves may be exploited to meet the needs. Given a system which depends on private stewardship and marshalling of natural resources, there is a supply shortage if the producers do not produce. FPC has the statutory duty, not only to guard the consumers against super-profits reaped from artificially inflated rates, but also to protect consumer interests by making sure that the rate schedule is high enough to elicit an adequate supply. It is a delicate balancing test. FPC must fix its course to attain the utopian "optimum" rate schedule. Given the current shortage of available supply FPC must swing the pendulum towards the incentive, supply-eliciting side of rates. And so it has done.[14]

In addition to the examination undertaken in relation to the *So La II* proceedings, the Power Commission undertook in early 1971, at the direction of Congress, a National Gas Survey, a portion of which was a National Gas Reserves Survey (NGRS). NGRS was a completely independent survey of reserves and did not rely on AGA figures at any point. However, in the Final Staff Report of the NGRS (May 1973) a comparison was made with AGA figures:

> The NGRS estimate is lower than the estimate by A.G.A.; however, the **[146]** difference is less than 10 percent. The difference of 23.5 Tcf between the estimate of the non-associated and associated gas reserves for the 6,358 entries in the reported fields category (a) is the primary difference between the total estimates. The gas reserves in the "A.G.A. omitted fields" are a relatively insignificant part in the total NGRS estimate, and it seems evident that the 62 entries in the "omitted" category (b) are small fields. The two dissolved gas estimates differ by 1.7 Tcf or by about 5 percent.[15]

C. *Collateral Estoppel*

The Supreme Court and this court have clearly stated that an agency or a private party *can* be collaterally estopped in a later court proceeding if a relevant issue had already been resolved in a contested hearing before the agency.[16] The Supreme Court recently affirmed this principle:

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[13] *Id.* at 115.

[14] *Placid Oil Co.* v. *FPC*, 483 F.2d 880, 894 n. 13 (5th Cir. 1973), *aff'd sub nom., Mobile Oil Corp.* v. *FPC*, 417 U.S. 283, 94 S.Ct. 2328, 41 L.Ed.2d 72 (1974).

[15] App. VI 1048a.

> Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 [60 S.Ct. 907, 84 L.Ed. 1263]; *Hanover Bank* v. *United States*, 285 F.2d 455, 152 Ct.Cl. 391; *Fairmont Aluminum Co.* v. *Commissioner of Internal Revenue*, [4 Cir.], 222 F.2d 622; *Seatrain Lines, Inc.* v. *Pennsylvania R. Co.*, [3 Cir.], 207 F.2d 255. *See also Goldstein* v. *Doft*, [D.C.N.Y.], 236 F.Supp. 730, *aff'd* [2 Cir.], 353 F.2d 484, *cert. denied*, 383 U.S. 960 [86 S.Ct. 1226, 16 L.Ed.2d 302], where collateral estoppel was applied to prevent relitigation of factual disputes resolved by an arbitrator.[17]

The Supreme Court has also held that collateral estoppel can be applied when the prior proceeding involved a *different* government agency because for collateral estoppel purposes, agencies of the same government are in privity with each other.

> Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in *Chicago, Rock Island & Pacific Railway Co.* v. *Schendel*, 270 U.S. 611, 620 [46 S.Ct. 420, 423, 424, 70 L.Ed. 757, 53 A.L.R. 1965], "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different . . . and parties nominally different may be, in legal effect, the same." A judgment is *res judicata* in a second action upon the same claim between the same parties or those in privity with them. *Cromwell* v. *County of Sac*, 94 U.S. 351 [24 L.Ed. 195]. There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that **[147]** party and another officer of the government.[18]

Other Circuits have applied both these principles in appropriate cases. The Eighth Circuit has held that the FTC was collaterally estopped from claiming use of unfair methods of competition where the claim was based on factual issues resolved favorably for defendants in a prior proceeding instituted under the Food and Drug Act.[19] Reciprocally, the Seventh Circuit upheld the defense of collateral estoppel in a proceeding under the Food and Drug Act where a prior proceeding *before* the FTC held that defendant's labeling claims were not deceptive.[20]

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[16] *United States* v. *Utah Construction Co.*, 384 U.S. 394, 421-422, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966); *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263 (1940); Pacific Seafarers, Inc. v. *Pacific Far East Line, Inc.*, 131 U.S.App.D.C. 226, 231, 404 F.2d 804, 809 (1968), *cert. denied*, 393 U.S. 1093, 89 S.Ct. 872, 21 L.Ed.2d 784 (1969)("Principles of collateral estoppel may properly be applied in administrative cases."); *Fairmont Aluminum Co.* v. *Commissioner of Internal Revenue*, 222 F.2d 622, 627 (4th Cir.), *cert. denied*, 350 U.S. 838, 76 S.Ct. 76, 100 L.Ed. 748 (1955); *Tampa Phosphate Railroad Co.* v. *Seaboard Coast Line RR Co.*, 418 F.2d 387, 399 (5th Cir. 1969), *cert. denied*, 397 U.S. 910, 90 S.Ct. 907, 25 L.Ed.2d 90 (1970); *Int'l Wire* v. *Local 38, Int'l Brhd. of Elec. Workers*, 357 F.Supp. 1018 (N.D.Ohio 1972), *aff'd*, 475 F.2d 1078 (6th Cir. 1973), *cert. denied*, 414 U.S. 867, 94 S.Ct. 63, 38 L.Ed.2d 86 (1973).

[17] *United States* v. *Utah Construction Co.*, *supra*, at 421-22, 86 S.Ct. at 1560.

[18] *Sunshine Anthracite Coal Co.* v. *Adkins*, *supra*, 310 U.S. at 402-03, 60 S.Ct. at 916. *See also French* v. *Rishell*, 40 Cal.2d 477, 254 P.2d 26 (1953)(en banc).

[19] *George H. Lee Co.* v. *FTC*, 113 F.2d 583 (8th Cir. 1940).

[5] It is difficult for us to discern why the policies which support the application of *res judicata* or collateral estoppel between court adjudications involving different agencies would not always be equally applicable between administrative adjudications (especially in an era when administrative agencies are taking on duties which were once the preserve of the courts). However, there is no need to resolve this broader issue at this time because we hold that the application of collateral estoppel is clearly appropriate on the facts of this case. The Trade Commission knew of the Power Commission's adjudicatory proceeding in *So La II* when it initiated its own investigation and could have intervened in the proceeding. We also weigh heavily the fact that the Power Commission has particular expertise on the factual issue involved, the accuracy of industry figures on *proved* natural gas reserves. In addition, we find that an area rate proceeding, bringing together as it does sharply divergent economic interests in the same arena to do battle, provided an excellent context in which to resolve such an issue. The record clearly indicates that *So La II* was conducted in an adversarial environment wherein third parties with adverse economic interests participated at all stages of the proceedings.

[6] Having concluded that the application of collateral estoppel would be appropriate in this case, we turn now to the essentially factual question whether the Power Commission actually did determine an issue which the Trade Commission now seeks to relitigate. We note that on this matter our scope of review is narrower; we may reverse the District Court's determination only if it is clearly erroneous.[21] The Trade Commission in its briefs never directly argues that the Power Commission did *not* actually determine the accuracy of AGA figures. Rather, the Trade Commission contends that the Power Commission only determined that AGA figures were appropriate for its use in the determination of just and reasonable rates. The Trade Commission seeks to determine whether the producers are underreporting reserves and are thus violating the FTCA. We agree with appellees that the distinction is illusory. "[T]he FTC's very theory is that there is

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[20] *United States* v. *Willard Tablet Co.*, 141 F.2d 141 (7th Cir. 1944).

[21] Rule 81(a)(3), F.R.Civ.P., provides that Federal Rules of Civil Procedure "apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States . . . ." We are thus bound by Rule 52(a), which states that "[f]indings of fact shall not be set aside unless clearly erroneous . . . ."

Another requirement for the application of collateral estoppel is that "the issue in the prior action must have been necessary and essential to the resulting judgment." 1B *Moore's Federal Practice* ¶ 0.443[1] (1974). The FTC has not argued this issue in this appeal.

antitrust significance in reporting misleading reserves data *because* rates were affected."[22]

The District Court probed counsel for the Trade Commission on this point several times. At some points counsel argued that it wanted reserve estimates [148] because it was investigating "possible collusive conduct by the natural gas producers in the reporting of these reserves."[23] In this regard, the District Court explicitly stated in its order that the producers must produce all documents passing *inter se* or with the AGA.[24] At other points the argument appears to be what we set out above.

[7,8] There can be no question that the Trade Commission has jurisdiction to determine whether the antitrust laws or the FTCA has been violated. However, the District Court was entitled to conclude on the present record (1) that the Trade Commission desired all reserve data in the possession of appellees in order to recompute independently Southern Louisiana reserves, and (2) that the Power Commission, on the basis of a contested evidentiary hearing, had found that the industry's figures for Southern Louisiana reserves for the relevant years were accurate. Based on these findings, the District Court could reasonably have concluded that it would be unjust and unreasonable to require the production of every scrap of data which related to reserves *of any kind*. By limiting production to "documents containing or underlying *proved* natural gas reserve estimates," the court has drawn a reasonable balance between the investigatory needs of the Trade Commission and the producers' claims arising out of the prior Power Commission investigations.

D. *The Bid Files*

Among the documents which would be liable to disclosure under specifications G, H, and I would be the producers' bid files. The bid files include information which producers assemble *in advance* of an oil lease bid. The information is based upon *limited* geophysical information and usually not upon actual exploration. The producers consider the models they have developed for making lease bids the most valuable trade secrets they own, because of the large outlays which have gone into their development and the ease with which any producer could be outbid on leases if its competitors had access to the model.[25] The producers assert that data contained in a bid file would give a competitor easy access to their bid models and understandably strongly argue against disclosure.

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[22] Common Counsel Brief, p. 25 n. 49.

[23] App. II 352a.

[24] See ¶ 3(b) of the six producers order. Reproduced as Appendix B.

The producers argue that the bid files are not relevant to any calculation of *proved* reserves, because the bids files only contain speculative estimates of producing capacity based on limited information. Once a producer obtains a lease and thus is able to drill exploratory wells, these bid estimates are no longer used by the company (except presumably to improve their bidding model or to analyze the bidding behavior of opponents). As a result, producers contend that the bid files could not be relevant to an investigation into conspiratorial and other practices to underreport *proved* reserves.

The Trade Commission on the other hand argues that "[t]he 'bid files' contain estimates of reserves, no matter how speculative or untested, and as such, are plainly relevant to the analysis of gas reserve reporting which is part of the Commission's investigation."[26] The Trade Commission adds in a footnote that the FTCA gives it the authority to report to Congress and that it therefore should be permitted to gather information for that purpose as well as for the more limited purpose of individual cease-and-desist orders.

[9,10] The Supreme Court in *Oklahoma Press Publishing Co.* v. *Walling*[27] clearly indicated that the District Court must consider in an enforcement proceeding whether the documents sought [149] by an administrative subpoena are relevant to the agency's inquiry. The judicial function in this regard is to be considered "neither minor nor ministerial."[28] Because such a question is essentially factual in nature, we must defer to the District Court's finding unless we can conclude that its determination was clearly erroneous.

[11] The evidence and argument presented to the District Court permitted it to conclude that the producers' bid file contained highly speculative estimates, which would be rapidly superseded by much sounder estimates, once the winning bidder could begin drilling. After the first well is drilled on a lease, no company relies on bid file data, nor is such data ever reported to the AGA. Only data relevant to *proved* reserves is reported, and the essential ingredient in the definition of

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[25] Mobil Oil Co. refers us in its brief to "the all too frequent cases in which such information has been stolen and sold for large sums of money. *See, e.g., Tlapek* v. *Chevron Oil Co.,* 407 F.2d 1129 (8th Cir. 1969); *Abbott* v. *United States,* 239 F.2d 310 (5th Cir. 1956); *Hunter* v. *Shell Oil Co.,* 198 F.2d 485 (5th Cir. 1952), *Ohio Oil Co.* v. *Sharp,* 135 F.2d 303 (10th Cir. 1943)." Brief of Mobil Oil Co., p. 27.

[26] Appellant's Reply Brief, pp. 9-10.

[27] 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946).

[28] 327 U.S. at 217, n. 57, 66 S.Ct. 494.

"proved reserves" is that the data is obtained by drilling, by penetration of the formation.[29] The "proved reserves" definition is accepted by the industry, the Power Commission, and the Trade Commission here. Thus, even if the bid file data showed a gross disparity compared to the data on *proved* reserves submitted to the AGA, this would prove nothing except that the company's original bid estimates were sadly in error, for by definition the *proved* reserves data must be based on geological information obtained by drilling at a later time than when the bid data is assembled. The preliminary data has no relevance whatsoever in showing whether the preliminary estimates of reserves should later be moved to the strictly defined category of "proved reserves."[30]

The Trade Commission makes one final argument, that companies sometimes delay drilling in order not to acquire any proved reserve data which they would be obligated to turn in to the AGA. Aside from the dubious wisdom (and likelihood) of a petroleum company paying millions of dollars and then permitting the lease to go untested, the District Court judiciously added the following caveat:

> If you can later come back to me with a situation where a company has been awarded a bid on a property and has delayed an unreasonable time in drilling on it so they could come up with a proper estimate, then you may apply and I will consider giving you the bid file on that particular one.[31]

We therefore affirm the District Court's finding that the bid materials were not relevant[32] at the present time to the Trade Commission's inquiry and the related modification contained in paragraph 2(a) of its six producers' order.

III. Random Sampling and Time Limitations

The Trade Commission argues that the District Court should have required complete disclosure of all proved reserve data in the Southern Louisiana area back through 1962. Instead, the court ordered disclosure (1) of proved reserve data for a random sample of 100 fields out of the 220 in Southern Louisiana (2) for the years 1969, 1970, and 1971.

[12] It is well established that an enforcing court may limit through

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[29] *See* note 2, *supra*.

[30] There is no consistently used or accepted definition for reserves other than "proved reserves." Various companies describe their data, at different stages, as "probable," "possible," "recoverable," and "ultimately recoverable."

[31] App. II 431a.

[32] We noted earlier that the District Court had not reached the issue of relevance with regard to the overall category of documents that do not relate to proved reserves. Page 144. Although logically the bid files fall within this category, throughout these proceedings they have been treated and discussed as if they were a discrete class of documents. The Record indicates that the District Court gave separate consideration to the bid files and ultimately based the relevant portions of the final order on a finding that the bid files lacked relevance. App. 431a.

modification or partial enforcement subpoenas [150] it finds to be unduly burdensome.[33] Such modification or partial enforcement is an exercise of the District Court's sound discretion and will only be overturned on appeal for abuse of discretion.[34]

With respect to the random sampling, the Trade Commission's position is that

> Such a limitation and sampling would make impossible any comparison of the total data supplied by producers who have fully complied with the subpoenas with the limited data which would be forthcoming from producers who supplied documents on only a random and numerically limited basis. Similarly the comparison with all the data submitted to the AGA for this region would be foreclosed.
>
> . . . Clearly the requirement that the Commission resort to a random sample of 100 fields would preclude any possibility of making a reasonable evaluation of natural gas reserves or checking the accuracy of estimates of natural gas reserves for Southern Louisiana.[35]

[13] On either theory of its investigation the Trade Commission's argument is unconvincing. If the Trade Commission is looking for an antitrust conspiracy, a random sample made up of data from 45% of the relevant fields should be adequate to turn up evidence of a conspiracy (if there is evidence to be turned up). If the FTC is investigating whether either the industry-wide definition of proved reserves or the manner of reporting such reserves is an unfair trade practice, we fail to see how a random sample of data from 45% of the fields would be inadequate. A random sample permits comparisons between producers or between producers and the AGA figures, especially since the FTC already has the AGA's complete field-by-field figures.[36] The District Court was entitled to conclude on the record before it that disclosure of data from all 220 fields would be burdensome, and that use of a random sample would neither preclude a reasonable evaluation of the manner in which reserves are estimated nor prohibit the Commission from checking the data as to its accuracy. We therefore affirm this aspect of the District Court's order.

On the other hand, the reasons for limiting disclosure to documents prepared during 1969, 1970, and 1971 are not as apparent to us. The Trade Commission's investigation was triggered, at least in part, by the drop in 1968 and 1969 of proved reserves as reported by the AGA. The Commission would thus appear to need data for a period of time preceding the reported drop in reserves in order to make comparisons. In this regard, we find the Commission's request for disclosure under specifications G, H, and I back through 1962 to be appropriate. We therefore conclude that the District Court's failure to require such disclosure is an abuse of discretion and must therefore be reversed.

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[33] *SEC* v. *Brigadoon Scotch Dist. Co.*, 480 F.2d 1047, 1056 (2nd Cir. 1973), *cert. denied*, 415 U.S. 915, 94 S.Ct. 1410, 39 L.Ed.2d 469 (1974); *Adams* v. *FTC*, 296 F.2d 861, 866–67 (8th Cir. 1961), *cert. denied*, 369 U.S. 864, 82 S.Ct. 1029, 8 L.Ed.2d 83 (1962); *Hunt Foods & Industries, Inc.* v. *FTC*, 286 F.2d 803, 811 (9th Cir. 1960), *cert. denied*, 365 U.S. 877, 81 S.Ct. 1027, 6 L.Ed.2d 190 (1961); *Chapman* v. *Maren Elwood College*, 225 F.2d 230 (9th Cir. 1955); *Comet Electronics, Inc.* v. *United States*, 381 F.Supp. 1233, 1242 (W.D.Mo.1974), *affirmed*, 420 U.S. 999, 95 S.Ct. 1439, 43 L.Ed.2d 758 (1975); *Genuine Parts Co.* v. *FTC*, 313 F.Supp. 855, 857 (N.D.Ga.1970), *affirmed*, 445 F.2d 1382 (5th Cir. 1971); *In re United Shoe Machinery Corp.*, 6 F.R.D. 347 (D.Mass.1947). *See also See* v. *Seattle*, 387 U.S. 541, 544, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967).

[34] *NLRB* v. *Northern Trust Co.*, 148 F.2d 24, 29 (7th Cir.), *cert. denied*, 326 U.S. 731, 66 S.Ct. 39, 90 L.Ed. 435 (1945).

[35] Appellant's Brief, p. 48.

[36] *See* note 4 and accompanying text.

IV. Confidentiality and Production at Situs

[14] The District Court attached the following conditions upon the disclosure of documents designated as confidential:

(1) The Secretary of the Federal Trade Commission is designated the custodian of the documents;

[151] (2) The documents (and presumably any documents or memoranda derived therefrom) must be kept in a depository with access restricted to the FTC employees assigned to the investigation;

(3) Documents can only be removed from the depository or used for other purposes with the court's permission; and

(4) Upon the termination of the investigation, the documents (and presumably all copies of documents) must be returned to their owner.

The Trade Commission does not question the confidential nature of the documents it seeks disclosed. Rather, its position is that the FTCA and the Commission's Rules of Practice provide appellees with adequate protection. In fact, the FTCA and the Rules of Practice merely state that the public disclosure of geophysical data or information and trade secrets is within the discretion of the Commission. 16 C.F.R. 4.11(d) clearly indicates that the Trade Commission will decide ultimately whether records exempt from disclosure under the Freedom of Information Act (as most of these records probably would be) will be disclosed.

The District Court was not required to rely on the unbounded discretion of the Trade Commission to keep the producers' estimates confidential.[37] In addition, we fail to see how the minor procedures imposed by the court will impose any substantial burden on the Commission's investigation. We therefore hold that the District Court did not abuse its discretion when it attached the conditions listed above to the disclosure of information by all seven appellees.[38]

[15] The Trade Commission also complains about the option permitting the production of documents for inspection where they are

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[37] *See* note 4, *supra*. The action of the Trade Commission, in acceding to the telephoned demand of a Congressman for immediate access to the documents in so short a period of time as to preclude resort to a court, underlines the wisdom and reasonableness of the District Court's protective order on confidentiality. The Federal Rules of Civil Procedure currently provide for motions to quash duly authorized subpoenas, but not phone calls.

[38] In order to protect confidential commercial information and trade secrets, District Courts frequently have required appropriate protection as a precondition to enforcement of FTC investigative subpoenas. *See, e.g., FTC* v. *St. Regis Paper Co.*, 304 F.2d 731, 732 n. 1 (7th Cir. 1962); *Graber Mfg. Co.* v. *Dixon*, 223 F.Supp. 1020 (D.D.C. 1963); *FTC* v. *Bowman*, 149 F.Supp. 624 (N.D.Ill.), *aff'd*, 248 F.2d 456 (7th Cir. 1957); *FTC* v. *Menzies*, 145 F.Supp. 164, 171 (D.Md.1956), *aff'd*, 242 F.2d 81, 84 (4th Cir.), *cert. denied*, 353 U.S. 957, 77 S.Ct. 863, 1 L.Ed.2d 908 (1957).

stored. The Supreme Court in *CAB* v. *Hermann* upheld the enforcement of a subpoena "with appropriate provisions for assuring the minimum interference with the conduct of the business of respondents."[39] The Second Circuit has also upheld a similar provision. It noted that "[r]equiring records to be produced away from the place where they are ordinarily kept may impose an unreasonable and unnecessary hardship which in itself would make the issuance of the subpoena, otherwise proper, arbitrary and capricious."[40] Since the number of documents to be produced will be quite large, it is not inappropriate to relieve appellees of some of the expense and burden entailed by permitting them the option of producing documents where they were stored.[41] It would then be the responsibility of the Trade Commission to copy and transport to Washington any documents they consider useful. We affirm the District Court as to the *in situs* condition.

V. The Superior Order

[152] [16] The Commission concedes that Superior does not report reserve estimates to or participate in, the work of the AGA. Since the FTC issued identical subpoenas to all producers, it was obvious to the District Court that several specifications, those relating to reporting and participating in the AGA, were not relevant to Superior. As a result, the District Court simply refused to enforce specifications G through J. In all other respects Superior will be required to provide the Commission with the same documents and information that is being required of the other six producers, subject to the confidentiality protections previously discussed. We affirm this order.

VI. Conclusion

[17] In the last analysis a petition for enforcement of an administrative subpoena *duces tecum* must be judged by the District Court on a case-by-case basis. Because questions of relevance and burdensomeness are peculiarly within the ken of the trial court, appellate tribunals should be wary of second-guessing. In our view, the District Court's orders represent a just and fair accommodation between the Trade Commission and the producers.

To summarize, we have affirmed the District Court's order in all respects save one, the time limitation in paragraph 2 of the six producers' order.

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[39] 353 U.S. 322, 323, 77 S.Ct. 804, 805, 1 L.Ed.2d 852 (1957).

[40] *Walling* v. *American Rolbal Corp.*, 135 F.2d. 1003 (2nd Cir. 1943).

[41] The Trade Commission's arguments notwithstanding, it is common for a District Court to require the administrative agency to inspect subpoenaed records or documents at the place where they are stored. *NLRB* v. *Friedman*, 352 F.2d 545 (3rd Cir. 1965); *Hunt Foods & Industries, Inc.* v. *FTC*, *supra*, 286 F.2d at 812. *FTC* v. *Bowman*, *supra*, 149 F.Supp. at 630; *F.T.C.* v. *Menzies*, *supra*, 145 F.Supp. at 171.

Affirmed in part and reversed in part.
See Appendix on next page.

APPENDIX A

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

To Mr. A. C. Long, Chairman Executive Committee & Chief Executive Officer,
Texaco, Inc.,
135 East 42nd Street, New York, New York. 10017

You are hereby required to appear before Donald K. Tenney, an Attorney and Examiner of *the Federal Trade Commission, at* Room 368, Federel Trade Commission Building, 6th and Pennsylvania Avenue, N.W., *in the City of* Washington, D.C. 20580 *on the* 5th *day of* January, 1972, *at* 10:00 a.*m., to testify* in connection with the Commission's investigation of various corporations and persons, File No. 711 0042, pursuant to Commission Resolution dated June 3, 1971, a copy of which is attached and made a part hereof, for the purposes stated therein.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

See attached "Definitions" and "Specifications."

Fail not at your peril

In testimony whereof, the undersigned, an authorized official of the Federal Trade Commission, has hereunto set his hand and caused the seal of said Federal Trade Commission to be affixed at Washington, D.C., this 24th *day of* November *19*71.

SEAL /s/ Assistant Director, Bureau of Competition.

DEFINITIONS

[154] As used herein, the term "documents" means all writings of every kind including books, records, folios, minutes, reports, memoranda, correspondence, agreements, discounted cash flow studies, cover

sheets, calculation sheets, print outs, telegrams, diary entries, pamphlets, notes, charts, and tabulations in the possession, custody or control of the Company. The term "documents" also includes voice recordings and reproductions or film impressions of any of the aforementioned writings as well as copies of documents which are not identical duplicates of the originals and copies of documents of which the originals are not in the possession, custody or control of the Company. The term "documents" further includes all punch cards or other cards, tapes or recordings used in data processing, together with the programming instructions and other written material necessary to understand or use such punch cards, tapes or other recordings.

In response to specifications in which the term "documents" is followed by an asterisk (*), a verified written statement by an officer of the company containing the requested information may be submitted in lieu of the documents called for provided that the underlying documents or source materials are listed or otherwise specifically identified in, or as part of, such verified statement.

Each document submitted must be identified as to the specification or specifications to which it is responsive.

The term "the Company" means the corporation upon which this Subpoena was served as well as its directors, officers, employees, and agents; its subsidiaries and affiliates; and the directors, officers, employees and agents of its subsidiaries and affiliates. The term "the corporation" means the corporation upon which this Subpoena was served.

Unless otherwise stated, the following definitions apply to the specifications that ensue:

1. *South Louisiana.* That geographical area delineated by Map III, page 84, of the May, 1971 edition of *Reserves of Crude Oil, Natural Gas Liquids, and Natural Gas in the United States and Canada and United States Productive Capacity as of December 31, 1970* including the offshore area. The term "Offshore South Louisiana" is defined as that geographic area which lies seaward from the Louisiana coastline. The South Louisiana Offshore Area is sometimes referred to as Federal Areas 1 through 4 and includes the West Cameron Area, East Cameron Area, Vermilion Area, South Marsh Island Area, Eugene Island Area, Shoal Area, South Pelto Area, Bay Marchand Area, South Timbalier Area, Grand Isle Area, West Delta Area, South Pass Area, Main Pass Area, Breton Sound Area, Chandeleur Area and Chandeleur Sound Area and any additions thereto, as indicated on the United States Geological Survey "Oil and Gas Development Map of the Gulf Coast State of Louisiana Outer Continental Shelf", as revised on January 5, 1971.

[155] 2. *Net Production.* The definition appearing in *Technical*

Report No. 1, Standard Definitions for Petroleum Statistics (First Edition, July 1, 1969), at page 11, is adopted.

3. *Natural Gas Present or Recoverable or Ultimately Recoverable.*

a. *Present.* Natural gas in place, i. e., existing either in the gaseous phase or in solution with crude oil in a natural underground reservoir or reservoirs.

b. *Recoverable.* Natural gas in place that is producible.

c. *Ultimately recoverable.* Natural gas in place that is producible, together with its cumulative production.

4. *Field.* A field is an area consisting of a single reservoir or multiple reservoirs all grouped on, or related to, the same individual geological features and/or stratigraphical condition. A reservoir is a porous and permeable underground formation containing an individual and separate natural accumulation of hydrocarbons (oil and/or gas) which is confined by impermeable rock or water barriers and is characterized by a single natural pressure system.

5. *Completion Date.* The first date on which any permanent equipment for the production of oil or gas is installed in a well. Completion reports may relate to the abandonment of a well or to the installation of permanent productive equipment.

6 & 7. *Associated Gas; Dissolved Gas.* The definitions of these two terms that appear in *Technical Report No. 1*, Standard Definitions for Petroleum Statistics (First Edition, July 1, 1969), page 6, are adopted.

8. *Nonassociated Gas.* Natural gas which is in a reservoir or reservoirs not containing significant quantities of crude oil.

9-13. *Proved Reserves; Revisions; Extensions; New Field Discoveries;* and *New Reservoir Discoveries in Old Fields.* The definitions of these five terms that appear in *Reserves of Crude Oil, Natural Gas Liquids, and Natural Gas in the United States and Canada and United States Productive Capacity as of December 31, 1970* at pages 102-104, are adopted.

14. *Dedicated Reserves.* The volume of natural gas committed to a pipeline company and for which both the seller and the pipeline company have received certificate authorization from the Federal Power Commission.

SPECIFICATIONS

A. Documents * which will indicate the correct legal name and business address of the corporation, its date and state of incorporation, and the name, position and home address of each officer and director of said corporation.

B. Documents * which will indicate the correct legal name and business address of the parent of the corporation, the date and state of incorporation of the parent and the percentage ownership the parent has in the corporation, and the name, position and home address of each officer and director of the parent.

[156] C. The corporation's Annual Reports for each of the years 1966, 1967, 1968, 1969 and 1970.

D. Documents * which will indicate the name and address of each subsidiary, affiliate, and division of the corporation and of the divisions of each such subsidiary and affiliate engaged in the exploration, development, production, or distribution of natural gas; the function(s) as heretofore set forth of each; and the dates and states of incorporation and the names, positions, and addresses of officers, directors, managers of each subsidiary, affiliate, and division.

E. Documents * which will indicate (1) each type of customer purchasing natural gas, produced in South Louisiana, from the corporation, its subsidiaries and affiliates and (2) the manner and methods of distribution of such natural gas to each such type of customer.

F. Documents * which will indicate the following for each of the years 1966 through 1970:

1. Total net production of natural gas, in units, in (a) the United States and (b) South Louisiana, by the corporation, its subsidiaries and affiliates.
2. Total unit and dollar volume of sales of the total net production of natural gas produced in (a) the United States and (b) South Louisiana, by the corporation, its subsidiaries and affiliates.
3. Total dollar volume of sales of the total net production of natural gas produced in South Louisiana by the corporation, its subsidiaries and affiliates to each type of customer identified in Specification E(1)—for 1969 and 1970 only.

G. Documents either received (from whatever source) or written by the Company, in whole or in part, at any time between January 1, 1962 to December 31, 1970, which contain estimates or evaluations of the volume of natural gas present or recoverable or ultimately recoverable (1) throughout all of South Louisiana (2) throughout all of Offshore South Louisiana and/or (3) in specific fields, portions of fields, leaseholds and/or portions of leaseholds located in Offshore South Louisiana.

Excluded from this specification are any documents previously made available to the Commission by the American Gas Association and presently in the custody of Price, Waterhouse & Company, 1801 K Street, Washington, D.C. Included in this specification by way of illustration but not limitation are documents containing estimates or evaluations including re-estimates or reevaluations made in connection with or in preparation for or as the result of the following: (1) bidding on or nominating leases (2) deciding whether to erect permanent platforms (3) compiling or inventorying total company reserves or supply (4) negotiating or contracting for the sale of natural gas, or for the joint or common exploration, development, production, purchase or sale of acreage, or for obtaining bank loans (5) filing depreciation expense schedules with Internal Revenue Service or (6) submitting field-by-field estimates to subcommittees or committees of the American Gas Association or the American Petroleum Institute.

[157] H. Documents * indicating any or all of the following with regard to each field and leasehold in Offshore South Louisiana for which estimates or evaluations of the volume of natural gas, pertaining to the whole or a portion thereof, are produced pursuant to Specification G:

1. For each such field and portion thereof, its name and the number(s) of each block number comprising said field or portion thereof—if the field or field portion is situated at least in part in a portion of a block, the portion of the block as well, e. g., "NW 1/4";
2. For each such leasehold and portion thereof, the OCS number and the name(s) and location(s) of the field(s) and portion(s) thereof comprising such leasehold or portion thereof;
3. The pipeline company(ies) serving each such field, leasehold, or portion thereof;
4. The producer(s) and the operator(s) of each such field, leasehold, or portion thereof, indicating the precise interest each such producer and operator has in the acreage;
5. For each such field, leasehold and portion thereof, the location (on a map) and designation of each well drilled including (for each such well):
    a. The current status as classified by the Company, e. g., "dry and abandoned", "temporarily abandoned", "suspended", "shut-in", "service", "producer", etc.;
    b. Whether classified by the Company as an oil or gas well at the time of (1) application for drilling (2) the filing of each completion report (3) currently;
    c. The number of reservoirs containing natural gas that have been penetrated by the well;
    d. The date drilling commenced; the date total depth was reached; first date of testing; first date of testing officially reported; completion date; date commenced producing.

I. Documents either received (from whatever source) or written by the Company, in whole or in part, at any time subsequent to January 1, 1962, which refer, analyze, compare, comment on, set forth, and/or relate to any or all of the following:

1. Any natural gas estimates or evaluations called for by Specification G; the preparation or completion of such estimates or

evaluations; the procedures, criteria or interpretations used in such preparation or completion; the identity of organizational units and personnel of the Company involved in such preparation or completion;

2. Any natural gas estimates or evaluations made available to the Commission by the American Gas Association and presently at Price, Waterhouse & Co., or appearing in any American Gas Association Report on Natural Reserves, published subsequent to January 1, 1967, including the constituent categories of these estimates such as "proved reserves", "revisions", "extensions", "new field discoveries", "new reservoir discoveries in old fields"; the preparation or completion of such estimates or evaluations; the pro[158]cedures, criteria or interpretations used in such preparation or completion; the organizational units and personnel of the Company involved in such preparation or completion;

3. Any lease nominations and bids, any agreements for joint or common leasing, exploration, development, production, purchase or sale, or any cash flow or economic feasibility studies preparatory to leasing, exploring, developing, purchasing or selling, which involve Offshore South Louisiana acreage;

4. Any compilation, report or study of "dedicated reserves";

5. Whether any well designated in response to Specification H-5 contains natural gas in sufficient quantities as to be capable of producing in paying quantities.

J. Documents either received (from whatever source) or written by the Company, in whole or in part, at any time subsequent to January 1, 1966, which refer, analyze, compare, comment on, set forth, and/or relate to any or all of the following:

1. Any failures or delays, for whatever reason, in reporting proved reserves of natural gas to the American Gas Association, including any failures or delays by personnel of the Association to identify to subcommittee members all fields containing proved reserves;

2. The classification or exclusion or inclusion of volumes of natural gas as proved reserves;

3. The relationship between increases or decreases of crude oil proved reserves with increases or decreases of associated, dissolved or associated-dissolved natural gas proved reserves;

4. Negative revisions to American Gas Association proved reserve estimates because of clerical or mathematical error.

K. Documents either received (from whatever source) or written by the Company, in whole or in part, at any time subsequent to January 1, 1962, which refer, analyze, compare, comment on, set forth, and/or relate to any or all of the following:

1. The relation between the amount of "proved reserves" and the rate allowed, to be allowed, or that may be allowed for natural gas by the Federal Power Commission;
2. The reporting of lower "proved reserve" figures.

L. Documents * naming all employees of the corporation, its subsidiaries and affiliates who have, any time since January 1, 1966 with regard to Offshore South Louisiana, estimated, evaluated or enumerated natural gas proved reserves, dissolved gas proved reserves, potential gas supply or well drilling activity either for the American Gas Association, American Petroleum Institute, Potential Gas Committee, American Association of Petroleum Geologists or the International Oil Scouts, including local scout checks, indicating for each person named (1) the association for which he estimated or enumerated (2) whether a member of the association (3) what was estimated or enumerated and (4) the dates for which he estimated or enumerated for the particular association.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Federal Trade
Commission
v. Civil Action No.
1089-73
Texaco, Inc.

Federal Trade
Commission
v. Civil Action No.
1090-73
Standard Oil Co.
(Indiana)

Federal Trade
Commission
v. Civil Action No.
1092-73
Exxon Corporation

Federal Trade
Commission
v. Civil Action No.
1093-73
Shell Oil Company

Federal Trade
Commission
v. Civil Action No.
1095-73
Standard Oil Co. of
California

Federal Trade
Commission
v. Civil Action No.
1096-73
Mobile Oil
Corporation

ORDER

The Federal Trade Commission ("Trade Commission") having petitioned on June 13, 1973, for enforcement of subpoenas *duces tecum* issued by an Assistant Director of the Trade Commission's Bureau of Competition to each of the above captioned respondents on November 24, 1971, in the course of a Trade Commission investigation into natural gas reserve reporting procedures (FTC Investigation File No. 711 0042); and the respondents having opposed enforcement of said subpoenas, contending that the principles of primary jurisdiction and collateral estoppel preclude the Trade Commission from seeking the demanded documents or data for purposes of determining the validity or accuracy of natural gas reserve estimates, and contending further, *inter alia*, that certain demands of the subpoenas are irrelevant to any proper subject or area of investigation and are unduly broad and burdensome; and the parties having fully briefed and presented oral argument on the issues; and the Court upon consideration of all the premises, being of the opinion that the Trade Commission is authorized to pursue the investigation to determine whether there exists any evidence of conspiracy in the reporting of proved natural gas reserve estimates to the American Gas Association by respondents, but that the subpoenas *duces tecum* are improper insofar as they seek data for the purposes of enabling the Trade Commission to attempt to deter[**160**]mine natural gas reserves or the validity or accuracy of natural gas reserve estimates, matters already considered and ruled upon by the Federal Power Commission, and the Court being of the further opinion that the subpoenas are improper in other respects as well and should not be enforced as issued:

It is now therefore ordered:

1. Enforcement of specifications A, B, C, D, E, and F of the subpoenas *duces tecum* is hereby granted. Enforcement of specifications G, H, I, J, K, and L is hereby denied except as provided below.

2. Respondents shall produce documents as called for by specifications G, H, and I of the subpoenas *duces tecum* for the years 1969, 1970 and 1971, subject to the following modifications and limitations:

(a) Production shall be limited to documents containing or underlying proved natural gas reserve estimates. Raw field data, bid calculation data, and bid calculation files are not required to be produced. As regards underlying back-up data for each estimate called for by specification G, only the immediate data used to make the estimate need be submitted. For estimates arrived at volumetrically, specification I(1) will be satisfied by supplying all the underlying numbers which were used in the formula including the recovery factor and the size of the reservoir(s). As for the estimates arrived at by pressure decline curves, specification I(1) will be satisfied by submitting the curve used.

(b) Production of documents shall be made with respect only to a random sample of 100 of those offshore Southern Louisiana fields which were included in reports for 1971 by the Southern Louisiana Subcommittee of the American Gas Association Committee of Natural Gas Reserves. This random sample shall be selected by a procedure agreed upon between Trade Commission and respondents.

(c) Each respondent shall make production with respect to the fields, selected in the manner described in paragraph 2(b), in which it had an ownership interest as of the date reports were submitted by the Southern Louisiana Subcommittee of the American Gas Association Committee of Natural Gas Reserves.

(d) All production ordered pursuant to this paragraph 2 shall be made for the sole purpose of permitting the Trade Commission to investigate whether there is a conspiracy in the reporting of natural gas proved reserve estimates, and not for the purpose of permitting the Trade Commission to investigate or determine the amount of proved natural gas reserves.

3. Respondents shall produce documents as called for by specifications J and K of the subpoenas *duces tecum*, subject to the following modifications and limitations:

(a) Production shall be limited to documents relating to proved natural gas reserve estimates in those offshore Southern Louisiana fields which were included in reports for 1971 by the Southern Louisiana Subcommittee of the American Gas Association Committee of Natural Gas Reserves.

[161] (b) Production shall be limited to documents prepared or dated during the years 1966 through 1971, inclusive, which were exchanged between or among, or constitute, contain or refer to any agreement, arrangement or communication between or among, respondent or others, including the American Gas Association.

4. Respondents shall produce documents as called for by specification L, except production shall be limited to the employees who have acted with respect to proved natural gas reserve estimates for offshore Southern Louisiana during the year 1966 through 1971, inclusive.

5. In complying with this Order, the definition of terms contained in the original subpoenas *duces tecum* shall apply.

6. Respondents shall comply with this Order within 180 days after the date upon which they are advised of the sample fields selected in accordance with paragraph 2(b) hereof.

7. Each respondent shall have the option of producing documents called for by this Order at the corporate office or field location where the responsive documents are normally maintained or at the Federal Trade Commission's offices in Washington, D.C. With respect to documents as to which any respondent elects to make production at a

corporate office or field location, the Trade Commission shall inspect and reproduce any of said documents at such office or field location at, such other location as agreed upon by the respective parties, and shall bear any costs of reproduction or copying which the Trade Commission may require or desire.

8. Any document produced under this Order which contains confidential information may be designated as being confidential by the respective respondents, in which event all documents so designated shall be subject to the following protective treatment:

(a) Documents designated as confidential by a respondent shall be deposited with and be maintained by a custodian who shall be the Secretary to the Commission. Unless and until otherwise ordered by the Court upon due notice to all affected parties documents so designated may be inspected only at the depository location and only by employees of the Trade Commission officially assigned to the Trade Commission's investigation entitled "File No. 711 0042." Said documents shall be used only in connection with said investigation, and said employees shall not suffer or permit disclosure or copying of any such document, or any portion thereof, or any information contained therein to any other person.

(b) Unless and until otherwise ordered by the Court upon due notice to all affected parties, documents designated confidential under this Order shall remain in custody of the Custodian and neither the documents nor any copies thereof shall be removed from such custody.

(c) At the conclusion of the Trade Commission's investigation pursuant to which such confidential documents have been produced, all documents so designated as confidential, together with all copies [162] thereof, shall be returned to the respective respondent unless the Trade Commission seeks and obtains an order of the Court providing otherwise.

(d) The protective provisions of this Order shall be deemed to apply to the Trade Commission, to the individual Commissioners of the Trade Commission and to all persons in the employ of the Trade Commission; sanctions for violation of any provision of this Order may be imposed on the Trade Commission, or any person who violates any provision of this Order.

9. The Court reserves its ruling as to any and all matters, contentions or issues not specifically disposed of by this Order. Jurisdiction over these proceedings is retained for the purposes of providing other and further relief as necessary.

So ordered this 22nd day of March, 1974.

(s) George L. Hart, Jr.
Chief Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Federal Trade Commission
v. Civil Action No. 1091-73
Superior Oil Company

ORDER

Upon consideration of the Federal Trade Commission's petition for enforcement of a subpoena *duces tecum*, the matter having been fully briefed and argued before the Court, and the Court being advised in the premises, it is this 22nd day of March, 1974,

ORDERED, That the respondent, The Superior Oil Co., Inc., shall comply, within 180 days from the date on which this Order becomes final, with Specifications A through F and K through L of the subpoena, provided that Specifications A, B, D, E and F may be complied with by submitting a verified written statement by an officer of the Company containing the requested information in lieu of the documents specified, and it is

FURTHER ORDERED, That as to the respondent, The Superior Oil Co., Inc., Specifications G through J of the subpoena be, and the same hereby are, denied enforcement and quashed; and it is

[163] FURTHER ORDERED, That any document produced under this Order which contains confidential information may be designated as being confidential by the respondent, in which event all documents so designated shall be subject to the following protective treatment:

(a) Documents designated as confidential by a respondent shall be deposited with and be maintained by a custodian who shall be the Secretary to the Commission. Unless and until otherwise ordered by the Court upon due notice to all affected parties documents so designated may be inspected only at the depository location and only by employees of the Trade Commission officially assigned to the Trade Commission's investigation entitled "File No. 711 0042." Said documents shall be used only in connection with said investigation, and said employees shall not suffer or permit disclosure or copying of any such document, or any portion thereof, or any information contained therein to any other person.

(b) Unless and until otherwise ordered by the Court upon due notice to all affected parties, documents designated confidential under this Order shall remain in custody of the Custodian and neither the documents nor any copies thereof shall be removed from such custody.

(c) At the conclusion of the Trade Commission's investigation pursuant to which such confidential documents have been produced, all documents so designated as confidential, together with all copies thereof, shall be returned to the respondent unless the Trade Commission seeks and obtains an order of the Court providing otherwise.

(d) The protective provisions of this Order shall be deemed to apply to the Trade Commission, to the individual Commissioners of the Trade Commission and to all persons in the employ of the Trade Commission; sanctions for violation of any provision of this Order may be imposed on the Trade Commission, or any person who violates any provision of this Order.

The Court reserves its ruling as to any and all matters, contentions or issues not specifically disposed of by this Order. Jurisdiction over these proceedings is retained for the purposes of providing other and further relief as necessary.

So Ordered This 22 Day of March, 1974.

George L. Hart, Jr.
George L. Hart, Jr.
Chief Judge

GATES RENTAL, INC., et al. *v.* FEDERAL TRADE COMMISSION*

Civ. A. No. C75-95A. F.T.C. Docket No. C-2245.

(United States District Court, Northern District of Georgia, August 13, 1975)

On motion to dismiss, or in the alternative for summary judgment, court held that the F.T.C. has yet to take "final agency action"; plaintiffs have failed to exhaust their administrative remedies, and, therefore, it would be improper for court to intervene at this time.

Motion to dismiss granted.

Before May, Jr., *District Judge.*

Order of Court

This is an action for declaratory relief filed by Gates Rental, Inc., et al., against the Federal Trade Commission seeking review of a consent order entered in July 1972. The case is presently before the Court on the Commission's motion to dismiss, or in the alternative for summary judgment, or, if dismissal and summary judgment are denied, to strike the plaintiffs' demand for a jury trial.

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* Not otherwise reported; *affirmed*, 5 Cir. 1976, 532 F.2d 184. See also p. 1158 herein. For case before the Commission, see 81 F.T.C. 86, 82 F.T.C. 263 and 83 F.T.C. 823.

The facts are as follows: Gates Rental, Inc., a corporation organized, existing and doing business under the laws of the State of Georgia, is engaged in the sale and rental of televisions and stereophonic equipment. On February 24, 1972, Gates received a notice from the Secretary of the Commission informing them that the Commission had determined to institute a formal proceeding against Gates for false, misleading, and deceptive sales and advertising practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and the Truth-in-Lending Act, 15 U.S.C. § 1601, *et seq.* Thereafter, on July 11, 1972, the matter was disposed of by the entry of a consent order as provided in the Commission's Rules, Part 2, Subpart C. Plaintiff's complaint is with regard to paragraph one of that consent decree which orders plaintiff to cease and desist from:

> Representing in any advertisement, directly or by implication, or in any oral statements made to a customer, that an individual can rent or purchase any of respondents' merchandise at a discount price, or an inexpensive price, or an advantageous price, or *for any specified amount, payment or period of time* without disclosing in every instance in a clear and meaningful way, the average prevailing retail price of the merchandise or comparable merchandise using the term "average retail price" together with either:
>
> (a) the total dollar cost to the individual of purchasing the same merchandise under respondents' "rent-to-buy" plan, using the term "our total purchase price;" or
>
> (b) the total charge for renting the same merchandise for twelve months, using the term "rent for one year. (emphasis added)

It is the emphasized phrase which plaintiffs dispute. They assert that during the negotiations prior to the entry of the consent order counsel for the Commission represented to them that the disputed language would only be applicable to advertisements and oral statements made in connection with the rent or purchase of merchandise at discount, inexpensive, or advantageous prices. Plaintiffs contend that they signed the consent order in reliance on this representation.

Thereafter, plaintiffs learned from conversations with counsel for the Commission that the drafter's intent was that the language "or for any specified amount, payment or period of time" be applicable to all aspects of plaintiff's business. On August 7, 1972, plaintiffs filed with the Commission a Petition for Modification of the Commission's Consent Order requesting that the language in question contained in paragraph one of the consent order be deleted so as to conform the order to the purported intent of the parties at the time of execution. On January 23, 1973, the Commission issued an order denying relief. The order indicated that the consent decree was not as limited as plaintiffs suggested but also applied whenever, in connection with plaintiffs' "rent-to-buy" plan or similar installment purchase plan, or any rental plan, a specified amount, payment or period of time is represented.

However, the Commission recognized that the consent decree as worded could be construed to apply to business transactions not falling within such plans and, accordingly, proposed a revised paragraph one to which plaintiffs had 20 days to accept. Plaintiffs rejected the proposed modification and on February 21, 1973, submitted a Petition for Interpretation of Order Issued on January 23, 1973. Furthermore, on April 11, 1973, plaintiffs filed another Petition for Modification requesting that language be added to paragraph one making it inapplicable to individualized oral responses to telephonic or oral inquiries initiated by customers. On October 9, 1973, the Commission denied this petition and ordered plaintiffs to comply with the consent order issued July 11, 1972. In December 1973, plaintiffs filed a petition for review of the October 9 order in the United States Court of Appeals for the Fifth Circuit. The Court of Appeals, in September 1974, dismissed the petition on jurisdictional grounds without prejudice to plaintiffs' right to proceed in the district court.

In September 1972 the plaintiffs submitted to the Commission their compliance report in accordance with the consent order. Thereafter, in December 1974 plaintiffs received a letter from the Commission indicating that processing of the compliance report had been suspended pending final disposition of plaintiffs' original petition for modification and requiring plaintiff to submit an update of the compliance report within 30 days. Plaintiffs contend that the request for this additional report is neither authorized nor provided for in the consent order.

Plaintiffs contend that the consent order issued July 11, 1972, must be set aside or, in the alternative, be reformed to reflect the intent of the parties when said decree was executed.

The preliminary issue that must be resolved is whether the case is ripe for judicial review. The Court holds that the case is premature as the plaintiffs have not exhausted their administrative remedies and, therefore, defendant's motion to dismiss is GRANTED.

Plaintiffs claim the right to judicial review under Section 703 of the Administrative Procedure Act, 5 U.S.C. § 703, and the Court construes this claim as one asserting the full range of judicial review provisions provided in the APA, 5 U.S.C. § 701, *et seq.* Under 5 U.S.C. § 703 a judicial review proceeding is to be had in a court specified by statute or in the absence or inadequacy thereof "in a court of competent jurisdiction." However, under 5 U.S.C. § 704 only "final agency action" is reviewable. *See also, Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

In the present case the Commission has yet to give the consent order a concrete interpretation and has not accepted or rejected a compliance report submitted by plaintiffs. Indeed, plaintiffs have failed to submit the updated report requested by the Commission which has the authority to compel the filing of additional reports to monitor compliance with its cease and desist orders. *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950); *National Petroleum Refiners Ass'n* v. *Federal Trade Comm'n*, 482 F.2d 672 (D.C. Cir. 1973); *see also*, *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21 (1974); *Securities and Exchange Comm'n* v. *Brigadoon Scotch Distributing Co.*, 480 F.2d 1047 (2d Cir. 1973). The Commission has yet to determine whether or not the plaintiffs are in compliance with the consent order and thus the plaintiffs are asking this Court to speculate as to the Commission's ultimate response to the plaintiffs' conduct. The courts have wisely refused to take jurisdiction to make such decisions. *See Aetna Life Insurance* v. *Haworth*, 300 U.S. 227 (1937).

Although the plaintiffs have expressed a fear that the Commission will reject their compliance report, such fear is not sufficient to merit judicial review at the present time. The Commission interpretation of the consent order feared by the plaintiffs may be changed or never enforced. *See Vulcanized Rubber & Plastics Co.* v. *Federal Trade Commission*, 258 F.2d 684 (D.C. Cir. 1958). A primary purpose of the exhaustion of administrative remedies requirement is the avoidance of premature interruption of the administrative process by the courts. Principles of administrative autonomy require that agencies be given sufficient opportunity to exercise the discretion and expertise that are frequently involved in administrative decision-making. *McKart* v. *United States*, 395 U.S. 185, 193, 195 (1969). As stated by the Supreme Court:

> The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action or else has clearly exceeded its jurisdiction. *McKart* v. *United States*, *supra*, at 1974.

The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence–to make a factual record, to apply its expertise and discretionary authority, and to resolve disputes and correct its own errors so as to moot judicial controversies. *See McKart* v. *United States*, *supra*, 194-95; *Parisi* v. *Davidson*, 405 U.S. 34, 37 (1972). Having neither received the requested updated report on compliance from plaintiffs nor ruled on plaintiffs' specific conduct, the Commission has yet to take "final agency action." Plaintiffs have failed to exhaust their administrative remedies and, therefore, it would be improper for this Court to intervene in the administrative process at the present time. As the Court lacks subject matter jurisdiction, the defendant's motion to dismiss is hereby ORDERED GRANTED.

So ORDERED, this 13th day of August, 1975.

BROWN & WILLIAMSON TOBACCO CORP. v. LEWIS A. ENGMAN, ET AL.*

No. 75 Civ. 4047 (CHT) F.T.C. Docket C-2183

PHILIP MORRIS INC. v. LEWIS A. ENGMAN, ET AL.*

No. 75 Civ. 4048 (KTD) F.T.C. Docket C-2181

R.J. REYNOLDS TOBACCO CO. v. LEWIS A. ENGMAN, ET AL.*

No. 75 Civ. 4049 (KTD) F.T.C. Docket C-2184

LOEW'S THEATRES, INC. v. LEWIS A. ENGMAN, ET AL.*

No. 75 Civ. 4050 (CBM) F.T.C. Docket C-2180

AMERICAN BRANDS, INC. v. FEDERAL TRADE COMMISSION ET AL.*

No. 75 Civ. 4051 (CLB) F.T.C. Docket C-2182

LIGGETT & MYERS INC. v. LEWIS A. ENGMAN, ET AL.*

No. 75 Civ. 4052 (CLB) F.T.C. Docket C-2185

(United States District Court, Southern District of New York, August 28, 1975)

In denying an action to stay accumulation, during adjudication, of civil penalties for alleged violations of F.T.C. consent orders, court held that, since amount of civil penalties imposed was at court's discretion, due process right of plaintiffs had not been violated.

Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y., for plaintiff.

Before TENNEY, *District Judge:*

MEMORANDUM

Plaintiffs, the six major producers of cigarettes in this country,[1] have moved by order to show cause for an Order of this Court granting them preliminary injunctive relief staying, pending final judgment, the accumulation of civil penalties for alleged violations of the identical consent orders entered into by each of the companies with the Federal Trade Commission in March of 1972. For the reasons stated below, the request for a preliminary injunction is denied.

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* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶60,473 at 67,104 (1975-2 Trade Cases). See also pp. 1525 and 1542 herein. For case before the Commission, see 80 F.T.C. 455.

[1] Mr. Weisberg, the Assistant United States Attorney, made a motion on the record in open court on August 25, 1975 for consolidation of the six cases filed in this Court. The motion was granted and the Assistant United States Attorney was directed to submit an order to that effect.

The purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits. *Checker Motors Corp.* v. *Chrysler Corp.* 405 F.2d 319, 323 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969); *Hamilton Watch Co.* v. *Benrus Watch Co.* 206 F.2d 738, 742 (2d Cir. 1953). Such an injunction may never be obtained as a matter of right, but is clearly addressed to the discretion of the district court. *Yakus* v. *United States*, 321 U.S. 414 (1944); *Checker Motors Corp.* v. *Chrysler Corp., supra*, 405 F.2d at 323.

Historically this remedy has been viewed as drastic or extraordinary in nature and, absent a clear showing that movant has carried the burden of persuasion, the relief will be denied. *Dopp* v. *Franklin National Bank*, 461 F.2d 873, 878 (2d Cir. 1972); *Checker Motors Corp.* v. *Chrysler Corp., supra*, 405 F.2d at 323. That burden consists of showing either a reasonable probability of success on the merits and irreparable injury or that movants have raised serious questions going to the merits and that the balancing of the equities tips decidedly in their favor. *Robert W. Stark, Jr., Inc.* v. *New York Stock Exchange, Inc.* 466 F.2d 743, 744 (2d Cir. 1972); *Checker Motors Corp.* v. *Chrysler Corp., supra*, 405 F.2d at 323; *Crimmins* v. *American Stock Exchange, Inc.*, 346 F. Supp. 1256, 1258-59 (S. D. N. Y. 1972). An additional factor of relevance to be considered is the public interest. *American Motorists Ins. Co.* v. *City Wide Transportation Co.*, 308 F. Supp. 1080, 1084 (S. D. N. Y. 1969); 7 J. Moore, Federal Practice ¶ 65.04[1], at 47 (2d ed. 1948).

Since the issues of irreparable harm, the balancing of the equities, and the public interest will be dispositive of the motion, the Court will move directly to a consideration of those issues. Assuming, for the moment, that plaintiffs have at least raised serious questions going to the merits, they must then demonstrate that, on balance, the equities in the present situation tip decidedly in their favor. In the alternative, assuming that plaintiffs have demonstrated a reasonable probability of success on the merits, then they must further demonstrate irreparable injury in the absence of the relief requested.

On the question of irreparable injury, plaintiffs allege that they face a denial of due process should the stay be denied. In the absence of this relief, plaintiffs feel that they are placed in an impossible predicament, *i.e.*, they are faced with a choice of acquiescing in the findings of the Federal Trade Commission (regarding violations of the 1972 consent order) which they consider to be erroneous, or of awaiting the Commission's enforcement proceeding in the face of ever-mounting civil penalties. This dilemma, plaintiffs contend, would, in effect, deny them a forum in which to protest the ruling and, in doing so, deny them due process. In support of this argument they cite *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961).

The *St. Regis* case, however, is distinguishable from the instant case. The penalty provision applicable in *St. Regis* was mandatory in nature. The penalty provision applicable in the instant case, 15 U.S.C. § 45(l), reads as follows:

> (l) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of *not more than $10,000 for each violation*, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission. (Supp. 1975) (emphasis added).

As can clearly be seen, the penalty provision of § 45(l) merely fixes the upper limit of the penalty and any penalties to be ultimately assessed are discretionary with the court. *United States* v. *J. B. Williams Company, Inc.*, 498 F.2d 414, 438 (2d Cir. 1974); *United States* v. *Beatrice Foods Co.*, 322 F. Supp. 139, 141 (D. Minn. 1971).

In reaching its decision as to the imposition of penalties, the Court may consider, *inter alia*, the ability of the violator to pay, the good or bad faith of the violator, the degree of due care exercised, the injury to the public, and the delay on the part of the Federal Trade Commission in initiating the enforcement suit. *United States* v. *J. B. Williams Company, Inc., supra*, 498 F.2d at 438; *United States* v. *Ancorp National Services, Inc.*, 367 F. Supp. 1221, 1224 (S. D. N. Y. 1973); *United States* v. *Beatrice Foods Company*, 351 F. Supp. 969, 971 (p. Minn. 1972), *aff'd* 493 F.2d 1259 (8th Cir. 1974), *cert. denied*, 43 U. S. L. W. 3474 (U.S. March 4, 1975); *United States* v. *H. M. Prince Textiles, Inc.* 262 F. Supp. 383, 388-89 (S.D.N.Y. 1966). Thus, penalties to be assessed, if any, will be tempered by these considerations.

In addressing this question as well as the question of the public interest involved in the request for a stay of an assessment of penalties under § 45(l), the United States District Court for the District of Columbia (per Parker, *J.*) stated:

> The strong public interest in this area requires that possible penalties not be stayed pending such litigation in order to avoid encouraging frivolous suits for purposes of delay. Of course court administrative delays and the plaintiff's good faith on the one hand, and, as in this case, the unreasonableness or frivolousness of plaintiff's grounds for review on the other hand, are factors which a court may consider in assessing penalties. *United States* v. *H. M. Prince Textiles, Inc.*, 262 F. Supp. 383 (S. D. N. Y. 1966). *Floersheim* v. *Weinburger* 346 F. Supp. 950, 956 (D.D.C. 1972).

This Court is in agreement with the views expressed by Judge Parker in *Floersheim* and must conclude that plaintiffs have failed in their burden of showing either irreparable injury or that the balancing of the equities tips decidedly in their favor. Far from being subjected to a denial of due process, plaintiffs' risks here are no greater than the risks attendant in any litigation. In the face of these findings and in light of the remarks made by Judge Parker in *Floersheim*, it seems unnecessary to comment further on the question of the public interest.

Accordingly, plaintiffs' motion for a preliminary injunction is denied.

So ordered.

CONTROL DATA CORPORATION ET AL. v. FEDERAL TRADE COMMISSION*

Civ. A. No. 4-74-Civ. 412. F.T.C. Docket No. 8940.

(United States District Court for the District of Minnesota, September 3, 1975)

Plaintiffs have moved for partial summary judgment on the complaint filed herein, and for an Order requiring the production of certain documents for in camera inspection by the Court. Defendants have filed a cross-motion for summary judgment.

Oral argument was heard on March 18, 1975.

The Court has considered the affidavits and exhibits and the briefs and arguments of counsel.

On all of the files and proceedings herein,

IT IS ORDERED:

1. That the defendants' motion for summary judgment is denied.

2. That the defendants within twenty days of the date of this Order disclose to plaintiffs a list containing the names and last known home and business addresses and telephone numbers of all persons known to the defendants or to the employees and staff of defendant Federal Trade Commission to have knowledge or information relating to all or any part of the allegations set forth in defendant Federal Trade Commission's complaint against plaintiffs filed in FTC Docket No. 8940, provided however that the defendants may delete from such list the names of any of the staff of the Federal Trade Commission and the names of any persons currently employed by the plaintiffs, and provided further that the defendants may petition this Court in camera to strike the name of any individual the inclusion of whose name on the list would disclose his status as a confidential source.

3. That the defendants promptly disclose the foregoing list as well

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* Not otherwise reported. See also p. 1500 herein. Appeal of F.T.C. denied 1-02-76, 8 Cir. (1976). For case before the Commission, see 86 F.T.C. 180, 1094.

as all other records that defendant Federal Trade Commission has previously indicated that it was willing to disclose in reply to plaintiffs' written petition of March 19, 1974, for disclosure of records pursuant to the Freedom of Information Act, 5 U.S.C. § 552, without demand or imposition of any fees for services expended by defendants in connection with locating and segregating said records.

4. That the defendants within twenty days of the date of this Order produce to this Court for its in camera inspection all of defendant Federal Trade Commission's records responsive to the plaintiffs' aforesaid petition for disclosure of records pursuant to the Freedom of Information Act which defendants contend are interagency or intra-agency memoranda exempt from the mandatory disclosure requirements of the Freedom of Information Act under 5 U.S.C. § 552(b)(5).

MEMORANDUM

On October 3, 1973, defendant Federal Trade Commission [FTC] filed a complaint against Control Data Corporation [CDC] and Automation Institute of America, Inc. [AIA], the plaintiffs herein, commencing administrative proceedings for alleged violations of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, in the conduct of certain vocational education programs in the field of electronic data processing. AIA is a wholly owned subsidiary of CDC. On October 22, 1973, CDC and AIA moved to dismiss the administrative complaint, alleging that a 13 month lapse between their submission of a proposed consent decree and the filing of the complaint constituted prejudicial delay, in violation of §§ 6(b) and (e) of the Administrative Procedure Act, 5 U.S.C. §§ 555(b) and (e). In pursuing that motion, CDC and AIA have made several requests for the production by the FTC of certain documents alleged to be relevant to the issue of prejudicial delay. Generally, they have first requested the Administrative Law Judge to issue a subpoena in the underlying administrative action and, when that request has been denied in whole or in part, the companies have submitted formal petitions to the FTC for production of the documents under the Freedom of Information Act, 5 U.S.C. § 552(a)(3) ["FOIA"]. In a prior action brought in this Court the companies were partially successful in compelling production of a portion of one document. *See Control Data Corp.* v. *Federal Trade Commission*, 4-74-Civ. 25 (D. Minn. May 3, 1975).

In the present action, also commenced pursuant to 5 U.S.C. § 552(a)(3), the plaintiffs seek to compel the production of certain additional documents not covered in this Court's prior Order. A formal petition for the production of these documents was first presented to the Secretary of the FTC on March 19, 1974, and consisted of the following five "specifications":

1. All records setting forth the name, last known residence address, last known residence phone number, last known business affiliation, last known business address, and/or last known business phone number of each person (excepting solely members of the Commission's staff) known to the Commission having knowledge or information relating to all, any, or any part of the allegations set forth in the Commission's Complaint in the matter of Control Data Corporation and Automation Institute of America, Inc. (FTC Docket No. 8940);

2. All records concerning or in any way related to the present or former existence at any time since January 1, 1969, of every committee, group, task force, or other organization, whether formal or informal, in which the Commission was a member or was otherwise represented, which committee, group, task force or other organization was organized, in whole or in part, for the purpose of studying, reviewing, making recommendations and/or coming to conclusions concerning private vocational education in the United States;

3. For each committee, group, task force, or other organization described in specification 2, above, all records setting forth the name of each agency, department or other arm of the federal or any state government that is/was a member of said committee, group, task force, or other organization and all records setting forth the name, title, last known business address and/or last known business telephone number of each employee of each of the aforesaid agencies, departments, or arms of government who represented their respective agency, department, or arm of government at meetings of said committee, group, task force, or other organization.

4. All records setting forth or in any way related to the substance of and/or the reason(s) for each of the Commission's revisions of or amendments to the first published version of the Commission's guidebook, "Our Vocational Training Can Guarantee You the Job of a Lifetime";

5. All records setting forth or in any way related to:

(a) the development and/or preparation of Guide 10(e) of the Commission's "Guides for Private Vocational and Home Study Schools" [16 CFR 254.10(e)];

(b) the failure or omission of Guide 10(e) to specify with any degree of particularity the information which should be disclosed to prospective consumers; and/or

(c) any proposed versions of Guide 10(e) that differed from the final version of said Guide as published in 16 CFR 254.

By letter dated May 23, 1974, the FTC informed the plaintiffs that: (1) it would grant access to some of the documents responsive to specifications two through five; (2) it would not grant access to any of its documents responsive to specification one, because all such documents were "part of active investigatory files" and thus exempt from disclosure under 5 U.S.C. § 552(b)(7); and (3) it would not grant access to certain documents admittedly responsive to specifications two through five, because such documents were interagency or intra-agency memoranda containing "no clearly severable factual portions" and thus exempt from disclosure under 5 U.S.C. § 552(b)(5). On approximately June 10, 1974, the plaintiffs were informed that none of the documents which the FTC was willing to voluntarily release would be forthcoming until payment of a "search and segregation fee" of $183.00. The plaintiffs have refused to pay such a fee and, hence, have not yet obtained any of the documents specified in the March 19 petition.

The Court now has before it the following motions. The plaintiffs have moved for partial summary judgment and for an Order requiring the production of certain documents for in camera inspection by the Court. The relief which they seek by means of the motions consists of: (1) an Order requiring the prompt disclosure of all information responsive to specification one; (2) an Order requiring the prompt disclosure of all documents requested before June 10, 1974, which the FTC has agreed to voluntarily disclose and enjoining the FTC from requiring payment of a "search and segregation fee" for the production of such documents; and (3) an Order requiring the production for in camera inspection by the Court of all documents responsive to specifications two through five. The defendants have filed a cross-motion for summary judgment, urging that there is no genuine issue of material fact and that they are entitled to a judgment of dismissal as a matter of Law. The Court has heard oral argument on the motions, and the issues have been fully briefed by the parties.

The Identity of Knowlegeable Persons and the § *552(b)(7) Exemption* -

The first specification requests production of all of the FTC's "*records setting forth*" the names and locations of persons having knowledge of the allegations set forth in the administrative complaint. The request might conceivably be construed broadly to encompass written statements and the like which incidentally contain the names and locations of knowledgeable persons. From the outset, however, the parties have proceeded on the assumption that the plaintiffs seek to discover only the names and last known locations of all such persons, and the plaintiffs so state in their supporting brief in this Court.[1]

In refusing production of such a list the FTC relied on § 552(b)(7),

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[1] The Court recognizes that the Freedom of Information Act requires only that government agencies disclose existing documents, and that it does not require agencies to create documents not previously in existence. The Court further recognizes that the Act, even as amended, is not intended to be a substitute for the normal discovery procedures employed in litigation. Thus, for example, the FOIA could not serve as the basis of an Order requiring the FTC to produce a list of the witnesses it intends to use in the administrative proceeding, since that would presumably require the creation of a document not in existence and its sole purpose would be to fulfill the needs of a party in litigation which are more properly met by discovery.

The request for a list of knowledgeable persons, to the extent that such a list does not already exist, borders on the impermissible document-generating situation, and it is unabashedly presented for the purposes of discovery in an ongoing proceeding. The issue it presents is a difficult one, for the limitation of the FOIA to documents already in existence is vital to prevent the Act from creating a whole new layer of bureaucracy. Moreover, it may be argued that the scope of discovery in administrative proceedings ought to be governed by the normal rules of discovery, subject to review on appeal from the final agency decision.

On the other hand, however, it is now clear that the FOIA is applicable to requests by litigants engaged in pending administrative proceedings. *See Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 19-20 (1974); *Control Data Corp.* v. *FTC*, No. 4-74-Civ. 25 (D. Minn. February 28, 1974). And amended § 552(b) provides that "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt under this subsection." It would be within the Court's power to order the FTC to sift through its documents pertaining to the underlying administrative complaint and turn over to the plaintiffs all the documents containing the names and locations of knowledgeable persons, after having excised everything else. This tedious and time-consuming process would be wasteful for all concerned. The Court therefore has concluded that, under the circumstances of this case, it is

(Continued)

which, at that time, exempted from the disclosure requirements of the FOIA "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency. . . ." In their brief submitted to this Court the defendants have cited a plethora of cases standing for the propositions that the (b)(7) exemption is to be read literally, that its purpose is to assure that private parties do not indirectly obtain any earlier or greater access to investigatory files than they would obtain directly in litigation proceedings, and that once a court concludes that documents are "investigatory files compiled for law enforcement purposes," it must automatically deny disclosure under the FOIA. *See, e.g., Center for National Policy Review* v. *Weinberger*, 502 F.2d 370 (D.C. Cir. 1974); *Rural Housing Alliance* v. *United States Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974); *Weisberg* v. *U.S. Department of Justice*, 489 F.2d 1195, 1202-03 (D.C. Cir. 1973)(en banc), *cert. denied*, 416 U.S. 993 (1974); *B & C Tire Co.* v. *Internal Revenue Service*, 376 F. Supp. 708, 713-14 (N.D. Ala. 1974); *Williams* v. *Internal Revenue Service*, 345 F. Supp. 591 (D. Del. 1972), *aff'd per curiam*, 479 F.2d 317 (3d Cir.), *cert. denied*, 414 U.S. 1024 (1973).

However, § 552(b)(7) was radically amended by Public Law 93-502, effective February 18, 1975, and now provides for exemption of:

> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted "invasion of personal privacy," (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, . . . confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel . . . .

In *N.L.R.B.* v. *Sears, Roebuck & Co.*, 43 U.S.L.W. 4491, 4501 (April 28, 1975), the Supreme Court held that an action involving the § 552(b)(7) exemption was controlled by the amended version of that section, notwithstanding the fact that the documents had originally been denied and the action had been commenced prior to the amendment of the Act. Therefore, the law to be applied in the present case is the amended version of exemption (b)(7). That version is very specific in setting forth the particular instances in which investigatory files may be withheld, and it contains no reference to the rights of a party in

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proper to disregard the form of the request and to require the agency to supply a simple list of knowledgeable persons and their last known locations. This requirement is not burdensome, since the initial list of names included in the agency's investigatory files can be compiled by clerical personnel having no special training in the law or in the particular case at hand.

For the purposes of the record, it should be noted that the FTC has not raised any objection to the request for a list of names on the ground that to require the production of such a list would require the creation of a document not yet in existence.

litigation with the agency. Indeed, the Supreme Court noted in *Sears* that:

> . . . [t]he legislative history clearly indicates that Congress disapproves of those cases, relied on by the General Counsel, . . . which relieve the Government of the obligation to show that disclosure of a particular investigatory file would contravene the purposes of Exemption 7 . . . .

Id. at 4501. Accordingly, in examining the FTC's claim of exemption under § 552(b)(7), the slate of caselaw precedent is wiped clean, and the Court must look to the words of the amended section.

Under the FTC's theory of exemption as presented in its brief, the only portion of amended § 552(b)(7) which could arguably be said to permit nondisclosure of the requested list of knowledgeable persons is § 552(b)(7)(D), which permits nondisclosure ". . . to the extent that the production of such records would . . . (D) disclose *the identity of* a confidential source . . ." (emphasis supplied). The narrow issue presented in relation to specification one, therefore, is whether disclosure of the full list of names of persons known to the FTC to have knowledge of matters in the administrative complaint would disclose the *identity of* confidential sources. The Court has concluded that, as a general rule, such a list would not have the prohibited effect. The list will undoubtedly be a long one, and the plaintiffs will have no way of knowing which persons on the list were confidential sources or, indeed, which persons on the list have even spoken to FTC investigators.

The recent Eighth Circuit decision in *Brennan* v. *Engineered Products, Inc.*, 506 F.2d 299 (8th Cir. 1974), is highly instructive in this regard. The Court there upheld a pretrial claim of "informer privilege" in a Fair Labor Standards Act case in which the Secretary of Labor had refused to turn over a list of potential trial witnesses as well as pretrial investigative statements made by such persons. But the Court specifically noted that a defendant in a civil proceeding has the right to know the "names of those persons known to the plaintiff who [have] information concerning the issues," and further noted that from the beginning the Secretary had supplied such a list. *Id.* at 303 and n. 2. Thus, despite its great concern with and respect for the governmental privilege protecting confidential sources, the Court left no doubt that compiling a list of names of all those persons with knowledge of the underlying action is routine discovery in no way inconsistent with that privilege.

Accordingly the Court will grant the plaintiffs' motion for partial summary judgment, and will enter an Order requiring the defendants to produce a list of the names of those persons, known to the agency, who have knowledge of matters in the administrative complaint filed in FTC Docket No. 8940. The list shall include the names and the last known home and business addresses and telephone numbers of such persons. However, the Order will provide for the deletion of certain names. First, pursuant to the stipulation of the plaintiffs entered in their brief, the FTC need not include in the list the names of any of its staff, and need not include the names of persons who are currently employed by the plaintiffs. Second, the Court recognizes that there may be some rare instances in which the very inclusion of the name of a particular individual on even a long list will almost certainly indicate to the party seeking disclosure that the individual was an "informer." If the FTC has adequate grounds to support its conclusion that, with respect to any particular individual, inclusion on the list would disclose his status as a confidential source within the meaning of § 552(b)(7)(D), it may submit to the Court its reasons for so concluding, and the Court will consider in camera a motion to strike the name of such individual. The Court wishes to stress, however, that such instances will be truly extraordinary, and that it does not expect that such a request for deletion of names will be necessary in this case.

Documents Responsive to Specifications Two Through Five and Withheld Under Claim of the § *552(b)(5) Exemption* -

The defendants have now indicated that there are approximately twenty documents being withheld pursuant to § 552(b)(5) despite their responsiveness to specifications two through five. Section 552(b)(5) provides that an agency need not disclose ". . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . . ."

In *Control Data Corp.* v. *FTC*, *supra*, at 3-4, this Court enumerated some of the basic principles governing the withholding of documents requested under the FOIA. The Court there noted that the FOIA requires disclosure of all governmental documents which fail to come within one of the nine exemptions of the Act, that the statutory exemptions are to be narrowly construed, that the district courts are empowered to conduct de novo review of an agency's claim of exemption, and that the burden is on the agency to prove the applicability of an exemption. The *Control Data* decision also set forth the initial standard by which a court is to judge a claim of exemption under § 552(b)(5):

> In [*Environmental Protection Agency* v.] *Mink*, [410 U.S. 73 (1973)] the Supreme Court approved of the dichotomy that had developed in cases under the FOIA between "materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the others." 410 U.S. at 89. Under *Mink*, the former may be withheld, while the latter, the "purely factual," is not within the purview of (b)(5) and hence is not exempt from disclosure. Furthermore, if matters reflecting the deliberative processes and those of a factual nature both appear in a memorandum, the factual information must be disclosed if it is severable from the deliberative items. *Ibid.*, 91; *Vaughn* v. *Rosen*, [484 F.2d 820, 825 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974)].

Id. at 6.

The FTC contends that the twenty items which it is withholding reflect deliberative or policy-making processes, and contain no "clearly severable" factual portions. The standard imposed by the new Act is "reasonably severable," *see* § 552(b), and the plaintiffs are correct in their argument that a document reasonably capable of being edited must be released whether or not its components are "clearly" segregable. Semantic arguments aside, however, if the factual portions of the documents cannot reasonably be severed, the agency's legal conclusion that the documents need not be disclosed is unassailable.

Nevertheless, this Court must be independently satisfied that the agency's conclusion of non-severability is an accurate one. To support its conclusion, the FTC has submitted a synopsis which tends to indicate that the very nature of the documents proves their exempt status. It is true that the Supreme Court has indicated that, while an order requiring production for in camera inspection is proper under the FOIA, the granting of an in camera inspection should not be automatic. *See Environmental Protection Agency* v. *Mink, supra,* at 93. It is also true that some courts have indicated that a synopsis of withheld documents may be sufficient to permit the court to assess the validity of an agency's claim of exemption. *See, e.g., Cuneo* v. *Schlesinger,* 484 F.2d 1086, 1092 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974); *Vaughn* v. *Rosen, supra,* at 824-27.

Nevertheless, it is always difficult for a court to make a factual determination about the contents of documents which it has not seen, and it is especially difficult when the court's experience with the type of document at issue has been limited. Moreover, there is merit to the plaintiffs' contention that it is highly improbable that none of the documents have factually severable portions. While the Court does not wish to become the permanent umpire in an ongoing dispute between two chronically bickering parties, Congress has entrusted it with the duty of assuring that the FOIA is fully complied with by agencies such as the FTC. Without an in camera inspection of the twenty withheld documents the Court cannot confidently conclude that the claim of exemption under § 552(b)(5) is a valid one. In short, the agency has failed to meet its burden of establishing the propriety of the claim of exemption. Accordingly, the motion for an Order of production for the purposes of an in camera inspection will be granted. The synopsis previously prepared by the FTC should be of great value in conducting that inspection.

The Validity of the "Search and Segregation" Fee as Applied to the Documents Requested by the Plaintiffs Prior to June 10, 1974 -

Section 552(a)(1) of Title 5 provides:

> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

Section 552(a)(3) of the same title provides:

> . . . [E]ach agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person . . . .

The parties' battle over the $183.00 fee hinges on the juxtaposition of these two provisions.

The plaintiffs contend that, when the two provisions are read together, the FTC is prohibited from charging any fee for the production of documents unless the actual fee schedule has been published in the Federal Register, the fee schedule has been validly incorporated by reference in the Federal Register, or the party requesting the documents has actual notice of the fee schedule. Uncontroverted affidavits submitted by the plaintiffs establish that they did not have actual notice of the "search and segregation" fee before June 10, 1974. The record also shows that the fee schedule was not in fact published in the Federal Register, but that the FTC did publish in the Federal Register a rule purporting to incorporate by reference fees to be set in the future by the Secretary of the FTC. *See* 16 C.F.R. § 4.8(c) (1974).

The FTC contends that it has the power to require payment of the fee under one of two theories. First, it contends that the word "published" in § 552(a)(3) does not mean "published in the Federal Register" as stated in § 552(a)(1). Hence, says the FTC, the fee schedules were not required to be published or incorporated by reference in the Federal Register.

The Court recognizes that the use of the word "publish" in § 552(a)(3) is ambiguous,[2] and that the legislative history is not helpful in resolving the ambiguity. The Court also acknowledges that it might be logical to allow exaction of the fee without prior publication in the Federal Register since rules governing the amounts of fees are not of the type which people need to consult to plan their activities. However, the recent amendment of the FOIA provides in new § 552(a)(4)(A):

> . . . In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be

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[2] There are clear instances within the FOIA itself where Congress used the word "publish" in a way which meant published elsewhere than in the Federal Register. For example, § 552(a)(2) requires that an agency make available statements of policy not published in the Federal Register unless the materials are "promptly published and copies offered for sale." The Court would have been inclined to defer to the agency's interpretation of the word "publish" in § 552(a)(3) had it not been for the recent amendment of the Act in which Congress indicated that the fees themselves were to be set only pursuant to notice and comment. See § 552(a)(4)(A), and the discussion thereof in text.

> limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication . . . .

The requirement of "notice" and "comment" lend greater content to the word "publish" in § 552(a)(3). The Court concludes that, in using those words, Congress was referring to the process of rulemaking set forth in § 553(b), which specifically requires that the notice of proposed rulemaking be published in the Federal Register, and which impliedly indicates that the final rules themselves must be published in the same source. One searches the legislative history in vain for any indication that Congress believed that, in enacting § 552(a)(4)(A), it was changing the publication requirements for the setting of fees. Therefore, although the matter is not without some doubt, the Court concludes that Congress intended in § 552(a)(3) to require the publication of fees in the Federal Register. *Cf.* 31 U.S.C. § 483a, applied in *Diapulse Corp.* v. *Food & Drug Administration*, 500 F.2d 75 (2d Cir. 1974).

Second, the FTC contends that it has complied with the alternative mode of publication permitted by § 552(a)(1), which provides for incorporation by reference. The plaintiffs point out, however, that this provision for incorporation by reference was not strictly complied with, since the Secretary of the FTC did not seek or obtain the approval of the Director of the Federal Register for such incorporation. They stress that such approval is not a rubber stamp, as is evidenced by 1 C.F.R. § 51.4 (1974), setting forth the conditions necessary before the Director will approve incorporation by reference. While the Court is dubious that the plaintiffs have been in any way prejudiced by the FTC's failure to follow the strict requirement of incorporation by reference, the issue seems squarely controlled by the plain words of § 552(a)(1). The FTC did not comply with the technical requirements of publication in the Federal Register, and accordingly the provisions in its fee schedule cannot be enforced against the plaintiffs with respect to documents requested before they received actual notice of the fees on June 10, 1974. Accordingly, the Court will grant the plaintiffs' request for an Order prohibiting the collection of a "search and segregation" fee in the production of any document requested in the March 19, 1974, petition.

It follows from the foregoing that the defendants' motion for summary judgment will be denied.

BELTONE ELECTRONICS CORPORATION et al. v. F.T.C., et al.*

Civ. A. No. 75 C 1230. F.T.C. Docket No. 9014.

(United States District Court, Northern District of Illinois, E.D., September 10, 1975)

1. F.T.C. HAS AUTHORITY TO PREVENT UNFAIR OR DECEPTIVE ACTS OR PRACTICES INCLUDING DISSEMINATION OF FALSE ADVERTISEMENTS RELATING TO FOOD, DRUGS AND OTHER DEVICES.

Dissemination of false advertisements in commerce relating to food, drugs, and other devices is an unfair or deceptive act or practice which Federal Trade Commission has authority to prevent under Federal Trade Commission Act.

2. IN ORDER TO ENFORCE MANDATE OF F.T.C. ACT, F.T.C. HAS BROAD AUTHORITY TO CONDUCT INVESTIGATIONS.

Federal Trade Commission has broad authority to conduct investigations concerning conduct and practices of corporations in order to enforce mandates of Federal Trade Commission Act.

3. IF VIOLATIONS OF F.T.C. ACT ARE ESTABLISHED, F.T.C. IS INVESTED WITH POWER TO ISSUE CEASE AND DESIST ORDERS.

Power is invested in Federal Trade Commission to issue cease and desist orders if violations of Federal Trade Commission Act are established.

4. PURSUANT TO F.T.C. ACT, F.T.C. HAS EXPLICIT AUTHORITY TO PROMULGATE TRADE REGULATION RULES.

In addition to its broad investigatory and adjudicatory powers, Federal Trade Commission has explicit authority to promulgate trade regulation rules pursuant to Federal Trade Commission Act.

5. EXCLUSIVE RULE-MAKING AUTHORITY OF F.T.C. ARE SET OUT IN PROCEDURES IN F.T.C. ACT.

[591] Procedures set out in Federal Trade Commission Act are exclusive rule-making authority of Federal Trade Commission.

6. A.P.A. MANDATES GOVERNING NOTICE DID NOT APPLY TO PETITION BEFORE F.T.C.; NO PROCEEDING WAS PENDING UNTIL A COMPLAINT WAS FILED.

Mandates of Administrative Procedure Act respecting notice did not apply to petition before Federal Trade Commission wherein plaintiff sought to hold proposed complaint in abeyance where, under a practice which was later discontinued, Commission tendered to plaintiffs a complaint which it intended to file in future and, until complaint was filed, no proceeding was pending.

7. F.T.C. INITIATION OF RULE-MAKING PROCEEDING AT PLAINTIFFS' REQUEST RENDERED PORTION OF PLAINTIFFS' COMPLAINT MOOT.

Portion of complaint wherein plaintiffs sought initiation of a proceeding before Federal Trade Commission for promulgation of an industrywide rule was moot where Commission subsequently honored plaintiffs' request by initiating a rule-making proceeding.

8. COURTS MAY BYPASS ADMINISTRATIVE REMEDIES IF AGENCY HAS CLEARLY VIOLATED A STATUTORY OR REGULATORY RIGHT; ISSUE IS STRICTLY LEGAL IN NATURE NOT INVOLVING AGENCY EXPERTISE OR IF JUDICIAL REVIEW IS PRECLUDED IN LATER AGENCY ORDER.

Courts will ordinarily not interfere with an agency until it has completed its action; but administrative remedies may be bypassed if agency has clearly violated a right secured by statute or agency regulation, issue involved is a strictly legal one not involving agency's expertise or any factual determinations, or issue cannot be raised upon judicial review of a later order of agency.

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* Reported in 402 F.Supp. 590 (1975). For case before the Commission, see 88 F.T.C. 335.

9. BECAUSE F.T.C. ACTION WAS DISCRETIONARY, STANDING ALONE, IT WAS NOT REVIEWABLE BEFORE CONCLUSION OF ADJUDICATORY PROCEEDINGS.

Action of Federal Trade Commission in issuing complaint against corporate plaintiff and five other manufacturers with regard to alleged ommissions in hearing aid advertising that were industrywide was discretionary and, standing alone, was not reviewable short of review at conclusion of adjudicatory proceedings.

10. F.T.C. ACTION WAS NOT ARBITRARY OR CAPRICIOUS AND DID NOT WARRANT COLLATERAL JUDICIAL INTERVENTION.

Fact that Federal Trade Commission had proceeded against only corporate plaintiff and five other manufacturers with regard to alleged omissions in hearing aid advertising that were industrywide did not constitute such arbitrary and capricious action on part of Commission as to warrant collateral judicial intervention.

11. RELIEF SOUGHT, AFFIRMATIVE DISCLOSURE OF NEGATIVE ASPECTS OF PRODUCTS, WAS NOT ARBITRARY AND CAPRICIOUS: COLLATERAL JUDICIAL INTERVENTION WAS NOT WARRANTED.

Nature of relief which Federal Trade Commission sought against corporate plaintiff and five other manufacturers, namely, affirmative disclosures of negative aspects of their products in their advertising, was not so arbitrary and capricious as to warrant collateral judicial intervention in proceedings before Commission.

12. PLAINTIFFS' COMPLAINT THAT F.T.C. SINGLED THEM OUT ON A NEW ISSUE COULD ONLY BE REVIEWED AT CONCLUSION OF ADMINISTRATIVE PROCEEDINGS, IF AT ALL.

Complaint that corporate plaintiff had, along with others comprising 40% of hearing aid market, been singled out for prosecution by Federal Trade Commission on a new issue raised at best a question of Commission discretion which, if reviewable at all, could only be reviewed upon completion of administrative proceedings.

13. F.T.C. CONCURRENT USE OF AUTHORITY TO CONDUCT ADJUDICATIVE PROCEEDINGS AND PROMULGATE TRADE REGULATION RULES IS NOT IMPROPER.

Congress has specifically authorized Federal Trade Commission to conduct adjudicative proceedings and to promulgate trade regulation rules, and there is nothing improper in Commission's concurrent use of both procedures, even if they appear to have a common objective.

14. F.T.C. CONDUCT, SEEKING TO AVOID A MULTIPLICITY OF ACTIONS, WAS TO BE COMMENDED, NOT CHARACTERIZED AS ARBITRARY AND CAPRICIOUS.

[592] Conduct of Federal Trade Commission in avoiding a multiplicity of actions by determining to adjudicate false advertising charges against corporate plaintiff as well as charges of alleged nondisclosure was to be commended rather than characterized as arbitrary and capricious so as to warrant judicial intervention.

15. THOUGH F.T.C. PROCEEDED AGAINST ENTIRE HEARING AID INDUSTRY THROUGH TRADE REGULATION RULE PROCEEDING AND PROCEEDED AGAINST CERTAIN NUMBERS OF INDUSTRY ON IDENTICAL QUESTION THROUGH INDIVIDUAL ADJUDICATION, JUDICIAL REVIEW WAS NOT WARRANTED.

Though Federal Trade Commission had taken a stance against entire hearing aid industry as evidenced by its proposed rule, while it proceeded on identical question against corporate plaintiff and five other manufacturers by way of individual adjudication, judicial intervention was not warranted, where vice, if any, was that proposed rule and proposed order against plaintiff were in all essential respects identical when it came to disclosures and, in event Commission entered an arbitrary order against plaintiff at conclusion of administrative proceeding plaintiff could obtain direct review of order.

16. ADOPTION OF TRADE REGULATION RULE REQUIRES F.T.C. TO PUBLISH PROPOSED RULE AND REASONING THEREFOR IN FEDERAL REGISTER, INFORMAL HEARINGS, SUBMISSION OF WRITTEN VIEWS, DATA, AND ARGUMENTS BY INTERESTED PARTIES, AND PROMULGATION OF FINAL RULE TOGETHER WITH STATEMENT OF RULE'S BASIS AND PURPOSE.

When Federal Trade Commission decides to adopt a trade regulation rule, it must comply with procedure set out in Federal Trade Commission Act, including publication of proposed rule and reasons therefor in Federal Register, informal hearings, submission of written data, views, and arguments by interested persons, and promulgation of a final rule based on rule-making record together with a statement of rule's basis and purpose.

17. THE MOST DESIRABLE MEANS TO OBTAIN BROAD OBJECTIVES OF F.T.C. ACT IS THE RULE MAKING PROCESS.

Rule making is a most desirable means of obtaining the broad objectives of the Federal Trade Commission Act.

18. RULE MAKING AUTHORITY DOES NOT DIMINISH F.T.C.'S AUTHORITY TO PROCEED ON CASE-BY-CASE BASIS IN APPROPRIATE CIRCUMSTANCES.

Provision of Federal Trade Commission Act prescribing procedure to be followed by Federal Trade Commission when it exercises its rule-making authority does not diminish authority of Commission to proceed on a case-by-case basis in appropriate circumstances and to deal with fact situations that may result in decisions which articulate general standards of conduct.

19. RECORD FAILED TO ESTABLISH F.T.C.'S ACTION WARRANTED PREHEARING COLLATERAL JUDICIAL INTERFERENCE.

Record failed to establish that circumstances were so inappropriate as to warrant prehearing collateral judicial interference with decision of Federal Trade Commission to initiate adjudicatory proceedings against plaintiff and five other manufacturers with regard to alleged advertising omissions that were industry-wide.

(Syllabus, with substituted captions, taken from 402 F.Supp. 590.)

On motion of plaintiffs for preliminary relief, and alternative motions of defendants for dismissal or summary judgment, court held that F.T.C.'s decision to issue complaint was discretionary and not reviewable pending conclusion of adjudicatory proceedings; relief sought was not arbitrary and capricious warranting collateral judicial intervention; and F.T.C.'s exercise of its rule-making authority did not diminish its authority to proceed on a case by case basis in appropriate circumstances.

Motion of plaintiffs for preliminary injunction denied; alternative motion of defendants for dismissal granted.

Donald A. Mackay, Sidley & Austin, Allan N. Lasky, Spivack & Lasky, Chicago, Ill., *Ginsburg, Feldman & Bress*, Washington, D.C., *Don H. Wallach*, New York City, for plaintiffs.

Samuel K. Skinner, U.S. Atty., Chicago, Ill., Federal Trade Commission, Washington, D.C. for defendants.

MEMORANDUM DECISION

MARSHALL, *District Judge.*

By this action the plaintiffs, Beltone Electronics Corporation and its present and former officers and directors, Sam Rosen, David H. Barnow and Chester K. Barnow (hereinafter collectively "Beltone") seek a declaratory judgment that the defendants, Federal Trade Commission and its Commissioners (hereinafter either "FTC" or the "Commission") [593] have acted and are proceeding against Beltone in an unlawful manner and preliminary and permanent injunctive relief in implementation of the requested declaratory judgment. The plaintiffs assert that their claims arise under the Federal Trade Commission Act, 15 U.S.C.A. § 41 *et seq.* (Supp. Feb. 1975),[1] the Administrative Procedure Act, 5 U.S.C. §§ 551-559 and 701-706, and the due process clause of the Fifth Amendment to the Constitution of the United States and that the matter in controversy exceeds $10,000 exclusive of interest and costs (measured by the alleged injury to Beltone's extensive business operations). Accordingly, jurisdiction and venue are said to be here under 28 U.S.C. §§ 1331(a), 1357 and 2201, 2202 and 28 U.S.C. § 1391(e). The defendants do not question venue and their attack on jurisdiction is limited to the assertion that it is wanting because the plaintiffs have failed to exhaust their administrative remedies.

The plaintiffs have moved for a preliminary injunction pursuant to Rule 65, Fed.R.Civ.P., to restrain the defendants and staff from proceeding upon an adjudicative administrative complaint and proposed order which the Commission issued against Beltone on March 5, 1975. By their briefs the plaintiffs have limited the preliminary relief they seek to those portions of the Commission's complaint and proposed order which, if sustained, would require Beltone to make certain affirmative disclosures in its advertising.

The defendants, while opposing the plaintiffs' motion for preliminary relief, have countered with alternative motions to dismiss for failure to state a claim upon which relief can be granted or summary judgment. Rules 12(b)(1) and (6) and 56, Fed.R.Civ.P.

The parties appear to agree that there are no contested material issues of fact. What is presented is a purely legal question: When and under what conditions may a district court interfere with a proceeding pending before the FTC. However, to the extent required by Rules 52(a) and 65(d), Fed.R.Civ.P., the following shall constitute findings of fact as well as conclusions of law and reasons for the decision here rendered.

[1-5] Under the Federal Trade Commission Act, the Commission has

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[1] The Federal Trade Commission Act was recently amended by the Federal Trade Commission Improvement Act, § 202, Pub.L.No. 93-637 (Jan. 8, 1975).

the authority to prevent "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." 15 U.S.C.A. § 45(a)(1), (6) (Supp. Feb. 1975). The dissemination of false advertisements in commerce relating to food, drugs, and other devices is an unfair or deceptive act or practice. 15 U.S.C.A. §§ 52, 55(a)(1) (Supp. Feb. 1975). To enforce the mandate of the Act, the Commission has broad authority to conduct investigations concerning the conduct and practices of corporations, 15 U.S.C.A. § 46(a) (Supp. Feb. 1975), and the power to issue cease and desist orders if violations are established. 15 U.S.C.A. § 45(b) (Supp. Feb. 1975). In addition to its broad investigatory and adjudicatory powers, the Commission has explicit authority to promulgate Trade Regulation Rules. 15 U.S.C.A. § 57a (Supp. Feb. 1975). The procedures set out in Section 57a are the exclusive rule making authority of the FTC.

Beltone is an Illinois corporation with its principal place of business in Chicago. It manufactures hearing aids which are then sold to independent dealers. There are approximately 60 manufacturers or importers of hearing aids in the United States. In 1972, the FTC, pursuant to its advertising substantiation program ordered Beltone and 13 other manufacturers to provide factual substantiation for certain of their advertising claims. 15 U.S.C.A. § 46(b) (Supp. Feb. 1975), *amending* 15 U.S.C. § 46(b) (1970). Beltone filed its report with the Commission on September 22, 1972.

[594] On May 7, 1974, the FTC notified Beltone that "the Commission has determined to institute a formal proceeding" against Beltone. The notice was accompanied by a proposed complaint which alleged misrepresentations and failures to make certain affirmative disclosures in Beltone's advertisements. Five other hearing aid manufacturers, which, together with Beltone, comprise 40% of the market, were served with similar complaints.

On May 22, 1974, shortly after Beltone had received notice of the proposed complaint against it, the Commission announced that it was conducting an

> industry-wide investigation to determine whether manufacturers, promoters, renters or sellers of hearing aids have been or are falsely advertising their products or using unfair or deceptive acts or practices in marketing them.[2]

On October 24, 1974, Beltone and four other manufacturers[3] that had been served with the proposed complaints presented to the Commission their "Petition for Rule Making and Request to Hold Proposed Complaints in Abeyance" in which they urged the Commission to proceeding to rule making to develop standards of affirmative disclosures if they were in fact necessary. While that petition was before the Commission, amendments to the Federal Trade Commission Act dealing with rule making became effective. Pub.L. No. 93-637 (Jan. 8, 1975). On January 10, 1975, the Commission denied the petition without any statement of the grounds for the denial: One week later Beltone and the other four manufacturers filed a "Petition for Reconsideration . . ." which was denied on March 5, 1975, again without any statement of the grounds for the denial. On the same date the Commission issued formal complaints and proposed orders against six manufacturers.[4] It is the complaint and proposed order issued against Beltone that is the focal point of the controversy here.

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[2] FTC News Release, May 22, 1974.

[3] Seeburg Industries, Inc., Textron, Inc., Radioear Corporation and Dahlberg Electronics, Inc.

The complaint issued against Beltone asserts two theories of deceptive practices in advertising. The first is misrepresentations that relate specifically to hearing aids manufactured and distributed by Beltone. For example, many of Beltone's advertisements are alleged to represent either explicitly or implicitly that its hearing aids are new, unique, or superior to others in the market. The complaint alleges that Beltone's hearing aids are not new, unique or superior and it seeks a cease and desist order in respect to such representations. Plaintiffs do not challenge the authority of the Commission to proceed on those allegations.

The second and controversial theory of the Commission's complaint is the alleged need to make affirmative disclosures in advertising about any hearing aid. No manufacturer or seller of hearing aids presently makes such disclosures.

In Paragraph Nine of its complaint the Commission alleges as "truth and in fact":

* * * * * * *

> 3. Many persons with a hearing loss will not receive any significant benefit from *any* hearing aid.
>
> 4. Many persons with a hearing loss will not be able to consistently distinguish and understand speech sounds in noisy or group situations by using *any* hearing aid.
>
> [595] 5. In many instances, persons who hear but do not understand have a discrimination problem that cannot be helped by *any* hearing aid.
>
> 6. *No* hearing aid will restore natural hearing to the wearers thereof nor will it enable such persons to hear sounds naturally. (All emphasis supplied.)

And in Paragraph Thirteen it alleges:

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[4] Prior to the filing of this lawsuit the FTC followed the practice of issuing "proposed" complaints and orders. While the complaints were in this state the parties could attempt to negotiate a settlement and thus avoid litigation. If, however, an agreement could not be reached, the Commission would issue a formal complaint. This practice has recently been abandoned. Under current procedures a formal complaint is issued in the first instance; nevertheless, the parties shall have an opportunity to enter into settlement. 40 Fed.Reg. 15235 (Apr. 4, 1975).

> The following statement constitutes a material fact with respect to the making of *any* claim regarding the hearing capabilities or hearing quality of *any* hearing aid:
>
> Many persons with a hearing loss will not receive *any* significant benefit from *any* hearing aid. (Emphasis supplied.)

The Commission asserts that these alleged facts are material and that failure to disclose them renders Beltone's advertising false and thus an unfair and deceptive act or practice.

On the basis of these alleged facts and certain representations which Beltone allegedly makes in its advertising regarding the beneficial effect of its hearing aids and their ability to enable the wearer to distinguish speech sounds in noisy or group situations and to understand that which they hear and to hear "naturally," the Commission seeks an order prohibiting Beltone from disseminating any advertisement which represents directly or by implication, that:

> [Beltone's] hearing aids will be beneficial to persons with a hearing loss, unless in immediate conjunction therewith it is clearly and conspicuously disclosed that *many* persons with a hearing loss will not receive *any* significant benefit from *any* hearing aid.
>
> Use of [Beltone's] hearing aids will enable persons with a hearing loss to distinguish or understand speech sounds in noisy situations, unless in immediate conjunction therewith it is clearly and conspicuously disclosed that *many* persons with a hearing loss will not be able to consistently distinguish and understand speech sounds in noisy situations by using *any* hearing aid.
>
> Use of [Beltone's] hearing aids will enable persons with a hearing loss to distinguish or understand speech sounds in group situations, unless in immediate conjunction therewith it is clearly and conspicuously disclosed that *many* persons with a hearing loss will not be able to consistently distinguish and understand speech sounds in group situations by using *any* hearing aid.
>
> Makes *any* representation, directly or by implication, that *any* hearing aid may or will affect hearing capability or hearing quality unless the advertisement clearly and conspicuously discloses *in the exact language* . . . that: *Many* persons with a hearing loss will not receive any significant benefit from any hearing aid.[5]

The Commission's complaint against Beltone was referred to an administrative law judge for hearings. Beltone answered, on April 10, denying the material allegations of the complaint. Such was the posture of the matter before the Commission when the plaintiffs commenced this action on April 18.

The plaintiffs' complaint is in three counts, all of which are based on the foregoing facts. Count I asserts that the "institution [by the Commission] of adjudicative proceedings . . . to compel Beltone and only a few other manufacturers to make [disclosure] statements in their advertising which . . . are necessarily applicable to all hearing aid advertising, is arbitrary and capricious . . . and violates plaintiffs' Constitutional right to due process of law." Complaint ¶ 15. Count I also asserts that Beltone would be irreparably injured if it were forced to defend itself in a rule making proceeding aris[956]ing out of the Commission's industrywide investigation while at the same time defending itself in the individual adjudicatory proceeding. Complaint ¶ 16. Count II asserts that "[t]he Commission's notices of denial of [Beltone's Petition for Rule Making and Request to Hold Proposed Complaints in Abeyance] and the Petition for Reconsideration violated the Administrative Procedure Act, 5 U.S.C. § 555(e) . . . ." Complaint ¶ 19. Count III asserts that "[t]he Commission, although designating its proceeding 'adjudicative,' is in fact and in law engaged in 'rule making,' as that term is defined in the Administrative Procedure Act, 5 U.S.C. § 551(5) . . . [contrary to its] authority to engage in rule making . . . set forth in Section 18 of the Federal Trade Commission Act, as added by Section 202 of the . . . Federal Trade Commission Improvement Act, Pub.L. No. 93-637, § 202 . . . ." Complaint ¶¶ 21, 22.

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[5] Administrative Complaint No. 9014, Order, Part I, 1(a)(4)-(6), 1(b). All emphasis supplied.

All of the briefs of the parties on all of the pending motions were filed prior to June 24, 1975. On that date the Commission published in the Federal Register a notice of the initiation of a "proceeding for the promulgation of a Trade Regulation Rule for the Hearing Aid Industry." 40 Fed.Reg. 26646 (June 24, 1975). The notice was accompanied by the proposed rule. *Id.* 26646, *et seq.*

The proposed rule covers matters other than disclosures in advertising.[6] But there are disclosure provisions in the rule which virtually track the proposed order against Beltone. Thus Section 440.10(a)-(c) prohibits the dissemination of any advertisement:

> (a) Which makes any general or specific representation that a hearing aid will or has the capacity to affect hearing capability or hearing quality, unless it is clearly and conspicuously disclosed that many persons with a hearing loss will not receive any significant benefit from any hearing aid; *Provided, however,* that nothing herein shall prohibit a truthful representation that hearing aids can help many persons with a hearing loss.
>
> (b) Which makes any representation that a hearing aid will enable a person with a hearing loss to distinguish or understand speech sounds in noisy situations, unless, in addition to the disclosure required by § 440.10(a), it is clearly and conspicuously disclosed that many persons with a hearing loss will not be able to consistently distinguish and understand speech sounds in noisy situations by using any hearing aid. (c) Which makes any representation that a hearing aid will enable a person with a hearing loss to distinguish or understand speech sounds in group situations, unless, and in addition to the disclosure required by § 440.10(a), it is clearly and conspicuously disclosed that many persons with a hearing loss will not be able to consistently distinguish and understand speech sounds in group situations by using any hearing aid.

Although the proposed rule was published and the proceedings attendant it were initiated subsequent to the commencement of this action, there is no reason why it should not be judicially noticed and considered in ruling on the pending motions. Indeed, the proposed rule sharpens the issues under Counts I and III of the plaintiffs' complaint and moots whatever vitality there was to Count II.

Turning first to Count II, the plaintiffs complain of the Commission's failure to give any statement of the grounds for its denials of Beltone's "Petition for Rule Making and Request to Hold Proposed Complaint in Abeyance" and its "Petition for Reconsideration . . ." contending that the reasonless denials violated Section 6(e) of the Ad[**597**]ministrative Procedure Act, 5 U.S.C. § 555(e) (1970) which provides:

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[6] Thus, one section of the rule requires that dealers provide consumers with a right to cancel purchases of hearing aids should they be dissatisfied with their performance.

> Prompt notice shall be given of the denial in whole or in part of a . . . petition . . . of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

They rely on *Natural Resources Defense Counsel, Inc.* v. *S. E. C.*, 389 F.Supp. 689, at 700 (D.D.C.1974), in which the court held that the SEC's denial of a petition for rule making required a statement of grounds under Section 6(e).

For their part, defendants contend in respect to Count II that no "agency proceeding" was pending within the meaning of Section 6(e) so that its mandate did not apply to the initial Petition or the Petition for Reconsideration.

[6] To the extent that the petitions sought to have the proposed complaint "held in abeyance," the defendants' position is sound. On May 7, 1974, under a practice which has now been discontinued (see, note 4, *supra*), the Commission tendered to Beltone and others a complaint which it intended to file in the future. Until the complaint was filed no proceeding was pending. In effect this aspect of Beltone's petition sought a continuance or postponement of a proceeding which had not then commenced.

[7] Insofar as the Petition and the Petition for Reconsideration sought the initiation of a rule making proceeding, they have now been honored. Thus, without agreeing or disagreeing with the decision in *Natural Resources Defense Counsel, Inc., supra*, this aspect of the claim presented in Count II of the complaint is moot.

The contentions advanced by Counts I and III and the plaintiffs' motion for a preliminary injunction are not so easily disposed of. There the plaintiffs seek to be relieved of the burden of defending against the disclosure allegations of the complaint on the grounds that it is arbitrary and capricious for the Commission to single out only Beltone and five other manufacturers with regard to alleged advertising omissions which are industry wide and that the Commission is really engaged in rule making under the guise of adjudicating the complaint, contrary to the provisions of newly enacted Section 18 of the Federal Trade Commission Act. To those two grounds a third can now be added: that it is unfair to require Beltone simultaneously to respond individually to the disclosure allegations of the complaint and, as a part of the industry, to the proposed rule, when it is clear that the former will be subsumed by the latter if it is adopted.

At the threshold of these contentions is the defendants' assertion that these are issues reviewable only after the completion of the Commission's adjudicatory proceeding against Beltone and then by an appropriate court of appeals and not this court. 15 U.S.C. § 45(c) (1970).

[8] Both sides agree that as a general rule a party is not entitled to judicial review of a supposed or threatened administrative injury until the prescribed administrative remedy has been exhausted. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S.Ct. 459, 82 L.Ed. 638 (1938); *Borden* v. *F. T. C.*, 495 F.2d 785, 786 (7th Cir. 1974); *Jewel Companies* v. *F. T. C.*, 432 F.2d 1155, 1156-57 (7th Cir. 1970). There are, however, a number of well established exceptions to the exhaustion requirement. Thus, as the Court of Appeals for this Circuit held in the leading case of *Borden* v. *F. T. C.*, *supra:*

> It is well settled that ordinarily courts will not interfere with an agency until it has completed its action and that administrative remedies may be bypassed only if (1) the agency has clearly violated a right secured by statute or agency regulation, *Leedom* v. *Kyne*, 358 U.S. 184, 188-89, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958); *Elmo Division of Drive-X Company* v. *Dixon*, 121 U.S.App.D.C. 113, 348 F.2d 342, [598] 346-347 (1965); (2) the issue involved is a strictly legal one not involving the agency's expertise or any factual determinations, *Jewel Companies, Inc.* v. *F. T. C.*, 432 F.2d 1155, 1159 (7 Cir. 1970); *McKart* v. *United States*, 395 U.S. 185, 197-199, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969); or (3) the issue cannot be raised upon judicial review of a later order of the agency, *Jewel, supra*, at 1159.[7]

It is with these exceptions in mind that Counts I and III of the plaintiffs' complaint must be judged.

[9,10] Of course, the Commission's action in issuing the complaint against Beltone is discretionary and, standing alone, is not reviewable short of review at the conclusion of the adjudicatory proceeding. *F. T. C.* v. *Universal-Rundle Corp.*, 387 U.S. 244, 249-250, 87 S.Ct. 1622, 18 L.Ed.2d 749 (1967); *Ostler Candy Co.* v. *F. T. C.*, 106 F.2d 962, 965 (10th Cir. 1939), *cert. den.*, 309 U.S. 675, 60 S.Ct. 713, 84 L.Ed. 1020 (1940); *Miles Laboratories* v. *F. T. C.*, 50 F.Supp. 434, 437-38 (D.C.1943), *aff'd*, 78 U.S.App.D.C. 326, 140 F.2d 683 (1944), *cert. den.*, 322 U.S. 752, 64 S.Ct. 1263, 88 L.Ed. 1582. And the fact that the Commission has proceeded against only Beltone and five other manufacturers does not constitute action so arbitrary and capricious as to warrant collateral judicial intervention such as is sought here. In *Universal-Rundle*, *supra*, the Supreme Court held that even if an entire industry was engaged in an illegal course of conduct, the Commission had the authority to proceed against only one member of the industry. And while the Court went on to say that the Commission does not have the unbridled power to institute a proceeding which arbitrarily destroys one of many law violators in a particular industry (387 U.S. at 251, 87 S.Ct. 1622), that is not this case. Here the six against whom the

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[7] 495 F.2d at 786-87. A fourth exception to the exhaustion doctrine may be where agency action unduly interferes with the conduct of foreign relations. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963).

Commission has proceeded comprise 40% of the market. Thus, as in *Moog Industries* v. *F. T. C.*, 355 U.S. 411, 413, 78 S.Ct. 377, 2 L.Ed.2d 370 (1957), "Whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the [Commission]."

[11] Nor does the nature of the relief which the Commission seeks against Beltone and the other five alter this conclusion. While requirements that manufacturers and sellers of products make affirmative disclosures of negative aspects of their products in their advertising are of fairly recent origin, their premises are not novel. The jurisprudence of the vendor's duty to disclose and misrepresentation by omission runs deep in the common law. The Commission has successfully urged it under the Federal Trade Commission Act in adjudicatory proceedings involving individual products, *see, J. B. Williams* v. *F. T. C.*, 381 F.2d 884 (6th Cir. 1967) (Geritol); *Keele Hair and Scalp Specialists* v. *F. T. C.*, 275 F.2d 18 (5th Cir. 1960) and *Erickson* v. *F. T. C.*, 272 F.2d 318 (7th Cir. 1959) (anti-baldness products), and has embraced it on an industry wide basis by way of a Trade Regulation Rule. *See, F. T. C. Proposed Trade Regulation Rule on Unfair or Deceptive Advertising or Labeling of Cigarettes in Relation to Health Hazards of Smoking*, 29 Fed.Reg. 8324 (1964). This case appears to present a third approach. The Commission has elected to proceed against some but not all of the members of an industry in respect to alleged failures to disclose which the respondents assert are industry-wide shortcomings. That does not render the proceedings arbitrary, for our experience teaches that, on occasion, a case by case approach to a particular type of conduct has advantages over immediate legislative prohibition or regulation.

[599] [12] In short, then, the plaintiffs' complaint that Beltone has along with others comprising 40% of the hearing aid market, been singled out for prosecution on a new issue raises at best a question of Commission discretion which, if reviewable at all, can be reviewed only under the statute, 15 U.S.C. § 45(c) (1970), upon completion of the administrative proceedings.

[13] The pendency of simultaneous proceedings does not strengthen the plaintiffs' position. By Sections 5 and 18 of the Federal Trade Commission Act, Congress has specifically authorized the Commission to conduct adjudicative proceedings and to promulgate Trade Regulation Rules. 15 U.S.C.A. §§ 45, 57a (Supp. Feb. 1975). There is nothing improper in the Commission's concurrent use of the two procedures, *Lehigh Portland Cement Co.* v. *F. T. C.*, 291 F.Supp. 628, 632 (E.D.Va.1968), *aff'd*, 416 F.2d 971 (4th Cir. 1969), even if, as here, they appear to have a common objective.

Beltone has been called to book by the Commission in respect to alleged false advertising apart from the question of non-disclosure. Those alleged violations should be heard promptly, and the plaintiffs concede as much for they do not challenge the authority of the Commission to proceed upon them.

[14] Having brought the false advertising charges against Beltone, the Commission has also alleged non-disclosure to the end that all of the allegations can be adjudicated in a single proceeding. Certainly avoidance of a multiplicity of actions is to be commended and not castigated as arbitrary and capricious.

Should the plaintiffs prevail here on the timing of the Commission trial of the issues of non-disclosure, one of two equally undesirable results would ensue. Two adjudicatory proceedings could result—one of the false advertising claims, the other to enforce the proposed rule when it becomes final. Or, the trial of the false advertising claims could await the trial on enforcement of the proposed rule, again when it becomes final. It is not amiss to note in this context that the rule proceedings may move slowly.

Marco Sales, supra, upon which the plaintiffs heavily rely, is not analogous to the situation here. In the first place, *Marco* was a direct review of final agency action. In that action the Commission ordered Marco to cease and desist the operation of a punch card lottery. In 1969, some 18 months before the cease and desist order was issued, the Commission had promulgated strict rules regulating similar lotteries, but did not ban them. The Commission attempted to justify the disparate treatment given Marco and the industry generally by relying on *Moog* and *Universal-Rundle.* The court rejected the argument.

> Both of these cases involve adjudicatory proceedings and stand for the proposition that even if all the petitioner's competitors were engaged in the same practice, it is no defense to the petitioner that the cease and desist order is directed to him alone. Obviously, the Commission cannot be expected to bring simultaneous proceedings against all of those engaged in identical practices. These cases would be in point if Marco were urging that others engaged in identical practices competing with him, were not similarly pursued by the Commission. Petitioners do not so argue. They argue rather that those engaged in the same activity are regulated while Marco is annihilated. In short, it is not that the Commission has failed to act against others but that it has adopted a positive regulatory approach to them totally inconsistent with its approach toward the petitioners.
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> * * * * * * *
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> The arbitrary character of the Commission's action here consists of its total failure to even advert to, much less explain, its reason for the rigid ad hoc adjudicatory stance it adopted toward the petitioner and the flexible tolerance its industry regulations dis[**600**]played to those utilizing the same or similar devices. 453 F.2d at 6.

[15] Clearly the abuse of discretion found in *Marco* is distinguishable from the agency action challenged here. True there is the parallel that the FTC has taken a stance against the entire hearing aid industry as

evidenced by its proposed rule, while it proceeds on the identical question against Beltone and five others by way of individual adjudication. But the vice in *Marco* was that the individual order to cease and desist was far more severe than the general rule. It was inconsistency in the name of individualized treatment that the court rejected. Here the vice, if it be one, is that the proposed rule and the proposed order against Beltone are in all essential respects identical when it comes to disclosures. Furthermore, as in *Marco*, should the Commission enter an arbitrary order against Beltone at the conclusion of the administrative proceeding, Beltone may obtain direct review of it.

Accordingly, the plaintiffs' complaint that Beltone is being called upon to respond in simultaneous proceedings again raises nothing more than a question of Commission discretion which cannot be reviewed in these collateral proceedings.

There remains Count III of the plaintiffs' complaint which asserts that the adjudicatory proceeding against Beltone is in fact a rule making proceeding being conducted in violation of the Administrative Procedure and the Federal Trade Commission Acts.

[16] Some judicial uncertainty existed as to the rule making authority of the Commission until its recent codification by the Magnuson Moss-Warranty Federal Trade Commission Improvement Act, Pub.L.No. 93-637, § 202 (Jan. 4, 1975), Federal Trade Commission Act, § 18, 15 U.S.C.A. § 57a (Supp. Feb. 1975). Section 18 provides:

> (a)(1) The Commission may prescribe—
>
> (A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce . . ., and
>
> (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce. . . .
>
> (2) The Commission shall have no authority under this chapter, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce. . . . .

When the Commission decides to adopt a Trade Regulation Rule under (a)(1), it must comply with the procedures set out in subsection (b), which include publication of the proposed rule and the reasons therefor in the Federal Register, informal hearings, the submission of written data, views, and arguments by interested persons, and the promulgation of a final rule based on the rule making record together with a statement of the rule's basis and purpose.

[17] The Commission's authority to prescribe Trade Regulation Rules is limited to the procedures delineated in Section 18. This fact was stressed in the House Report on the bill.

> Section 202 replaces the existing rulemaking authority of the FTC under section 6(g) of the Act with a new section 18 which authorizes the FTC to issue rules defining with specificity the acts or practices which are unfair or deceptive and which are within the scope of section 5(a)(1) of the Federal Trade Commission Act. . . . This rulemaking

> authority would be the exclusive substantive rulemaking authority of the FTC under the Federal Trade Commission Act.

H.R.Rep.No. 93-1107, 93d Cong.2d Sess. 1974, 1974 U.S.Code Cong. & Adm. News, p. 7727.[8] In limiting the rulemaking au[601]thority of the FTC, Congress expressed the view that rule making was the most desirable means of obtaining the broad objectives of the Act.

> Substantial sentiment has developed over the years that in many instances the desirable manner of implementing the broad standards of Section 5(a) of the Federal Trade Commission Act should be by means of rule-making with the complaint-cease and desist order procedure used as a means of enforcing the rules. Rule-making offers the obvious advantages that (a) each person who could be affected by the proposed rule is afforded an opportunity to be heard on it in a well defined and well understood procedure, (b) the rules are developed in advance of their application to any person or practice and apply with uniformity, and (c) judicial review of any rule is available as well as of the procedures used in adopting it. *Id.* at 7714.

In this regard, Congress echoed the sentiment of the FTC itself. When it proposed its rule regarding disclosure of the health hazards of smoking cigarettes it said:

> A rulemaking proceeding affords an economical method of consolidating common issues of fact and law in a streamlined, but comprehensive and fair, proceeding having few of the cumbersome attributes of litigation. Such a proceeding does not present questions of assessing individual guilt or innocence for past conduct, the strict procedural and evidentiary requirements of litigation are inapplicable.
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> * * * * * * *
>
> [Adjudicative proceedings would be inequitable since] the principal considerations . . . pertain more or less equally to all of the cigarette manufacturers, who are, of course, competitors. The situation plainly calls for uniform consolidated treatment, not separate lawsuits. 29 Fed. Reg. at 8368-69 (1964).

Furthermore, the Supreme Court has recognized a general policy preference in favor of rule making. In *S. E. C.* v. *Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947), the Court considered the power of the SEC to formulate new rules of conduct in an adjudicatory proceeding. It stated that since an agency has the power to make rules prospectively through its rule making power it has less reason to rely on ad hoc adjudication to formulate new standards of conduct. Filling in the interstices of legislation should be performed as much as possible, through the quasi-legislative promulgation of rules to be applied in the future. But a rigid requirement always requiring prospective rule making would reduce the flexibility of the agency to deal with specialized problems as they arise. 332 U.S. at 202, 67 S.Ct. 1575. The Court then went on to state some of the circumstances under which adjudication would be a proper method to formulate new rules of conduct.

> In other words, problems may arise in a case which the administrative agency could not reasonably foresee problems which must be solved despite the absence of a relevant

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[8] *Accord*, Conference Rep. No. 93-1408, 93d Cong.2d Sess. 1974, 1974 U.S.Code Cong. & Adm. News, p. 7763.

> general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. . . . And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency. See *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 421, 62 S.Ct. 1194 [1202], 86 L.Ed. 1563.

[602] 332 U.S. 202-203, 67 S.Ct. 1580; *N. L. R. B.* v. *Bell Aerospace Co.*, 416 U.S. 267, 294, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974). *See also*, *N. L. R. B.* v. *Wyman Gordon Co.*, 394 U.S. 759, 765-766, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969) (Fortas, J.).

Accepting the general desirability of the rule making approach to the formulation of general standards of conduct, the question is whether by explicitly conferring rule making authority on the Commission by the enactment of Section 18 of the Act, the Congress reduced the Commission's authority to proceed on a case by case basis under Section 5 of the Act. Stated somewhat differently, does the FTC with its express power to promulgate rules under Section 18, nevertheless have the power under Section 5 to grapple with fact situations which may result in decisions which articulate general standards of conduct? In *Chenery*, *supra*, the Supreme Court concluded that the SEC had the power to adjudicate cases from which emerged general standards of conduct despite the fact that Congress had granted the agency explicit rule making power. Here the circumstances supporting non-interference with the exercise of the Commission's discretion are even more compelling than in *Chenery*.

Neither the adjudicatory nor the rule making proceedings have been held. No factual record of any kind is available. True the plaintiffs urge that non-disclosure is industrywide and the disclosure provisions of the Commission's proposed order which has been served on Beltone are as broad as its proposed rule. But absent an administrative hearing of either type it would be presumptious for a court to conclude that the Commission, which is the primary adjudicator of facts in such disputes, and to whose expertise courts must defer, will not encounter problems in either proceeding which it could not reasonably foresee, or will not conclude that it has not had sufficient experience with the particular problem to warrant rigidifying its tentative judgment into a hard and fast rule or will not, contrary to the plaintiffs' predictions, encounter varying fact situations which require individualized treatment.

[18,19] Therefore, insofar as the plaintiffs' Count III rule making contention is concerned, Section 18 prescribes the procedure to be followed by the Commission when it exercises its rule making authority, but Section 18 does not diminish the Commission's authority

to proceed on a case by case basis in appropriate circumstances. On the record here no showing has been made that the circumstances are so inappropriate as to warrant prehearing collateral judicial interference with the Commission's judgment.

Under *Borden* v. *F. T. C.*, *supra*, a district court should not interfere with an administrative proceeding unless the agency has clearly violated the law, the issue does not involve agency expertise or factual determinations or adequate judicial review will not be available upon later review of the agency's order. The plaintiffs have failed to meet any of these standards. The Commission is acting within the authority granted it by the Congress and it is not proceeding in an arbitrary and capricious manner against Beltone. Although the facts underlying the parties' presentation of the issues here are not in dispute, the potential for fact variations and the need for Commission expertise are inherent in the entire subject of advertising disclosures in the hearing aid industry. Finally, adequate judicial review of both the rule making and adjudicatory proceedings are available upon the completion of the proceedings.

For the foregoing reasons the plaintiffs' motion for a preliminary injunction is denied, the defendants' alternative motions to dismiss and for summary judgment are granted and judgment will enter dismissing the action.

A.O. SMITH et al. v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 75-15. F.T.C. File No. 99-199.

(United States District Court, District of Delaware, September 22, 1975)

1. **RELEVANCE OF REQUESTED MATERIALS TO CONTESTED ISSUES IS FIRST QUESTION TO BE TAKEN IN MEASURING PROPRIETY OF WIDE-RANGING DISCOVERY REQUEST.**

   Initial inquiry to be taken in measuring the propriety of a wide-ranging discovery request is whether the materials sought are relevant to any of the legal and factual issues being contested by the parties.

2. **FOR REVIEW OF ADMINISTRATIVE ACTION, THE "SUBSTANTIAL EVIDENCE" TEST ONLY APPLIES TO REVIEWING AGENCY FINDINGS MADE ON A RECORDED HEARING OR TO MEASURE AGENCY ACTION BASED ON AN ADJUDICATORY HEARING.**

   "Substantial evidence" test for review of administrative action applies only to measure agency action based on an adjudicatory hearing or to review agency findings made on a hearing record.

3. **DE NOVO REVIEW OF ADMINISTRATIVE ACTION IS LIMITED TO CASES OF ADJUDICATORY AGENCY ACTION WHERE INVESTIGATIVE PROCEDURES ARE**

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* Reported in 403 F.Supp. 1000 (1975). See also pages 1205 and 1293 herein.

INADEQUATE OR WHEN NEW ISSUES ARE RAISED IN AN AGENCY PROCEEDING TO ENFORCE NONADJUDICATORY ACTION.

De novo review of administrative action is limited to circumstances where the agency action is adjudicatory in nature and the agency fact-finding procedures are inadequate or when issues which were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.

4. FEDERAL COURT IN WHICH ACTION FOR PREENFORCEMENT JUDICIAL REVIEW WAS SOUGHT, WAS LIMITED TO DETERMINING WHETHER AGENCY ACTION WAS ARBITRARY OR CAPRICIOUS RATHER THAN REVIEWING AGENCY ACTION UNDER SUBSTANTIAL EVIDENCE TEST OF DE NOVO.

Federal court in which action for preenforcement judicial review of Federal Trade Commission annual line of business reporting program was sought was not reviewing an adjudicatory agency proceeding nor reviewing the findings of a hearing required to be on the record so that review of the agency action would not be under the substantial evidence test or de novo, but rather would be limited to determining whether agency action was arbitrary or capricious.

5. CONTENTION OF UNDUE BURDENSOMENESS OF F.T.C.'S LINE OF BUSINESS REPORTING PROGRAM WOULD BE MEASURED BY THE ARBITRARY AND CAPRICIOUS STANDARD.

Contention that Federal Trade Commission's line of business reporting program was unduly burdensome would be measured by the arbitrary and capricious standard.

6. COURT MUST CONSIDER WHETHER DECISION WAS BASED ON RELEVANT FACTORS OR WHETHER THERE WAS A CLEAR ERROR OF JUDGMENT IN DETERMINING ARBITRARY OR CAPRICIOUS AGENCY ACTION.

[100] In making a determination as to whether agency action is arbitrary or capricious, the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

7. BROAD DISCRETION GRANTED F.T.C. UNDER STATUTE AUTHORIZING REQUIREMENT OF PERIODIC REPORTING OF INFORMATION BY ECONOMIC ENTITIES DOES NOT PRECLUDE CONSIDERATION OF RELEVANT FACTORS IN ADOPTING REPORTING REQUIREMENTS SUCH AS THE LINE OF BUSINESS PROGRAM.

Although significant discretion has been lodged with the Federal Trade Commission under statute authorizing it to require periodic information reporting by economic entities, the broad discretion does not mean that there are no factors which the FTC must consider in adopting reporting requirements such as the line of business reports program.

8. NATURE OF ACTION FOR PREENFORCEMENT REVIEW OF F.T.C. LINE OF BUSINESS PROGRAM WAS NOT MERELY A SUMMARY PROCEEDING TO ENFORCE F.T.C. ORDERS TO WHICH DISCOVERY WAS INAPPROPRIATE, BUT RATHER AN EXAMINATION OF THE F.T.C. PROGRAM ITSELF TO ADJUDICATE ALLEGED ILLEGALITIES.

Action brought by several corporate entities for preenforcement review of Federal Trade Commission's line of business reporting program did not involve enforcement of Commission orders but rather involved an examination of the program itself in order to adjudicate contentions regarding the program's alleged illegality and was not merely a summary proceeding to enforce FTC orders to which no discovery would be appropriate.

9. AGENCY INVOLVED IN ACTION FOR PREENFORCEMENT REVIEW WOULD BE REQUIRED TO CERTIFY TO COURT MATERIALS RELIED ON OR USED TO PROMULGATE ITS RULE, SINCE IT DID NOT HAVE THE RIGHT TO DESIGNATE WHICH ITEMS IT CONSIDERED TO BE ADMINISTRATIVE RECORD AND REFUSED TO SUBMIT MATERIALS TO THEIR OPPONENTS OR TO THE COURT.

Agency whose rule was being subjected to preenforcement review did not have the right to designate whatever items it considered to be the administrative record and thus to refuse to submit, either to the court, or to agency's opponents, other materials employed or relied upon by the agency in promulgating its rule; agency would be required to certify to the court all materials considered in adoption of the rule.

10. AGENCY MAY NOT LIMIT JUDICIAL INQUIRY BY PRODUCING PORTION OF ADMINISTRATIVE RECORDS WHICH REVEALS ADMINISTRATIVE CONSIDERATION OF ALL RELEVANT FACTORS, EVEN IF COURT'S REVIEW OF ADMINISTRATIVE ACTION IS LIMITED TO DETERMINATION OF WHETHER THE ACTION IS ARBITRARY AND CAPRICIOUS.

Even though review of particular administrative action may be limited to determination of whether it is arbitrary and capricious, judicial inquiry may not be limited by agency merely producing some portion of the administrative record which reveals administrative consideration of all relevant factors.

11. EXPLANATIONS NOT EMPLOYED IN ADMINISTRATIVE DECISIONS AND OFFERED SUBSEQUENT TO ACTION BEING REVIEWED ARE UNACCEPTABLE BY THE COURTS.

Courts are not free to accept explanations of counsel which were not employed by the agency for administrative decisions and which were offered subsequent to the occurrence of administrative action being reviewed.

12. NEITHER CONGRESSIONAL CORRESPONDENCE SENT BY F.T.C. CHAIRMAN, NOR STAFF REPORTS PREPARED PRIOR TO PROMULGATION OF RULE, NOR LETTERS SENT IN CONNECTION WITH DENIALS OF MOTIONS TO QUASH PROVIDE BASIS FOR FINDING PROMULGATION OF RULE NOT TO BE ARBITRARY AND CAPRICIOUS IN AS MUCH AS THEY CANNOT BE CONSIDERED AS CONTEMPORANEOUS EXPLANATIONS.

Neither reports which were prepared by Federal Trade Commission staff and which were prepared prior to promulgation of rule under attack, nor letter sent by chairman of the FTC to United States Senator some two and one-half months prior to the promulgation of the rule nor letters sent by the Commission in connection with denial of motions to quash the rule after it had been promulgated could be considered as contemporaneous explanations of the Commission action or provide basis for finding that the action in promulgating the rule was not arbitrary and capricious.

13. COURT WOULD NOT REMAND, IN ABSENCE OF SUFFICIENT ADMINISTRATIVE RECORD TO DETERMINE ARBITRARY AND CAPRICIOUS AGENCY ACTION, TO AGENCY TO SET FORTH AFTER THE FACT REASONING, BUT WOULD ALLOW USE OF DISCOVERY PROCEDURES.

Where administrative record was insufficient permit determination of whether agency action was arbitrary and capricious, court would not remand to the agency to allow it to set forth its reasons after the fact but rather would allow use of discovery procedures in connection with action.

14. RELEVANCE, UNDER DISCOVERY RULES, IS TO BE MEASURED BY REFERENCE TO NATURE OF SUBJECT MATTER, NOT ACCORDING TO SPECIFIC ISSUES RAISED BY PLEADINGS.

Under rules of discovery, relevance is to be measured, not according to the [1002] specific issues raised by the pleadings, but rather by reference to the nature of the subject matter.

15. IN ORDER THAT REVIEW OF ADMINISTRATIVE DECISIONS BE MADE PROMPTLY, THE USUAL BROAD SCOPE OF DISCOVERY IS SUBJECT TO RESTRICTION.

In reviewing administrative decisions, the usual broad scope of discovery is subject to restriction in order that the review may be had promptly.

16. ENCOURAGEMENT OF FRANK DISCUSSION WITHIN THE GOVERNMENT REGARDING

FORMULATION OF POLICY IS THE PURPOSE OF THE EXECUTIVE PRIVILEGE AGAINST DISCLOSURE OF INTRA-AGENCY ADVISORY COMMUNICATIONS DURING DISCOVERY.

Purpose behind the executive privilege against disclosure during discovery of intraagency advisory communications is the encouragement of frank discussion within the government as regards the formulation of policy.

17. **FACTUAL MATERIAL CONTAINED IN DELIBERATIVE MEMORANDA IS DISCOVERABLE IF SUSCEPTIBLE TO SEVERENCE FROM ITS CONTEXT.**

Executive privilege against discovery does not attach to purely factual communications within or between agencies so long as disclosure would not compromise military or state secrets; Factual material contained in deliberative memoranda is discoverable if susceptible to severence from its context.

18. **ON BASIS OF AN AD HOC BALANCING OF THE HARM RESULTING FROM DISCLOSURE AGAINST INDIVIDUAL NEED FOR MATERIALS, EVEN THOSE MATERIALS ACTUALLY ENCOMPASSED WITHIN CONFINES OF EXECUTIVE PRIVILEGE ARE NOT EXEMPTED FROM DISCLOSURE.**

Even materials actually encompassed within limited confines of executive privilege are not absolutely exempted from disclosure; privilege can be overridden on basis of an ad hoc balancing of individual need for materials against the harm resulting from disclosure.

19. **BURDEN OF DEMONSTRATING PROPER ENTITLEMENT TO DISCLOSURE EXEMPTION, AS WITH ANY DISCOVERY PRIVILEGE, RESTS ON THE CLAIMANT OF EXECUTIVE PRIVILEGE.**

As with any discovery privilege, burden is on the claimant of executive privilege to demonstrate a proper entitlement to exemption from disclosure.

20. **PRECISE DESIGNATION AND DESCRIPTION OF THE DOCUMENTS, AND SPECIFIC REASONS FOR PRESERVATION OF THE CONFIDENTIALITY OF THE COMMUNICATIONS MUST BE SUBMITTED BY THE HEAD OF AN AGENCY, AFTER HIS PERSONAL CONSIDERATION, TO PROPERLY SUPPORT A CLAIM OF EXECUTIVE PRIVILEGE.**

To properly support a claim of executive privilege, it must be made by the head of the applicable agency after actual personal consideration by that officer, there must be a specific designation and description of the document claimed to be privileged, and there must be a demonstration of precise and certain reasons for preserving the confidentiality of the communications.

21. **WHERE F.T.C. CLAIMED EXECUTIVE PRIVILEGE FOR DOCUMENTS WHICH APPEARED TO MOSTLY CONTAIN FACTUAL MATERIAL, FAILURE TO SET FORTH FULL DESCRIPTION OF DOCUMENTS AND SPECIFIC REASONS FOR THE PRESERVATION OF THEIR CONFIDENTIALITY, TOGETHER WITH CHAIRMAN'S FAILURE TO INDICATE HIS PERSONAL REVIEW OF THE MATERIAL, PRECLUDES EXECUTIVE PRIVILEGE DETERMINATION.**

Where certain documents with respect to which Federal Trade Commission claimed executive privilege appeared, upon reading attenuated descriptions, to contain largely factual material, failure of agency to fully describe the documents and to set forth precise and certain reasons for preserving the confidentiality of the documents, along with failure of FTC chairman to indicate that he had engaged in a personal review of the documents, precluded determination that the documents were protected by executive privilege.

22. **DESPITE IMPROPER RAISING OF CLAIM OF EXECUTIVE PRIVILEGE BY AGENCY, COURT WOULD NOT RULE SINCE PUBLIC INTEREST WAS FACTOR IN DETERMINING PROPER SCOPE OF DISCOVERY; INSTEAD, AGENCY INVOLVED WAS GRANTED OPPORTUNITY TO RAISE CLAIM PROPERLY.**

Even though claim of executive privilege had not been properly raised, court would not rule, since public interest was a factor to be considered in determining proper scope of discovery, that no privilege attached to documents as result of failure to properly raise claim of executive privilege but rather would give the agency involved another opportunity to properly raise the claim.

23. DETERMINATION THAT DOCUMENTS WERE PROTECTED BY EXECUTIVE PRIVILEGE WAS PRECLUDED BY FAILURE OF F.T.C. TO ARTICULATE PRECISE AND CERTAIN REASONS FOR PRESERVING CONFIDENTIALITY OF COMMUNICATIONS SOUGHT TO BE DISCOVERED BY DEPOSITION OF F.T.C. OFFICIAL.

Failure of Federal Trade Commission to articulate precise and certain reasons for preserving confidentiality of certain communications which were sought to be discovered by deposition of FTC official precluded determination that the documents were protected by executive privilege.

24. BY TESTIFYING AS TO WHAT HE HAD TOLD A COMMISSION STAFF MEMBER, A COMMISSION OFFICIAL COULD NOT CLAIM EXECUTIVE PRIVILEGE IN REGARD TO WHAT THAT PERSON HAD TOLD HIM.

If executive privilege has been properly invoked, Federal Trade Commission would be deemed to have waived the privilege with respect to two specific questions by allowing FTC official to respond to prior deposition questions in which the substances of the official's ad[**1003**]visory communications were divulged; official could not testify as to what he had told another member of the Commission or its staff and yet claim executive privilege with respect to what the other person had told him.

25. COURT WAS NOT REQUIRED TO COMPEL F.T.C. OFFICIAL TO ANSWER QUESTIONS WHERE STAFF MEMBER'S VIEWS WITH RESPECT TO RULE UNDER REVIEW HAD NO RELEVANCE TO COURT'S EVENTUAL DETERMINATION AS TO WHETHER PROMULGATION OF RULE WAS ARBITRARY OR CAPRICIOUS.

Federal Trade Commission staff member's views with respect to rule which was subject of preenforcement review proceeding had no relevance to court's eventual determination as to whether the promulgation of the rule was arbitrary and capricious so that, even if any executive privilege claim with respect to deposition testimony by the official may have been waived by the FTC, court was not required to compel the official to answer the questions.

26. ATTORNEY-CLIENT PRIVILEGE WOULD NOT PROTECT DOCUMENTS FROM DISCOVERY WHERE DOCUMENTS SOUGHT WERE NOT SHOWN TO HAVE BEEN PREVIOUSLY COMMUNICATED TO F.T.C. COUNSEL AND WHERE IT WAS DIFFICULT TO PROVE CONFIDENTIAL MANNER OF COMMUNICATION OF ORIGINAL INFORMATION BECAUSE OF WIDE DISTRIBUTION OF THE DOCUMENTS WITHIN THE AGENCY.

Where there was no showing that documents sought by parties who were seeking preenforcement review of Federal Trade Commission rule had previously been communicated to the FTC counsel, and where, in view of the apparently wide distribution of the documents within the FTC, it was difficult to conclude that the original information was communicated in a confidential manner, attorney-client privilege would not shield the documents from discovery.

27. DISCOVERY IN THE FORM OF DEPOSITIONS FROM CERTAIN AGENCY OFFICIALS WAS IMPROPER AND IRRELEVANT WHERE SCOPE OF REVIEW TO DETERMINE WHETHER AGENCY ACTION WAS ARBITRARY AND CAPRICIOUS WAS LIMITED TO ADMINISTRATIVE RECORD.

Where scope of review of agency action was limited to the administrative record to determine whether the action was arbitrary and capricious, discovery in the form of depositions from certain agency officials was improper and irrelevant.

(Syllabus, with substituted captions, taken from 403 F.Supp. 1000.)

On motion to compel preenforcement judicial review of F.T.C.'s annual line-of-business reporting program and a cross motion for protective order, court held that its area of review was limited to whether agency actions was capricious and arbitrary; cause would not be remanded to Commission for post hoc assertion of bases for action where administrative record is insufficient; executive privilege claim for particular documents was improperly raised; and limited discovery under federal rules would be used to reveal the rationale behind adoption of the program.

Richard F. Corroon, Charles S. Crompton, Jr., Potter, Anderson & Corroon, Wilmington, Del., *Gilbert J. Helwig,* Pittsburgh, Pa., *John M. Wood, Lee A. Rau, Edward T. Tait, Reed Smith, Shaw & McClay,* Washington, D.C., for plaintiffs.

W. Laird Stabler, U.S. Atty., Wilmington, Del., *Robert J. Lewis,* Gen. Counsel, *Gerald Harwood,* Asst. Gen. Counsel, *James P. Timony, William A. Cerillo, Bruce G. Freedman, Mary L. Azeuenaga, Warren S. Grimes,* F.T.C., Washington, D.C., for defendant F.T.C.

Before MURRAY M. SCHWARTZ, *District Judge:*

This case involves pre-enforcement judicial review of the Federal Trade Commission ("Commission" or "FTC") annual line-of-business reporting program.[1] Previously this Court preliminarily enjoined the defendant Commission from enforcing its Orders to File Form LB against the plaintiffs in this action and related litigation.[2] The instant controversy arises over two discovery motions, the Commission's Motion for a Protective Order and the plaintiffs' Motion to Compel.

By its Motion for a Protective Order[3] the FTC seeks to halt the depositions of four Commission officials involved in the development and administration of the LB Program.[4] In support of its motion the defendant Commission contends both that the depositions will be unduly burdensome, resulting in total disruption [1064] of the LB Program, and that all discovery in this action is improper. Further, the Commission has sought, in the event its motion is denied, to have the Court certify this question to the Third Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b).[5] Plaintiffs have responded by asserting the Commission has failed to demonstrate the "good cause" required by Fed.R.Civ.Proc. 26(c) to justify issuance of a protective order. Plaintiffs oppose the FTC request for section 1292(b) certification on the ground that the matter before the Court involves no "controlling question of law."

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[1] The Commission, by resolution of August 2, 1974 adopted the Line-of-Business ("LB") Program and subsequently served Orders to File Form LB upon 345 American corporations. Notice of the Commission's August 2, 1974 resolution was published in the Federal Register on August 22, 1974. 39 Federal Register 30377.

[2] *A. O. Smith Corporation et al.* v. *Federal Trade Commission,* 396 F.Supp. 1108, Civil Action No. 75-15 (D.Del.1975); *Inland Steel Company* v. *Federal Trade Commission,* 396 F.Supp. 1125 (D.Del.1975).

[3] Docket No. 52.

[4] Plaintiffs had originally noticed a total of nine depositions of Commission officials. To date five of the nine depositions have been completed and the Commission seeks to prevent the plaintiffs from taking the remaining four depositions.

[5] See Note 58, *infra.*

Plaintiffs' Motion to Compel[6] seeks 209 documents currently in defendants' possession,[7] as well as an order requiring a Commission official to answer 17 questions as to which claims of privilege were interposed during the taking of his deposition. This particular facet of the instant litigation has been especially acrimonious, resulting in a wrestling match[8] between opposing counsel and the Commission-induced disappearance of the Hubler documents during a deposition recess. However, in addition to the physical defenses raised by Commission counsel, several legal issues have been raised by the parties in connection with this motion. The Commission asserts that none of the documents or the 17 questions have any relevance whatsoever to the current suit. Further, the Commission has attempted to raise the executive privilege attaching to intraagency advisory communications as a bar to discovery with respect to many[9] of the documents and the 17 specific questions. Plaintiffs have countered by arguing that the documents and subject-matter of the deposition questions are indeed relevant, the claim of executive privilege was improperly raised, and even if properly raised, subject to a multitude of specific exceptions. Plaintiffs also contend that any executive privilege claims properly attaching to the deposition questions were waived by the Commission during examination of the Commission official.

The parties' arguments in support and in opposition to the two motions are considered separately below.

I. SCOPE OF REVIEW

A. *In General*

[1] The initial inquiry to be undertaken in measuring the propriety of a wide-ranging discovery request is whether the materials sought are relevant to any of the legal and factual issues being contested by the parties.[10] In order to measure this relevance factor in a case involving judicial review of agency ac[1005]tion under the Administrative

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[6] Docket No. 54.

[7] The 209 documents are part of a total of 294 documents identified and briefly described in Hubler deposition Exhibit No. 50, Docket No. 46. Both parties have referred to those materials as the "Hubler Documents." The Court adopts this terminology.

[8] The pugilistic exhibition is described in great detail at pp. 369-73 of the Hubler Deposition Transcript, Docket No. 65D. The Court is impressed by the concentration of the lawyers, particularly those directly engaged in the struggle for possession of the Hubler documents, which enabled them to remember to state exactly what had happened for the record. The result is an entertaining series of combat descriptions which prove conclusively that litigation is more than a battle of wits.

[9] See note 40, *infra* and accompanying text for a precise delineation of the exact number of documents claimed to be privileged against disclosure.

[10] F.R.Civ.Proc. 26(b)(1) provides that:

> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be

(*Continued*)

Procedure Act, 5 U.S.C. § 551 *et seq.*, it is first necessary to precisely delineate the appropriate scope and standard of such judicial review. *See Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 413, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

The starting point for determination of the review standard is section 706 of the A.P.A., 5 U.S.C. § 706.[11] That section provides six basic standards by which propriety of administrative action is to be judicially measured. Of these standards, the "arbitrary and capricious" test, 5 U.S.C. § 706(2)(A) and the statutory mandate to set aside agency action that fails to satisfy various statutory, constitutional or procedural requirements, 5 U.S.C. § 706(2)(B), (C) and (D) govern *all* cases in which judicial review is authorized by section 701 and 702 of the A.P.A., 5 U.S.C. §§ 701 and 702.[12] *Overton Park, supra* at 414, 91 S.Ct. 814. Section 706 provides two additional review standards, the "substantial evidence" test, 5 U.S.C. § 706(2)(E) and *de novo* review, 5 U.S.C. § 706(2)(F), both of which apply in only limited instances.

[2] The "substantial evidence" test applies in only two situations. First, this test is properly employed to measure agency action based on an adjudicatory hearing. *Overton Park, supra* at 414, 91 S.Ct. 814; *Camp* v. *Pitts*, 411 U.S. 138, 141, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). The only other opportunity for correct utilization of this test is review of agency findings made on a hearing record under 5 U.S.C. §§ 556 and 557. However, the applicability of these two sections are controlled by 5 U.S.C. § 553(c)[13] which authorizes review on the record under sections 556 and 557 only where some other statute requires such hearings to be

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inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

[11] 5 U.S.C. § 706 provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (D) without observance of procedure required by law;
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> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
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> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

[12] 5 U.S.C. § 701(a) provides that:

> "(a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law."

5 U.S.C. § 702 provides that:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review."

[13] 5 U.S.C. § 553(c) provides in part that:

> ". . . When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection."

on the record. *United States* v. *Allegheny-Ludlum Steel*, 406 U.S. 742, 756-8, 92 S.Ct. 1941, 32 L.Ed.2d 453 (1972); *Overton Park, supra; Camp* v. *Pitts, supra. See, e.g., Dry Colors Manufacturers Ass'n, Inc.* v. *Dep't of Labor*, 486 F.2d 98, at 104, n. 8 (3d Cir. 1973); *Siegel* v. *Atomic Energy Commission*, 130 U.S.App.D.C. 307, 400 F.2d 778, 785 (1967). *See generally* 2 K. Davis, *Administrative Law Treatise* § 13.08 (1958 ed.).

[3] *De novo* review is similarly limited to two specific sets of circumstance.

[1006] "First, such *de novo* review is authorized when the [agency] action is adjudicatory in nature and the agency fact finding procedures are inadequate. And, there may be independent judicial fact finding when issues that were not before the agency are raised in a proceeding to enforce non-adjudicatory agency action." *Overton Park, supra* 401 U.S. at 415, 91 S.Ct. at 823; *Camp* v. *Pitts, supra* 411 U.S. at 141-2, 93 S.Ct. 1241.

[4] It is clear in the instant controversy that neither the "substantial evidence" test nor *de novo* review are applicable. First, this Court is not reviewing an adjudicatory agency proceeding. Nor is it reviewing the findings of a hearing required to be on the record under 5 U.S.C. §§ 556 and 557. While the Court has held that for purposes of preliminary injunctive relief the FTC's promulgation of the LB Program in August, 1974, constituted rulemaking under section 4 of the A.P.A., 5 U.S.C. § 553, there is nothing in the Federal Trade Commission statute, 15 U.S.C. § 41 *et seq.*, which requires such rulemaking to be on the record and accompanied by formal findings of fact. Secondly, this is a pre-enforcement proceeding, not an action to enforce non-adjudicatory agency action.[14] Accordingly, the "substantial evidence" test and *de novo* review are equally inapposite to this litigation.

Therefore, whatever review is ultimately undertaken, it will be largely centered around the "arbitrary or capricious" test. In addition, plaintiffs' arguments that the LB Program violates statutory, constitutional and procedural provisions will require review under the standards provided in 5 U.S.C. § 706(2)(B), (C) and (D).[15]

Plaintiffs have challenged the FTC's adoption of the LB Program on, at least, six separate grounds. These include, *inter alia*, claims that: (1) the Commission exceeded its statutory authority in issuing its order of August 2, 1974, establishing the LB Program; (2) the LB Program is excessively burdensome given the high cost of compliance and the allegedly dubious value of the information to be collected; (3) the ambiguous and occasionally contradictory reporting instructions, when combined with the requirement of certifying reported data as true at the risk of criminal sanctions, deprive plaintiffs of their due process rights under the Fifth Amendment; (4) the reporting requirements constitute an unconstitutional taking of property because of the high cost of compliance and the allegedly substantial risks regarding public dissemination of confidential information; (5) the reporting requirements violate their Fourth Amendment rights to be free from unwarranted searches; and (6) the FTC's promulgation of the LB Program failed to comply with procedural requirements articulated in the A.P.A.

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[14] The Court does not mean to suggest that if this proceeding was an enforcement proceeding brought by the Commission *de novo* review would be either proper or appropriate. That question is not here presented and accordingly no views on it will be proffered.

[15] See note 11 *supra*.

Issue number 1 is governed by the standard enunciated in 5 U.S.C. § 706(2)(C).[16] Issues 3, 4, and 5 will all be controlled by the review standard contained in 5 U.S.C. § 706(2)(B).[17] Issue number 6,[18] will be controlled by 5 U.S.C. § 706(2)(D).

[5,6] The remaining contention that the LB Program is unduly burdensome must be measured by the arbitrary or capricious standard. Although the ultimate standard of review on this issue is quite narrow, the Court must conduct a **[1007]** searching inquiry into the facts surrounding the FTC's actions. *Overton Park, supra* 401 U.S. at 415-6, 95 S.Ct. 814. *See Bowman Transportation, Inc.* v. *Arkansas Best Freight System, Inc.*, 419 U.S. 281, 285, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974). In making a determination as to whether the agency's action was arbitrary or capricious, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park, supra* 401 U.S. at 416, 91 S.Ct. at 823. *Bowman Transportation, supra* 419 U.S. at 285-6, 95 S.Ct. 438. *See generally*, L. Jaffe, Judicial Control of Administrative Action 182 (1965).

[7] In *Overton Park, supra*, the "relevant factors" were statutorily articulated in the underlying statute which authorized the administrative action. In contrast, the relevant factors to be considered by the Commission in promulgating programs of the type typified by the LB Program are nowhere delineated in the statute.[19] Thus, there exists a question as to exactly what factors had to have been considered by the

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[16] See note 11, *supra*.

[17] *Id.*

[18] The FTC having admitted non-compliance with the A.P.A., this question was initially answered in the negative with the issuance of a preliminary injunction as to plaintiff, A. O. Smith, et al., on February 19, 1975. The question of the correctness of issuance of that preliminary injunction is currently before the Third Circuit Court of Appeals.

[19] The statute upon which the FTC relies authorizes the Commission to require periodic information reporting by economic entities engaged in interstate commerce. 15 U.S.C. A. § 46. Section 46(a) and (b) provide:

> The Commission shall also have power—
>
> Investigation of corporations
>
> (a) to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.
>
> Reports by corporations

(Continued)

Commission in formulating the LB Program. While the resolution of this question is not presently required, it is clear at this juncture that significant discretion has been lodged with the Commission under 15 U.S.C. § 46. However, this broad discretion cannot be taken to indicate there are no factors which the agency must consider in adopting the LB Program. *See* Davis, *Administrative Law Text*, 148.

Federal courts, in the post-*Overton* era, when faced with challenges to administrative action alleged to be arbitrary and capricious have on occasion identified "relevant factors" by extrapolating the purposes of the underlying statutory authorization and translating those purposes into the precise factual context before them. *See, e. g., Hanly* v. *Mitchell*, 460 F.2d 640, 646-8 (2d Cir. 1972); *Getty Oil Company* v. *Ruckelshaus*, 467 F.2d 349, 355, 357 (3d Cir. 1972); *Transcontinental Gas Pipe Line Corporation* v. *F. P. C.*, 160 U.S.App.D.C. 1, 488 F.2d 1325, 1329-30 (1973); *Getty Oil Company* v. *Ruckelshaus*, 342 F.Supp. 1006, 1015 (D.Del.1972). Still other federal courts have articulated relevant factors by reference solely to the factual circumstances extant at the point an administrative decision is made. *See e. g., Duquesne Light Company* v. *EPA*, 522 F.2d 1186 (3d Cir. 1975). While this technique might, at first blush, appear to smack of judicial intrusion into the domain of agency discretion and expertise, *cf. EDF* v. *Ruckelshaus*, 142 U.S.App.D.C. 74, 439 F.2d 584, 598 (1971) (dissenting opinion), such an undertaking is designed to protect the exercise of [1008] an agency's discretion by providing a legal framework of statutorily-emanating guidelines and standards within which such discretionary authority must be exercised. *See EDF* v. *Ruckelshaus, supra* at 597-8. *Cf.* Davis, *Administrative Law Text*, 148. Accordingly, the eventual inquiry into the Commission's actions in promulgating the LB Program will ultimately focus upon whether the Commission considered all relevant factors and whether there have been any clear errors of judgment. However, in conducting its review, the Court "is not empowered to substitute its judgment for that of the agency." *Overton Park, supra*.

B. *The Appropriateness of Discovery*

The FTC maintains no discovery whatsoever is appropriate in this

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(b) To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission.

action. It argues alternatively that this is either a summary enforcement proceeding where discovery is ordinarily improper or a pre-enforcement review of agency action in which judicial review is confined to the administrative record. Under either contention, any discovery, whether in the form of depositions, interrogatories or requests for production of documents, is, according to the Commission, unnecessary.

[8] The Commission's argument that this is merely a summary proceeding to enforce its orders to file Form LB can itself be disposed of in summary fashion. Rather than being an enforcement proceeding brought by the Commission, this is a pre-enforcement review action[20] brought by several corporate entities subject to the reporting requirements of the Commission's LB Program. As such the Court is not concerned with enforcement of the Commission's orders but is instead examining the LB Program itself in order to adjudicate plaintiffs' various contentions regarding the Program's alleged illegality.[21]

The Commission's second argument that no discovery is proper where review is confined to the administrative record or only legal questions are raised is more troublesome. First, the Commission is correct in maintaining that review of administrative action alleged to be arbitrary and capricious is to be conducted through an examination of the administrative record which confronted the agency at the time it acted. *Overton Park*, *supra; Camp* v. *Pitts*, *supra; Dry Colors Manufacturers Ass'n* v. *Dep't of Labor*, 486 F.2d 98, 104 n. 8 (3d Cir. 1973); *Bradley* v. *Weinberger*, 483 F.2d 410, 414 (1st Cir. 1973). However, serious questions have been raised in this proceeding as to the scope of the administrative record to be reviewed and, as a result, a short digression on that issue is in order.

i) Composition of the Administrative Record

[9] At oral argument on the competing discovery motions the Commission argued it had the right to designate whatever items it considered to be the administrative record. Accordingly, it urged it was under no duty to submit either to the Court or to its opponents all materials employed or relied upon by the Commission in promulgating its Line of Business Program. This contention is unacceptable. Allowing administrative agencies to preclude judicial access to materials relied upon by an agency in taking whatever action is then being subject to judicial scrutiny would make a mockery of judicial review. Moreover, it would prevent courts from discharging their duty to make a "searching and careful" inquiry to determine whether all relevant factors were

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[20] See Opinion of February 19, 1975 and March 18, 1975 in this and related cases.

[21] See Docket No. 2 at 22, for a listing of plaintiffs' allegations.

considered by the agency and whether there has been a clear error of agency judgment as set forth in *Overton Park, supra.*[22] *Appa*[1009]*lachian Power Company* v. *Environmental Protection Agency,* 477 F.2d 495, 507 (4th Cir. 1973). *See Silva* v. *Lynn,* 482 F.2d 1282, 1283 n. 1 (1st Cir. 1973). It is therefore not surprising that the weight of judicial authority is contrary to the Commission's expressed desire to designate selected documents as the administrative record. The Supreme Court in *Overton Park* emphasized that review is to be conducted upon the "full administrative record" before the agency at the time it made its decision, 401 U.S. at 420, 91 S.Ct. 814. Several Circuit Courts of Appeal have adopted similarly stringent and all encompassing standards for determining the scope of administrative records.[23] Accordingly, the Commission will be ordered to promptly certify to this Court *all* materials considered by the Commissioners in their adoption of the LB Program on August 2, 1974.[24]

[10] It is possible to argue that since judicial review of administrative action alleged to be arbitrary and capricious encompasses an examination of the administrative record to determine whether all relevant factors were considered, *Overton Park, supra,* any portion of an administrative record that reveals administrative consideration of all relevant factors should be sufficient to delimit further judicial inquiry. However, such a position cannot be maintained because one of the many bases which justify the "substantial" nature of this type of judicial inquiry is to determine if any impermissible factors have entered into an agency's reasoning process. *See, E. D. F.* V. *Ruckelshaus,* 142 U.S.App.D.C. 74, 439 F.2d 584, 597-8 (1971). *See, e. g., D.C. Federation of Civic Associations* v. *Volpe,* 148 U.S.App.D.C. 207, 459 F.2d 1231 (1972).

ii) The Importance of Administrative Findings

[11] Federal courts engaged in judicial review of administrative action alleged to be arbitrary and capricious have often emphasized administrative findings as a much needed aid for properly focusing the "substantial inquiry" necessitated by such allegations. *See generally* Davis, *Administrative Law Text* 148 332-4 (1972); Scott, "In Quest of Reason: The Licensing Decisions of The Federal Banking Agencies," 42 *Chi.L.Rev.* 235 (1975). In *Burlington Truck Lines* v. *U.S.,* 371 U.S. 156, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962), the Supreme Court stated effective

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[22] In the instant case the Commission was ordered to prepare a list of materials it considered to be the administrative record. An examination of this list (Docket No. 70) reveals a sparse collection of items which would render a "rational determination" by this Court on the "arbitrary and capricious" test well nigh impossible. *Appalachian Power, infra* at 507.

[23] *See, e. g., Bradley* v. *Weinberger, supra* at 414; *Silva* v. *Lynn, supra* at 1283 n. 1; *Appalachian Power, supra* at 507; *Dry Colors, supra* at 104, n. 8. *Accord, Environmental Defense Fund* v. *Ruckelshaus,* 142 U.S.App.D.C. 74, 439 F.2d 584, 597-8 (1971); *Chrysler Corporation* v. *Dep't of Transportation,* 472 F.2d 659, 669 (6th Cir. 1972).

[24] 39 Fed.Reg. 30377, August 22, 1974.

judicial review, especially where discretionary administrative actions were challenged, required findings or explanations sufficient to reveal the basis of administrative action so that a determination could be made as to whether the contested acts were actually within the agency's discretion.[25] *Id.* at 167–9, 83 S.Ct. 239. Moreover, courts are not free to accept explanations of counsel for administrative decisions not employed by the agency and subsequent to the occurrence of the administrative action being reviewed. *Id.* at 168–9, 83 S.Ct. 239. This is because judicial acceptance of such "post-hoc rationalizations" would propel reviewing courts " 'into the **[1010]** domain which Congress has set aside exclusively for the administrative agency.' " *Id.* at 169, 83 S.Ct. at 246 *citing SEC* v. *Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947).

In *Overton Park*, the Supreme Court once again took notice of the need for informal findings that serve to explain administrative action. In that case, even though review on remand was to be conducted "on the full administrative record that was before the [agency] at the time [it] made [its] decision[s]," 401 U.S. at 420, 91 S.Ct. at 825, further explanations by the agency might be necessary if the "bare record" failed to disclose which factors were considered. *Id.* See Davis, *Administrative Law Text* 332–4. Similarly, in *Camp* v. *Pitts*, *supra*, mention was again made of the need for contemporaneous explanation of agency action. 411 U.S. at 143, 93 S.Ct. 1241. Nor has the utility of informal findings as a device for determining whether various relevant factors were administratively considered been lost upon the lower federal courts. *See, e. g., Environmental Defense Fund* v. *Ruckelshaus*, 142 U.S.App.D.C. 74, 439 F.2d 584, 597–8 (1971);[26] *Transcontinental Gas Pipe Line Corporation* v. *FPC*, 160 U.S.App.D.C. 1, 488 F.2d 1325, 1330 (1973). *Accord, Dry Colors, supra* at 105–6. *Cf. National Nutritional Food Ass'n* v. *FDA*, 491 F.2d 1141, 1145 n. 5 (2d Cir. 1974); Scott, *In Quest of Reason, supra.*

[12] The parties in this case have clashed sharply on the question whether the Commission made any informal findings or whether the "stated justification for informal action does not provide an adequate basis for judicial review." *Camp* v. *Pitts*, *supra* 411 U.S. at 138, 93 S.Ct.

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[25] Administrative findings were required by statute in *Burlington* by 5 U.S.C. § 1007(b) (now 5 U.S.C. § 557(c)(3)(A)). No such *formal* findings are mandated in the instant action. *Allegheny-Ludlum Steel, supra.* However, the Court's articulation of the important function of administrative findings in *Burlington* was far broader than that required by the relevant statute and thus *Burlington* is not read as limited to situations where formal findings are required after a hearing "on the record" under 5 U.S.C. § 557(c)(3)(A). *Compare Overton Park, supra* and *Camp* v. *Pitts, supra* with *Allegheny-Ludlum Steel, supra.*

[26] In *EDF* v. *Ruckelshaus, supra*, the D.C. Circuit Court of Appeals stated that: "We stand on the threshhold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years . . . [c]ourts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the decision, or a crucial factor had not been considered. Gradually, however, that power has come into more frequent use, and with it, the requirements that administrators articulate the factors on which they base their decisions." 439 F.2d at 597.

at 1242. Plaintiffs claim that the Commission made no findings and rendered no "contemporaneous explanation" of Commission action in adoption of the LB Program. The Commission however claims that there are findings.[27] These, according to the Commission, include letters issued by the Commission in connection with its denials of motions to quash its Order to File Form LB[28] (September 24, 1974), a statement by the Commission denying plaintiffs' renewed motions to quash[29] (January 7, 1975), two staff reports[30] prepared in March and May of 1974[31] and a letter from Commissioner Lewis Engman to Senator Philip A. Hart dated May 15, 1974.[32] The Court disagrees and concludes it is unable to treat these materials as "contemporaneous explanations" of the Commission's August 2, 1974 adoption of the LB Program.

The two staff reports are not explanations by the Commission, but rather by its staff.[33] Further, they were prepared *prior* to the August 2, 1974 promulgation of the LB Program and are thus unfit for treatment as contemporaneous informal findings by the Commission. Similarly, the May 15, 1974 Engman[1011]-Hart letter cannot be considered as constituting Commission findings because it issued some two and one-half months before the Commission adopted its LB Program by resolution dated August 2, 1974.[34]

The Commission responses denying the motions to quash and renewed motions to quash, while perhaps forming part of the administrative record, *cf., Bradley* v. *Weinberger, supra* at 415, cannot be treated as a "contemporaneous explanation" of the FTC's promulgation of the LB Program. Not only did they post-date the August 2nd decision by eight weeks and five months respectively, but their temporal context serves to render them susceptible to characterization as the type of "post-hoc rationalization" condemned for review purposes in *Overton Park, supra* 401 U.S. at 419, 91 S.Ct. 814. While these two statements could serve as findings or explanations of the Commission's reasons for denying the two sets of motions to quash, the administrative activity under review in this Court is the adoption of the LB Program, *not* the refusal to quash the Orders to File Form LB. "Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible." *EDF* v. *Ruckelshaus, supra* at 598.

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[27] Docket No. 62, p. 5.

[28] *Id.*

[29] *Id.*

[30] In a classic instance of having one's cake and eating it too, the Commission, at the same time it urges these two internal staff reports constitute part of its findings, also maintains that staff memos are never part of an administrative record. Docket No. 60, p. 14.

[31] *Id.*

[32] Docket No. 60, p. 8.

[33] The distinction between statements or acts of an agency and those of its staff has in some circumstances been deemed of great significance. *U. S.* v. *Citizens & Southern National Bank*, 422 U.S. 86, 95 S.Ct. 2099, 45 L.Ed.2d 41 (1975).

[34] No opinion is expressed as to whether the Engman-Hart letter could serve as Commission findings were it issued contemporaneously with the promulgation of the LB Program.

Were reviewing courts to treat as "contemporaneous explanations" the statements of agencies issued not in conjunction with administrative action, but some time afterwards when the propriety of that action is under attack, that would amount to judicial sanctioning of administrative practice based on a principle of "act now; figure out why later." Administrative agencies cannot be free to act unfettered by any standards or parameters of authority as long as they could subsequently advance some reasons as to why the action was originally undertaken. The integrity of the administrative process is not debased, but strengthened by the requirement of contemporaneous findings. The probative character of an explanation issued contemporaneously with particular agency action is superior to a statement made when action previously taken is attacked and justifications for it are sought.

It is within the realm of discretionary administrative action that informal findings or explanations assume the greatest importance in terms of providing a principled framework, both for administrative decision-making and judicial review. *See* Davis, *Administrative Law Text* 332–4 (1972); *EDF* v. *Ruckelshaus, supra* at 597–8. "Contemporaneous" will not be stretched to reach a result fundamentally inconsistent with the purpose of requiring explanations of agency action. Accordingly, the Court finds that for purposes of judicial review there are no "contemporaneous explanations" or findings accompanying agency action sufficient to indicate what factors were considered by the Commission.

D. *Remedies for a Lack of "Contemporaneous Explanations" of Administrative Action*

In *Overton Park* the Supreme Court also held that where the bare administrative record does not disclose what factors were considered in connection with agency action, a reviewing court could properly require an explanation in order to aid its determination as to whether a challenged action was arbitrary or capricious. 401 U.S. at 420, 91 S.Ct. 814. Further, the Court also held the absence of "administrative findings that were made at the same time as the decision" would justify requiring "the administrative officials who participated in the decision to give testimony explaining their action." *Id.* The Court **[1012]** did, however, indicate the essentially limited occasions for such inquiries by requiring a "strong showing of bad faith or improper behavior" when contemporaneous findings exist to justify an examination of the decision-makers' mental processes. *Id. citing U.S.* v. *Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941).

In *Camp* v. *Pitts, supra*, the class of administrative record that justified supplementation was extended from cases in which no agency findings had been made to either those where the "stated justification for informal action does not provide an adequate basis for judicial review," 411 U.S. 138, 93 S.Ct. at 1242 or ". . . there was such failure to explain administrative action as to frustrate effective judicial review . . . ." *Id.* at 142-3, 93 S.Ct. at 1244. *See National Nutritional Foods Ass'n* v. *FDA, supra* at 1145, n. 5.

The Commission relies on several cases for the proposition that discovery procedures or the taking of testimony are only proper in the context of judicial review of administrative action when a showing of bad faith has been made. This reliance is misplaced. In *Bradley* v. *Weinberger, supra*, the First Circuit never reached the issue sub judice. Similarly, in *Dry Colors, supra*, the Third Circuit's statement with respect to the scope of judicial review expressly assumed the existence of administrative findings. *See Id.*, 486 F.2d at 104, n. 8. Finally, both the Second and Fifth Circuit in *National Nutritional Foods Ass'n* v. *FDA, supra* at 1145 and *Bank of Commerce of Laredo* v. *City National Bank of Laredo*, 484 F.2d 284, 288 (5th Cir. 1973),[35] had specifically found that "contemporaneous explanations" of administrative action were present in both cases. Thus, the cited cases are distinguishable from the controversy at bar because of this Court's conclusion that "contemporaneous explanations" of the Commission's actions in adopting the LB Program are lacking. *Supra* pp. 1011-1012.

The Supreme Court did not provide explicit guidelines in either *Overton Park* or *Camp* for District Courts to follow to obtain further "explanation" for allegedly arbitrary and capricious agency action. Instead, the Court chose to defer to the fact-finding expertise of the lower federal courts and placed the specific choice of means within the discretion of the reviewing court. *Compare Overton Park, supra* 401 U.S. at 420-1, 91 S.Ct. 814 with *Camp* v. *Pitts, supra* 411 U.S. at 142-3, 93 S.Ct. 1241.

[13] The Commission has suggested that if this Court should find the administrative record to be inadequate because of a lack of contemporaneous explanations, a remand to the Commission would be appropriate.[36] The Court is unwilling to adopt this suggestion for the following reasons. In *Overton Park* the Supreme Court counseled strongly against the use of "post-hoc rationalizations" to reveal the basis of prior

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[35] *Bank of Commerce of Laredo, supra*, has been described as a "remarkably obtuse opinion." Scott, *In Quest of Reason*, 42 *Chi.L.Rev.* 235, 266 (1975). Professor Scott's criticisms of that case include allegations that the Fifth Circuit ignored *Overton Park* and relied upon *Camp* v. *Pitts* for a proposition directly contrary to its actual holding. 42 *Chi.L.Rev.* at 266-7.

[36] Docket No. 60, p. 10.

administrative acts. 401 U.S. at 419–21, 91 S.Ct. 814. Further, special warning with regard to the "post-hoc" nature of findings prepared subsequent to the actual administrative decision is found in the Court's advice that any such materials "must be viewed critically." *Id.* at 420, 91 S.Ct. 814. This Court is similarly sensitive to the unsatisfactory dynamics of such a remand and accordingly deems it unwise in the instant controversy.

By contrast, utilization of the discovery procedures available under the Federal Rules of Civil Procedure, albeit to a limited extent, appears to provide a more satisfactory, and entirely appropriate,[37] means of uncovering the **[1013]** rationale behind the Commission's adoption of the LB Program.[38] In particular, the adversarial nature of most discovery tools (depositions, interrogatories and requests for production) provides an ideal counter to any tendency of an agency requested to unilaterally prepare post-hoc findings to place a highly refined and, perhaps unwarranted, gloss upon prior decision-making.

[14,15] While discovery is appropriate, it will not necessarily be permitted to be as time consuming as the more common types of plenary actions. The scope of discovery under the Federal Rules of Civil Procedure is generally governed by Rule 26(b)(1) which provides that: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." In general the notion of relevance inherent in Rule 26(b)(1) has been given a very broad scope. 4 *Moore's Federal Practice* ¶ 26.56[1] at 26–131. Relevance is to be measured, not according to the specific issues raised by the pleadings, but rather by reference to the nature of the subject matter. *See Id.* at 26–120–22. Against this liberal standard for delimiting the parameters of discovery stands the caveat of the Supreme Court in *Overton Park* that: "If the District Court decides that additional explanation is necessary, that court should consider which method will prove the most expeditious so that full review may be had as soon as possible." 401 U.S. at 420–1, 91 S.Ct. at 826. In reviewing administrative decisions, it is held that the usual broad scope of discovery is subject to restriction in order that

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[37] *Carpenters 46 County Board* v. *Construction Industry Stabilization Committee*, 18 FR Serv.2d 1042 (N.D.Cal.1974); *Nuclear Data, Inc.* v. *AEC*, 364 F.Supp. 423, 425 (N.D.Ill.1973). *Cf. National Nutritional Foods Ass'n* v. *FDA*, *supra* at 1145; *Aleut League* v. *Atomic Energy Commission*, 337 F.Supp. 534, 541 (D.Alaska 1971). *But cf.*, *Bank of Commerce* v. *Laredo*, *supra* at 287. But see note 35 *supra*.

[38] While the actual discovery eventually had in this matter will be limited solely to curing the lack of a "contemporaneous explanation" of administrative action, this serves adequately to distinguish the instant pre-enforcement review from an action brought to enforce agency action. In such a proceeding the judicial focus is not directed towards a searching inquiry of the bases upon which an agency has acted. Instead, attention is focused upon the particular order sought to be enforced. As a result the degree and nature of any discovery in an enforcement proceeding is wholly distinguishable from the broad review here undertaken by the Court where discovery is being utilized to remedy the lack of administrative findings necessary to effectuate a complete and searching review of administrative action. *A. O. Smith et al.* v. *FTC et al.*, 396 F.Supp. at 1115, 1116 (D.Del.1975). *See U. S.* v. *Associated Merchandising Corp.*, 256 F.Supp. 318 (S.D.N.Y.1966). *Cf. Donaldson* v. *United States*, 400 U.S. 517, 528–9 and n. 11, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971); *United States* v. *Howard*, 360 F.2d 373 (3d Cir. 1966).

such review may be had promptly. Accordingly, whatever further discovery may eventually be had in this action will be of an essentially limited nature and should be framed in a manner consistent with the narrow purposes of such discovery.[39]

II. THE COMMISSION'S CLAIMS OF EXECUTIVE PRIVILEGE

[1014] Plaintiffs, first through requests for production, and now by motion to compel, seek access to 209 Commission documents identified and briefly described in Hubler Deposition Exhibit No. 50.[40] The Commission in turn responded by raising claims of executive privilege with respect to 129 documents and arguing that all the documents are nondiscoverable on relevance grounds. The privilege claims attaching to 10 documents or portions of those documents have now been mooted by release in a contemporaneous, but unrelated, agency decision in a Freedom of Information Act proceeding.

Executive privilege also reared its head in the context of a deposition taken by plaintiffs of a member of the Commission staff. These claims initially arose when the employee was directed by Commission counsel not to answer 17 questions on the ground that executive privilege attached to the subject matter sought to be disclosed by plaintiffs' deposition questions.[41]

By letter[42] dated June 10, 1975 Lewis A. Engman, Chairman, FTC, purported to formally raise the privilege claims with regard to the

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[39] It is noted a conflict appears to exist when the concept of a "searching and careful" judicial inquiry is placed against the restriction of such review to a record which consists solely of materials actually employed by administrative decision-makers in undertaking the acts subsequently under review. Due to the size of most administrative agencies, a high degree of responsibility is often delegated to staff members. Thus, in preparing a report to be utilized by the decision-makers, an administrative *staff* member might rely upon statistical or technological data gathered by the agency. Since the report thereafter submitted to the agency will not contain such data, but merely rely upon it, that data does not ordinarily become part of the administrative record. Because such data might itself be totally incorrect or otherwise invalid, both the staff's and decision-maker's reliance is misplaced. However, since such materials are not part of the record there is no readily apparent way to discover that the data is misleading or incorrect. In an ordinary civil action such lacunae would be uncovered through utilization of the liberal discovery procedures authorized by the Federal Rules of Civil Procedure. In suits involving judicial review of administrative action such discovery possibly cannot ordinarily be had due to the lack of relevance under Rule 26(b)(1) caused by the fact that neither the data nor its weaknesses can be employed by a court when review is limited to the administrative record.

Alternative resolutions of the foregoing conflict might include enlarging the administrative record for this limited purpose to include staff reports indirectly relied upon by the agency decision makers or utilizing discovery procedures notwithstanding the "relevance" problem under Fed.R.Civ.Proc. 26(b)(1).

[40] See Docket No. 46. There are a total of 294 separate documents listed in Hubler Deposition Exhibit No. 50. In a separate Freedom of Information Act proceeding the Commission has agreed to allow a member of the public access to 125 of these documents, and concurrently agreed to make them similarly available to the plaintiffs in the instant case. However, some of the documents released pursuant to the independent Freedom of Information Act request were never requested by plaintiffs.

[41] Docket No. 54, Exhibits A through M.

[42] The contents of the letter is as follows:

"Re: A. O. Smith Corporation, et al. v. Federal Trade Commission, et al., Civil Action No. 75-15—FTC File 99-199
Dear Judge Schwartz:

Plaintiffs in the above-captioned action have moved the court for an order compelling the Federal Trade Commission to produce certain documents listed in Hubler Deposition Exhibit 50 and to permit Myron J. Hubler to answer certain questions asked of him during the taking of his deposition to which Commission counsel objected and directed Mr. Hubler not to answer. (The questions are set forth in Exhibits A through M to plaintiffs' motion.)

I am hereby formally claiming the Commission's privilege for intra-governmental documents reflecting advisory

(*Continued*)

Hubler documents, as well as reiterating the privilege claims emanating from the Hubler deposition itself. The letter, which was not submitted as an affidavit, gives no reasons as to how or why the Commission would be harmed through disclosure of either the documents or the information sought by the deposition questions. Nor does the letter give any indication that Commissioner Engman made the decision to invoke executive privilege after personal consideration of the documents and their content.

A. *Executive Privilege in General*

[16] The Commission has labeled the privilege it is raising as the privilege against disclosure of intra-agency advis[**1015**]ory opinions, recommendations and deliberations. Since describing the privilege in these terms creates a substantial risk of confusion with a Freedom of Information Act provision[43] which exempts from disclosure "inter-agency or intra-agency memorandum or letters which would not be available by law to a party other than an agency in litigation with the agency," the privilege raised by the Commission under Rule 26[44] will instead be described as executive privilege. *Cf. U. S.* v. *Article of Drug*, 43 F.R.D. 181, 190 (D.Del.1967). The purpose behind the executive privilege against disclosure of intra-agency advisory communications is the encouragement of frank discussion within the government as regards the formulation of policy. *U. S.* v. *Berrigan*, 482 F.2d 171, 181 (3d Cir. 1973). This is because "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision-making process." *U. S.* v. *Nixon*, 418 U.S. 683, 705, 94 S.Ct. 3090, 3106, 41 L.Ed.2d 1039 (1974). *Accord, Ackerly* v. *Ley*, 137 U.S.App.D.C. 133, 420 F.2d 1336, 1341 (1969) ("there are enough incentives as it is for playing it safe and listing with the wind"). *See also, NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975).

[17] This privilege is not absolute, *U. S.* v. *Nixon*, *supra*, but instead is subject to at least two significant qualifications. First, the privilege

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opinions, recommendations and deliberations as to the following documents identified in Hubler Deposition Exhibit 50: Hubler Documents 1-4, 7-12, 15-57, 21-22, 25, 29-30, 33, 35-37, 39-41, 45, 48-50, 56-58, 63, 66-68, 70, 72-75, 77, 79-80, 105, 117, 130, 134, 138, 142, 144, 151, 159-161, 164, 166-68, 171, 176, 195-210, 223-225, 227-229, 238, 239, 241, 243, 246, 250, 252-257, 261-294.

I am also raising the privilege for intra-governmental communications reflecting advisory opinions, recommendations and deliberations with respect to the questions indicated in Exhibits A through M to plaintiffs' motion.

Respectfully,
/s/ Lewis A. Engman
Lewis A. Engman
Chairman

[43] 5 U.S.C. § 552(b)(5).

[44] Rule 26 allows discovery of any relevant matter not privileged from disclosure. *See* note 10, *supra*.

does not attach to purely factual communications within or between agencies, the disclosure of which would not compromise military or state secrets. *E.P.A.* v. *Mink*, 410 U.S. 73, 87-8, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). Moreover, factual material contained in deliberative memoranda has generally been held discoverable if susceptible to severance from its context. *Id. See e.g., Machin* v. *Zuckert*, 114 U.S.App.D.C. 335, 316 F.2d 336, *cert. denied* 375 U.S. 896, 84 S.Ct. 172, 11 L.Ed.2d 1214 (1963); *Boeing Airplane Co.,* v. *Coggeshall*, 108 U.S.App.D.C. 106, 280 F.2d 654 (1960); *Freeman* v. *Seligson*, 132 U.S.App.D.C. 56, 405 F.2d 1326 (1968). *Cf. Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 149 U.S.App.D.C. 393, 463 F.2d 788, 792 (1971). The same distinction is applied under the analogous Freedom of Information Act provision, 5 U.S.C. § 552(b)(5). *Soucie* v. *David*, 145 U.S.App.D.C. 144, 448 F.2d 1067 (1971); *Schwartz* v. *IRS*, 511 F.2d 1303 (D.C. Cir. 1975).[45]

[18] Secondly, even those materials actually encompassed within the limited confines of the privilege are not absolutely exempted from disclosure. Instead, the privilege can be overridden in appropriate circumstances. *See, e.g., U. S.* v. *Nixon, supra; Black* v. *Sheraton Corp.*, 371 F.Supp. 97 (D.D.C.1974). While the exact showing necessary to surmount a governmental claim of privilege is unclear,[46] what is basically involved in each case is an *ad hoc* balancing of individual need for the materials against the harm resulting from any such disclosure. In fact, it is this as[**1016**]sessment of individual need that most completely distinguishes adjudications of executive privilege under the Freedom of Information Act, where an individual's need for materials is deemed irrelevant. *SEC* v. *National Student Marketing Corp.*, 18 Fed.Rules Serv.2d 1302, 1308 (D.D.C.1974). *See generally*, Note, "The Freedom of Information Act and the Exemption for Intra-Agency Memoranda." 86 *Harv.L.Rev.* 1047 (1972).

[19,20] As with any privilege the burden is upon the claimant of executive privilege to demonstrate a proper entitlement to exemption from disclosure. *Accord, U. S.* v. *Article of Drug, supra. Cf. International Paper Company* v. *Fibreboard Corporation*, 63 F.R.D. 88, 93 (D.Del.1974). To properly support a claim of executive privilege at least three requirements must be satisfied. First, the privilege must be claimed by the head of the applicable agency after actual personal

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[45] While it is clear that the fifth exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(5) in no way affects the scope of materials discoverable in plenary civil actions, 4 *Moore's Federal Practice* ¶ 26.61 [4.3] at 26-277 (1974 ed.); *Pleasant Hill Bank* v. *U. S.*, 58 F.R.D. 97, 100 (W.D.Mo. 1973), cases construing that Freedom of Information Act exemption are readily analogous to cases where executive privilege is being examined under the aegis of Rule 26 discovery proceedings.

[46] Some cases speak in terms of a "pressing need" on the part of litigants in order to overcome a properly raised claim of executive privilege, *SEC* v. *Bausch & Lomb Co.*, 19 Fed.Rules Serv.2d 332 (S.D.N.Y.1974), while others view the central issue as "whether the damage resulting from disclosure outweighs the need for a just resolution of a legal dispute." *Black* v. *Sheraton, supra.*

consideration by that officer. *U. S.* v. *Reynolds,* 345 U.S. 1, 7-8, 73 S.Ct. 528, 97 L.Ed. 727 (1953). Secondly, there must be "a specific designation and description of the documents" claimed to be privileged. *Black* v. *Sheraton, supra.* This is necessary in order that a court be able to make a knowledgable decision as to whether any document or portion thereof actually contains advisory or deliberative materials. Any attempts to invoke executive privilege in the absence of this specific factual showing are actually attempts to interfere with the proper functioning of the judicial branch of our government by appropriating the means of this decision to the executive branch. *Cf. U. S.* v. *Nixon, supra.* Finally, there must be a demonstration of "precise and certain reasons for preserving" the confidentiality of the governmental communications. *Black* v. *Sheraton, supra.* A close reading of cases where claims of executive privilege were raised indicates that the necessary facts have generally been required to be raised by affidavit. *See, e.g., U. S.* v. *Reynolds, supra; Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318 (D.D.C.1966), *aff'd sub nom., V.E.B. Carl Zeiss, Jena* v. *Clark,* 128 U.S.App.D.C. 10, 384 F.2d 979 (1967), *cert. denied,* 389 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967); *Black* v. *Sheraton Corporation, supra.* Further, this Court requires the factual basis for other privilege claims to be made by affidavit. *International Paper Company* v. *Fibreboard Corporation, supra,* 63 F.R.D. at 94. However, for reasons that will shortly appear, it is unnecessary to decide whether the factual showing necessary to support a claim of executive privilege must be made by affidavit.[47]

B. *The Hubler Documents*

For a variety of reasons, the Court finds itself unable to properly adjudicate the Commission's claims of executive privilege. Moreover, it is held that the Commission has yet to raise any executive privilege claims whatsoever because of certain serious deficiencies in the manner the Commission has chosen to press these claims.

[21,22] While the Commission has fulfilled the requirement that executive privilege be raised by the head of an agency,[48] *U. S.* v. *Reynolds, supra,* it has failed to satisfactorily comply with at least two other requirements. First, the [1017] "specific designation and description of the documents," *Black* v. *Sheraton Corporation, supra,* is

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[47] See discussion, *infra* pp. 1016–1018.

[48] Plaintiffs have challenged whether the Chairman of the FTC is the "head" of the Commission for purposes of asserting executive privilege claims with arguments that the Chairman is not able to act on behalf of the Commission as a whole. The Court finds this argument to be unpersuasive because neo-literal compliance with the requirement that an agency head act in this context is unnecessary. That requirement was designed to deter governmental units from too freely claiming a privilege that is not to be lightly invoked, *U. S.* v. *Reynolds, supra,* by assuring that some one in a position of high authority could examine the materials involved from a vantage point involving both expertise and an overview-type perspective. It is impossible to suggest that allowing the FTC Chairman to raise these claims will undermine the purposes behind this requirement.

lacking in several crucial respects. The Commission did, through Chairman Engman's letter, specify the particular documents claimed as privileged from disclosure. In addition, the record does contain a document[49] which provides some information on each document in terms of its general inter-agency routing, its date of preparation and its title. However, little or no information is provided as to the actual content of various documents. Since it is clear that excisable factual portions are, if relevant, discoverable, and since certain documents[50] appear, upon reading the attenuated descriptions, to contain largely factual material, the failure to fully describe the documents precludes the Court from any *informed* analysis of what documents, or portions thereof, actually contain the type of advisory communications protected by the privilege. Similarly, the lack of specificity renders an assessment of the potential harm resulting from disclosure impossible, thereby preventing the Court from balancing such harm against plaintiffs' needs to determine whether to override any claims of privilege.

The second serious deficiency in the Commission's approach is its total failure to proffer "precise and certain" reasons for preserving the confidentiality of the requested documents. *Black* v. *Sheraton Corporation, supra.* Without such information, a court cannot employ the balancing process appropriate to a resolution of this controversy. While the Court notes its serious doubts as to whether plaintiffs will be able to demonstrate a level of need sufficient to overcome executive privilege with respect to these documents,[51] until the Court can find that reasons exist for shielding these materials from disclosure because they contain advisory communications, no further adjudication of these claims can occur.

These deficiencies, when combined with Chairman Engman's total and absolute failure to indicate that he had engaged in any personal review of these documents,[52] are sufficient to support a finding that the Commission has yet to raise any executive privilege with respect to these documents. This is because an improperly raised claim of privilege is no privilege at all. *Black* v. *Sheraton Corporation, supra* at 101; *International Paper Company* v. *Fibreboard Corporation, supra* at 93. Thus, the Court would be totally justified at this juncture in ruling against the Commission on its claims of executive privilege, particularly in view of the fact that the Commission was previously made aware of the shortcomings inherent in its prior attempts to raise executive privilege as a barrier to discovery.[53] However, because the public interest is a factor to be considered in determining the proper scope of discovery, 4 *Moore's Federal Practice* ¶ 26.60[3] (1972 ed.), it is concluded the public interest would not be served at this point by a finding that no privilege attaches to these documents as a result of the Commission's [1018] inability to properly raise its claims. Therefore, the Commission will be allowed a final "third bite[54] at the apple" on its executive privilege claim.

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[49] Hubler Deposition Exhibit 50. See Docket No. 46, Appendix A.

[50] *See, e. g.*, Document No. 11, Docket No. 46, Appendix at 2.

[51] See note 55, *infra*.

[52] Although an inference could be drawn that Chairman Engman did indeed examine the documents prior to asserting his claim of executive privilege, the Court is unwilling to indulge in such speculation. Not only does the unverified character of the Engman letter make attempts to raise inferences somewhat troublesome, but the commission itself argued in its briefs that providing greater specificity with respect to the documents would moot the claims of burden it has also raised as a bar to this discovery. Thus, the exact opposite inference, namely that *no one* at the Commission has examined these documents, may well be the more appropriate inference.

The Commission will be required to mend *all* the multitudinous flaws that currently beset its claims of executive privilege. Central to this task will be completion of a descriptive, full and specific itemization of the various documents being claimed as privileged. Further, the basis for every claim of privilege will have to be shown to enable proper judicial resolution of these questions. Finally, if any portions of the putatively privileged documents contain factual information, the Commission will have to demonstrate the impossibility of extricating those factual portions. As a last resort, to the extent that greater illumination of documentary contents cannot occur without essentially disclosing the actual privileged contents, the Commission will have to submit any such documents for *in camera* review by the Court. Contemporaneously, the plaintiffs will be allowed further opportunity to demonstrate their need for such documents bearing in mind the close relationship between need, relevance and the scope of review in this action.[55]

C. *The Hubler Deposition*

[23] The decisional posture of the remaining privilege claims raised during the taking of the Hubler deposition is similar to that taken with respect to the documents claimed as privileged. While no greater specificity is needed in this context because the deposition questions claimed to invade the province of protected advisory communications speak for themselves, the failure to articulate "precise and certain reasons for preserving their confidentiality," *Black* v. *Sheraton*

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[53] At a hearing on March 3, 1975 the Court, in denying a prior Commission motion for a protective order, ruled that the Commission had failed to properly invoke executive privilege. (Transcript 68, March 3, 1975.)

[54] See note 52, *supra*.

[55] The plaintiffs have a significant burden with respect to demonstrating the requisite showing of need sufficient to overcome any properly raised claim of executive privilege. It appears possible to describe the material sought by plaintiffs as falling within three classes of documents. First, some of the documents sought appear to be part of the administrative record and as such will, of course, be made available to plaintiffs. Other documents do not appear to have been considered by the Commissioners and thus cannot be part of the administrative record. Since review in this case is confined to the record, it is difficult to understand how plaintiff could ever demonstrate any level of need for such items because, at the very least, documents belonging to this class would then fall outside the proper scope of discovery under Fed.R.Civ.Proc. 26(b). Finally a third category of documents may exist. This category consists of materials which were not directly considered by the Commissioners, but which may have been indirectly relied upon by the Commissioners in promulgating the LB Program. If such materials exist, plaintiffs may have an argument that they should be made available either as part of the administrative record or through discovery. See note 39, *supra*.

Corporation, supra, once again precludes utilization of the requisite balancing test. Thus, even though the subject-matter sought to be elicited by the various questions is within the class of intra-agency communications designed to be protected by executive privilege, the Court can go no further without some information, other than its *sua sponte* speculation, *U. S.* v. *Article of Drug, supra,* as to the quantum and type of harm that would result from forced disclosure of these communications. Therefore, with respect to the questions asked, it is held executive privilege was improperly invoked and therefore not available to the Commission.

[24] Plaintiffs have argued that executive privilege was waived during taking of Hubler's deposition by the Commission counsel's practice of employing the privilege in a "one-way" fashion, i.e., allowing the witness to divulge the contents of his advisory communications to others but not allowing the witness to relate the responses received by the witness. The Commission has countered by arguing that little damage to the public interest occurs when a government employee is permitted to reveal the substance of his (or her) communications, as long as the employee is prevented from divulging the communications of [1019] others. This view of executive privilege is unacceptable. The purpose of this privilege is to promote frank and honest discussion within government agencies during the formulation of policy. If the privilege only attached to what one *hears* from others, as opposed to what one *says* to others, the privilege would be rendered meaningless since the purpose behind the rule would have evaporated. Moreover, given the Commission's view of the privilege in this context, one could always discover the total content of various intra-agency communications simply by deposing every participant to a particular conversation and obtaining information as to what that individual communicated to others. Therefore, if executive privilege had been properly invoked, the Commission would be deemed to have waived the privilege with respect to two specific questions[56] by allowing the witness to respond to prior questions in which the substance of the witness' advisory communications were divulged.

[25] Neither the Commission's failure to properly demonstrate the existence of executive privilege nor its inadvertent waiver of the privilege with respect to two specific questions requires the Court to compel answers by Mr. Hubler. This is because Mr. Hubler's views have no relevance to the ultimate review to be undertaken by the Court

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[56] Questions Nos. 5 and 6, Docket No. 54, Exhibit D.

in this action, as such review, with limited exceptions, will be confined solely to the administrative record.[57]

III. ATTORNEY-CLIENT PRIVILEGE

[26] The Commission has also sought to raise the attorney-client privilege with respect to two of the documents sought by plaintiff. The contours of this privilege in this district were recently enunciated in *International Paper Company* v. *Fibreboard Corporation, supra* where it was held that:

> "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a *fact* of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for purposes of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client."

63 F.R.D. at 93, *citing U. S.* v. *United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-9 (D.Mass.1950). While the Commission did submit an affidavit setting forth the facts upon which the attorney-client privilege claim is based, two elements necessary to justify the imposition of the privilege appear to be lacking. First, there is no showing that the documents contain any *facts* which had previously been communicated to Commission counsel. Secondly, the apparently wide distribution of these documents within the Commission renders it difficult to conclude that the original information conveyed, if any, was communicated in a confidential manner. Accordingly, the attorney-client privilege will not shield Documents Nos. 167 and 168.

IV. THE COMMISSION'S MOTION FOR A PROTECTIVE ORDER

[27] The Commission's motion for a protective order is granted predicated **[1020]** upon a finding that "good cause" has been demonstrated to prevent the taking of depositions from certain Commission officials. While the Court has rejected both the Commission's argument that the taking of these depositions would disrupt the LB Program's functioning and the contention that the depositions are inappropriate because this is an enforcement proceeding, the Commission has correctly asserted that no purpose is served by continuing the depositions of Commission officials. This is because the scope of review in this matter, confined with only limited exceptions, to the administrative record, renders such discovery improper and irrelevant. *See Elm*

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[57] The Commission earlier sought a protective order against the taking of Mr. Hubler's deposition. Other than an improperly raised claim by counsel of executive privilege, the Commission's sole argument in support of its motion was that such discovery was improper because this was an enforcement proceeding. No contention was properly urged that such discovery was improper because lacking in relevance to the scope of review.

Grove Savings & Loan Ass'n v. *Federal Home Loan Bank Board*, 391 F.Supp. 1041, 1043 (E.D.Wis.1975). It is therefore unnecessary to deal with the Commission's request that the Court certify this question under 28 U.S.C. § 1292(b).[58]

CONTROL DATA CORPORATION ET AL. v. FEDERAL TRADE COMMISSION*

Civ. A. No. 4-74-Civ. 412. F.T.C. Docket No. 8940.

(United States District Court for the District of Minnesota, October 2, 1975)

On motion of plaintiff for preliminary injunction, Court held that the "usual expense and annoyance" of litigation are not such "irreparable injury" as will justify a preliminary injunction.

Motion denied.

Before LARSON, *District Judge*.

Plaintiffs here are respondents in an administrative proceeding currently pending before the Federal Trade Commission (FTC) for alleged violations of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, in the conduct of their respective electronic data processing vocational education programs. A summary of those proceedings from March 1971 to January 1974 can be found in this Court's Order and Memorandum in a prior case between the present parties. *Control Data Corporation* v. *Federal Trade Commission*, No. 4-74-Civ. 25 (D. Minn. Feb. 28, 1974).

The complaint in this case was filed on August 23, 1974. Jurisdiction is invoked pursuant to 5 U.S.C. §§ 552(a)(3), 702, 704, and 706, and 28 U.S.C. § 1361. With the complaint plaintiffs filed a motion for a preliminary injunction. Oral argument on the motion was heard on September 16, 1974. For the reasons set out below, that motion must be denied.

The complaint incorporates by reference much of the recent administrative record in the FTC proceeding. That record indicates that on February 7, 1974, plaintiffs filed with the administrative law judge a request for issuance of a subpoena directed to certain information within the control of the FTC; that on March 11, 1974, that request was granted in part and denied in part; that on March 19, 1974, plaintiffs submitted a petition to the Secretary of the FTC requesting disclosure pursuant to 5 U.S.C. § 552 of five classes of information that had been denied in the Order of March 11. The five classes of information sought were:

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[58] 28 U.S.C. § 1292(b) provides that:

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. . . ."

* Not otherwise reported. See also p. 1449 herein. For case before the Commission, see 86 F.T.C. 180, 1094.

> (1) Names and addresses of all persons, other than FTC staff, having knowledge of any of the allegations in the complaint before the Commission;
>
> (2) Records of every committee, group, or task force, on which the FTC participated, which studied private vocational education in the United States at any time since 1969;
>
> (3) The membership of each committee, group, or task force described in (2);
>
> (4) Records relating to revisions or amendment of the FTC's guidebook "Our Vocational Training Can Guarantee You the Job of a Lifetime";
>
> (5) Various records relating to development and preparation of "Guide 10(e)" of the FTC's "Guides for Private Vocational and Home Study Schools."

On May 23, 1974, the Secretary agreed to produce a small portion of the documents requested and refused to produce the remainder. On June 10, 1974, he advised plaintiffs that they would be allowed to inspect the documents produced pursuant to the May 23 letter only after payment of a "search and segregation fee" of $183.00. The complaint and the motion for a preliminary injunction seek an Order compelling production of the documents requested of the Secretary and enjoining defendants from requiring payment of any search and segregation fees in connection with production of those documents.

Factors to be considered on a motion for a preliminary injunction are "(1) the significance of the threat of irreparable harm to plaintiff if the injunction is not granted; (2) the state of the balance between this harm and the injury that granting the injunction would inflict on defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest." 11 Wright and Miller, *Federal Practice and Procedure: Civil* § 2948, at 430–431. The most important of these factors, essential to obtaining a preliminary injunction, is the threat of irreparable harm if the injunction is not granted. *Id.*, at 430–438.

In the earlier litigation between these parties, this Court denied plaintiffs' motions for preliminary and permanent injunctions enjoining the administrative proceedings until the FTC produced certain documents then in dispute. The Court held in its Order and Memorandum of February 28, 1974, that plaintiffs had not made a showing of "irreparable injury" sufficient to stay the administrative proceedings. The setting of the present motion differs from that in the earlier case in that only production of documents, not a stay on the administrative proceedings, is sought. However, the Court holds that the test of "irreparable injury" is the same in both circumstances. In his affidavit in support of the present motion, counsel for plaintiffs claims that denial of the preliminary injunction will make it impossible to prepare adequately a defense to the administrative complaint. A very similar contention was considered and rejected in No. 4-74-Civ. 25 (Order and Memorandum of February 28, 1974, at 7-8). The Court's discussion there is fully applicable here. In brief, the "usual expense and annoyance" of litigation are not such "irreparable injury" as will justify a preliminary injunction.

It should be noted that in denying the preliminary injunction for failure to show irreparable injury, the Court expresses no view on the merits of the action.

Accordingly, upon all the records, files, and proceedings herein,

IT IS ORDERED:

That plaintiffs' motion for a preliminary injunction is denied.

FEDERAL TRADE COMMISSION v. J.B. WILLIAMS CO., INC.*

No. 70 Civ. 1589 F.T.C. Docket 8547

(United States District Court, Southern District of New York, October 24, 1975)

After in camera inspection of documents in a civil penalties suit, Court directed that F.T.C. furnish particular documents to defense counsel while denying discovery of other documents pursuant to Exemption 5 of the Freedom of Information Act.

Paul J. Curran, Patricia M. Hynes, Frederick P. Shaffer, New York, N.Y., for plaintiff.

Powell Pierpont, Hughes Hubbard & Reed, New York, N.Y., *Charles A. Horsky, John Vanderstar, Covington & Burling*, Washington, D.C., *Henry E. Schultz*, New York, N.Y. for defendant.

Before PIERCE, *District Judge:*

OPINION AND ORDER

Defendant in this civil penalty action moved for an order compelling discovery of certain documents pursuant to Rule 37(a), Fed. R. Civ. P. By order of this Court dated July 2, 1975, the motion was referred to Magistrate Raby. The Magistrate's report was received by this Court on September 9, 1975. That report stated that of the seven categories of documents requested by defendant, three categories were no longer at issue. As to the four remaining categories, the Magistrate concluded that all documents sought were immune from disclosure by virtue of Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5).

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* Not reported in Federal Reporter. Reported Trade Reg. Rep. ¶60,605 at 67,664 (1975-2 Trade Cases). See also pp. 438 and 938 herein. For case before the Commission, see 68 F.T.C. 481; *modified* 72 F.T.C. 865, 74 F.T.C. 1620, 1632.

The Magistrate reached this conclusion after having ordered *in camera* review of documents in Category One; he did not review documents in Categories Three, Six or Seven.

Counsel for defendant filed timely objections to the recommendations of the Magistrate, and those objections were received by this Court on September 18, 1975. On September 22, 1975 this Court issued an order to counsel for plaintiff, directing production of the relevant documents for *in camera* review. The order further directed counsel for plaintiff to furnish the Court with an affidavit of a person with personal knowledge to the effect that all documents described in Document Categories One, Six and Seven required by law to be disclosed as policy of the Federal Trade Commission related to this case had been in fact furnished to defendant. In an affidavit filed October 3, 1975, counsel for plaintiff declined to supply such a statement, stating that such a statement called for a legal conclusion to which neither counsel nor any employee of the Commission was competent to swear under oath. On October 8, the Court directed counsel for plaintiff to comply with the order of September 22, 1975. Thereafter, on October 10, 1975, counsel for plaintiff provided the Court with an affidavit listing six documents which had been sent to defendant and stating that said documents constitute all documents required by law to be disclosed as policy of the Commission related to this case. By October 16, 1975, all documents in the possession of the plaintiff described in Documents Categories One, Three, Six and Seven had been produced for review *in camera*. The Court has carefully reviewed fifteen different documents in Category One, and directs that three of those documents be furnished to defendant in that they constitute "final opinions" of an agency and "instructions to staff that affect a member of the public." 5 U.S.C. § 552(a)(2)(A) and (C). As regards the other twelve documents in Category One, the Court concludes that they are immune from disclosure as predecisional intra-agency memoranda. 5 U.S.C. § 552(b)(5). As regards Category Three, the Court concludes that all twenty-three documents in that category are immune from disclosure by virtue of § 552(b)(5), § 552(b)(7) and the rule of *Hickman* v. *Taylor*, 329 U.S. 495 (1947). Categories Six and Seven, treated by all parties as one category, contain nineteen documents. The Court concludes that these documents are predecisional intra-agency memoranda immune from disclosure by virtue of § 552(b)(5). A discussion of the nature of the documents and the applicable law follows.

Category One

In its original request to produce, defendant asked for copies of all records in the possession, custody, or control of plaintiff or of the

Federal Trade Commission which were prepared during the period from November 24, 1967 to and including November 28, 1969, and which consist of (1) instructions or directives from the Commission or members thereof to any employee of the Commission relating to interpretation of or compliance with the modified cease and desist order issued by the Commission on November 24, 1967, against defendant. However, plaintiff then refused to produce said documents, relying upon 5 U.S.C. § 552(b)(5) and (7). The documents produced for the inspection of the Court under Category One fall into six subcategories:

a. Direction by the Commission to various staff personnel to prepare drafts of documents for Commission consideration. (Nos. 1, 6, 7, 9, 13, 15).

b. Direction by the Commission that certain alterations be made in drafts of documents currently under consideration. (Nos. 4, 4a, 8, 10, 12, 14).

c. Opinions and requests of various individual Commissioners. (Nos. 7, 15).

d. Direction by the Commission to the staff to conduct an investigation. (No. 11).

e. Direction by the Commission to the staff to perform certain acts in preparation for a public hearing and the procedures to be followed at that hearing. (Nos. 2, 3).

f. Direction by the Commission that a certain document be placed on the public record. (No. 5).

In evaluating any claim of exemption under § 552(b)(5) of the Freedom of Information Act, there are a number of general principles which must be considered. Initially, all agency documents sought are available unless specifically exempt. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975). All of the documents at issue here were doubtless produced by an "agency" within the meaning of the Information Act, and the documents are "identifiable records" under the Act. *Id.* at 147.

As regards Exemption 5 (§ 552(b)(5)), which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency", the cases have evolved at least five general principles. The first is that Exemption 5 covers predecisional memoranda which are part of the deliberative process but does not exempt postdecisional memoranda which serve merely to explain a decision already made. *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 183-84 (1975); *NLRB* v. *Sears, supra*, at 152; *Sterling Drug* v. *FTC*, 450 F.2d 698, 706 (D.C. Cir. 1971). Second, Exemption 5 embraces the attorney work product privilege of *Hickman* v. *Taylor*, 329 U.S. 495 (1947).

NLRB v. *Sears, supra,* at 154. Third, Exemption 5 protects the deliberative or policymaking process but does not exempt purely factual or scientific information. *EPA* v. *Mink*, 410 U.S. 73, 89 (1973).[1] Fourth, where it is clear that an agency has adopted material in an otherwise exempt document as the basis of a non-exempt decision, some courts have held that the adopted material loses its immune status. See, e.g., *Sterling Drug* v. *FTC*, 450 F.2d 698, 706-08 (D.C. Cir. 1971); *American Mail Line, Ltd.* v. *Gulick*, 411 F.2d 696 (D.C. Cir. 1968).[2] Fifth, § 552(a)(2)(A) and (C) require that each agency shall make public all "final opinions" and "administrative staff manuals and instructions to staff that affect a member of the public." Counsel for defendant urge a broad reading of this subsection, asserting that whenever the Commission instructed its staff to take any action relating to J. B. Williams Co., that act necessarily involved an instruction which affected a member of the public. However, the case law does not support this interpretation. In *NLRB* v. *Sears, supra,* the lower court held that NLRB Advice and Appeals memoranda prepared by the General Counsel of the NLRB instructing Regional Directors whether or not to file suit were "instructions" under § 552(a)(2)(C). 346 F.Supp. 751, 754 (D.D.C. 1972). However, the Supreme Court, in reversing the judgment on other grounds, did not reach the issue. *NLRB* v. *Sears, supra,* at 160 and n. 26. Instead, the Supreme Court held that NLRB Advice and Appeals Memoranda which decide *not* to file suit are "final opinions" under § 552(a)(2)(A) and thus nonexempt, while decisions to file suit are exempt as part of the ongoing deliberative process shielded by § 552(b)(5). Thus, it seems clear to this Court from *Sears* that the mandate that instructions be disclosed cannot be seen as an exception to § 552(b)(5); rather, § 552(b)(5) is a statutory exception to any of the other sections of the statute which require disclosure, including § 552(a)(2)(C).

With the guidelines of the case-law construing Exemption 5 in mind, it is clear that all documents contained in subcategories a-d of Category One *supra* are within the intra-agency exemption. Certainly a direction to prepare a draft of a document and instructions to work deletions and alterations into drafts are at the heart of the deliberative process within the agency. See *NLRB* v. *Sears, supra,* at 150. These documents are without a doubt a reflection of the "agency's group thinking in the process of working out its policy and determining what the law is." *Id.*

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[1] Further, "purely factual material contained in a deliberative memoranda and severable from its context would generally be available for discovery." *Id.* at 88. However, see the discussion under Category Three, infra.

[2] However, the Supreme Court has indicated that this "adoption" concept must be treated with caution. It cannot be presumed that, merely because a decision reached the same result as recommended by an intra-agency memo, it follows that the memo was "adopted" as policy. *Renegotiation Board, supra,* at 185-86. "Indeed, release of the [inter-agency] reports on the theory that they express the reasons for the Board's decision would, in those cases in which the Board had other reasons for its decision, be affirmatively misleading." *Id.* at 186.

at 153, quoting Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 797 (1967).

As for the opinions and requests of the individual commissioners, it is axiomatic that "nowhere is [the] protection [of nondisclosure] more needed than between the ultimate decision-makers within an agency." *Sterling Drug* v. *FTC*, *supra*, at 708. Similarly, instruction to the staff to conduct an investigation is at the very starting point of the deliberative process. Each of these documents reveals a segment of "a valuable deliberative tool" which should not be made subject to public scrutiny. See *Renegotiation Board*, *supra*, at 190.

However, the documents in subcategories e and f of Category One are clearly postdecisional. Each of these documents evidences an explanation or direction to staff based upon what has already been decided by the full Commission. Although document No. 2 in Category One, directing that a hearing be set down, is marked "confidential" and although it contains marginal notations, in the Court's judgment it is postdecisional and does not reflect the deliberative process. Document No. 3, which sets procedures for the hearing, is also postdecisional and thus not within the ambit of the intra-agency exemption. The same is true of document No. 5, which simply directs that a certain document be made public. The Court accordingly holds that these, the second, third and fifth documents supplied by the government under Category One, are postdecisional and final decisions of the Commission which must be disclosed pursuant to § 552(a)(2). All other documents in Category One are protected by the intra-agency exemption.

Category Three

In this category, defendant requests all "memoranda or reports prepared by any employee of the Commission and reporting on conferences or conversations with any representative of defendant relating to interpretation of or compliance with the modified [cease and desist] order." Pursuant to this request, counsel for plaintiff gathered relevant documents from Commission files and produced said documents for this Court's review *in camera*.

The Court has carefully examined the twenty-three documents; twenty-two are letters written by staff attorneys or directors of the Bureau of Deceptive Practices to the files, often with copies to other staff personnel. One letter is from a staff attorney to the Commission itself. All these letters contain recollections of the author as to meetings held with representatives of the defendant, and the overwhelming majority contain recommendations and mental impressions of the author. It is clear to the Court that these documents must be judged against the standards of *Hickman* v. *Taylor*, 329 U.S. 495 (1947). The work product rule of that case is directly applicable to, and contained within, the intra-agency exemption of § 552(b)(5). *NLRB* v. *Sears, supra*, at 154.

Counsel for defendant urge that these letters and memos are discoverable because they are "purely factual" accounts of meetings, citing a string of cases which hold that Exemption 5 does not protect factual or scientific materials. However, none of those decisions are apposite; all deal with *scientific* facts or purely investigative data. See, e.g., *EPA* v. *Mink*, 410 U.S. 73 (1973) (results of investigations concerning scheduled nuclear testing); *Soucie* v. *David*, 448 F.2d 1067 (D.C. Cir. 1971) (scientific report on supersonic transport); *General Services Administration* v. *Benson*, 415 F.2d 878 (9th Cir. 1969) (results of GSA appraisal under government contract); *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963) (Air Force report on airplane crash.) In this case, the records of recollections of attorneys of the Federal Trade Commission engaged in compliance proceedings with the respondent cannot be characterized as "purely factual" even if they purport only to record what transpired. Rather, they are work product. Work product covers the "personal recollections" of an attorney. *Hickman* v. *Taylor, supra*, at 510. A lawyer will always "sift what he considers to be the relevant from the irrelevant facts." *Id.* at 511.

> Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down. Such testimony does not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and more an ordinary witness. (*Hickman* v. *Taylor, supra*, at 512–13.)

In *Hickman*, the Supreme Court refused to allow the movant discovery of an adversary's interrogation of witnesses where the movant had not been present at the interrogation. Here defendant requests discovery of records of conversations with *defendant*. Defendant's agents were present at all these meetings; their own recollection is available. The fact that defendant alleges that records of these meetings will be pertinent to a good faith defense does not warrant disclosure under *Hickman*. The crucial fact is that defendant's agents were present.

It is undisputed that the federal government enjoys the benefit of the work product privilege in litigation. *NLRB* v. *Sears, supra*, at 154; *Wu* v. *National Endowment for Humanities*, 460 F.2d 1030, 1033 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *International Paper Co.* v. *FPC*, 438 F.2d 1349 (2d Cir. 1971); *Olson Rug Co.* v. *NLRB*, 291 F.2d 655 (7th Cir. 1961); see *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss Jena*, 40 F.R.D. 318, 325 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.D. Cir.), *cert. denied*, 389 U.S. 952 (1967).

Accordingly, the Court holds that defendant has failed to make a sufficient showing to overcome the rule of *Hickman* v. *Taylor*, and holds that all documents in Category Three are protected by the "intra-agency" exemption of § 552(b)(5).

Further, the Court notes that all these records were made in preparation for the present litigation. Thus, the Court further holds that the documents in Category Three are immune from disclosure as "investigatory files compiled for law enforcement purposes" under § 552(b)(7). See *NLRB* v. *Sears, supra*, at 164-66; *Bristol-Myers Co.* v. *FTC*, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 894 (1970) (concrete prospect of enforcement proceedings).

Categories Six and Seven

Under this heading defendant requested all memoranda, studies, reports or other records adopted as policy by the Commission or any official thereof or relied upon by the Commission or any official thereof with respect to interpretation of or compliance with the modified cease and desist order.

This request involves the "adoption" concept discussed above. Under this category, counsel for plaintiff produced for *in camera* review nineteen documents. These included staff recommendations, recommendations of the General Counsel, memoranda of law, opinions of the individual Commissioners, proposed drafts, and a letter to the Attorney General of the United States, certifying the penalty action. On the basis of the Court's discussion concerning Category One, it is clear that, standing alone, all these documents are inter-agency or intra-agency memoranda exempt from disclosure by virtue of § 552(b)(5). However, it is possible that a document, which would be exempt standing alone, may lose that status by reason of its adoption as policy by the agency. See *Renegotiation Board, supra*, at 189; *NLRB* v. *Sears, supra*, at 152-53.

This "adoption" concept is not inconsistent with the purpose of Exemption 5 to protect internal deliberations. Rather, the "adoption" concept is also based upon the distinction between pre-decisional deliberations and decisional documents. By forcing agencies to make public documents which constitute the true basis for a decision, the Information Act operates to prevent the development of "secret law" against which unwitting respondents may be judged. *Sterling Drug, supra*, at 708. Defendant urges upon the Court a broad interpretation of this "adoption" concept, pursuant to its review of the decision of the Court of Appeals in *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 482 F.2d 710 (D.C. Cir. 1973). There the court wrote:

> [A] document which a decision-maker treats as justification for a decision communicated outside the bureaucracy to regulated parties should not be shielded from public

> disclosure on the ground that it was originally prepared for purposes of predecisional consultation. (*Id.* at 720)

Taking the language one step further, counsel for defendant urge the Court to accept the view that even in a case where the agency does not recite that it treated such a document as a basis for its decision, if it in fact relied upon the document, that document is disclosable.

There are two problems with this position. The first is that the decision of the Court of Appeals in *Grumman* was reversed by the Supreme Court. *Renegotiation Board, supra,* 421 U.S. 168 (1975). In so doing, the Supreme Court disapproved of any broad presumption of "adoption". The decision clearly requires that there be support in the record before any conclusion regarding "adoption" is reached. *Renegotiation Board, supra,* at 184-90.

> It is not for us to require disclosure of documents, under the purported authority of the Act, which are not final opinions, which do not accurately set forth the reasons for the [agency's] decisions, and the disclosure of which would impinge upon the . . . predecisional process. (*Id.* at 192).

Further, defendant's position would require that every document *relied upon* by an agency in reaching a decision be subject to disclosure. Clearly, the cases speak of "adoption," not "reliance." The argument that all documents relied upon are disclosable turns Exemption 5 on its head; the more a document was part of the predecisional deliberative process, the more likely it would be subject to disclosure. This was not the intent of the Congress. See *EPA* v. *Mink, supra,* at 86.

In this Court' judgment, the proper test for assessing whether a document has been "adopted" is that set forth in *Sterling Drug* v. *FTC, supra:*

> [I]f the Commission memoranda specifically indicate that reasons for its . . . decisions are contained in one or more of the memoranda prepared by individual members of the Commission or its staff, these memoranda, or the relevant portions thereof, must also be disclosed. (*Id.* at 708; accord, *American Mail Line* v. *Gulick, supra.*)

In the present case, the record contains no indication that any of the documents in Category Six or Seven were adopted as policy by the Commission. In fact, counsel for plaintiff has supplied this Court with a sworn affidavit to the effect that all documents in the relevant categories required by law to be disclosed as Commission policy related to this case have been provided to the defendant. Thus, the Court concludes that none of the documents in Categories Six or Seven were "adopted" by the Commission, and holds that these documents are immune from disclosure by virtue of Exemption 5, § 552(b)(5).

Counsel for plaintiff is directed to furnish defendant with copies of the second, third and fifth documents contained in Category One of the documents produced for *in camera* inspection. The motion of defendant J. B. Williams Co. for an order pursuant to Rule 37(a) F. R. Civ. P. is in all other respects denied.

So ordered.

H.R. GIBSON, SR., ET AL. v. AL COHEN ET AL.*

Civ. A. No. 75-H-1539. F.T.C. Docket No. 9016.

(United States District Court, Southern District of Texas,
October 30, 1975)

On motion for dismissal of complaint by intervenor in case involving one respondent in F.T.C. administrative proceeding attempting to enjoin co-respondent in same proceeding from voluntarily complying with administrative subpoenas *duces tecum*, court held that plaintiff in this case had no standing to seek injunction because the complaint failed to state a claim upon which relief could be granted.

Accordingly, plaintiff's motion for temporary restraining order and preliminary injunction is denied; F.T.C. motion for summary judgment dismissing above complaint is granted.

Bardwell D. Odum, Dallas, Texas, for plaintiffs.

Presley E. Werlein, Jr., Houston, Texas, for defendants.

Edward B. McDonough, Jr., U.S. Atty., *William L. Bowers, Jr.*, Asst. U.S. Atty., Houston, Texas, and *Robert J. Lewis, Gerald P. Norton, Gerald Harwood* and *John T. Fischbach*, F.T.C., Washington, D.C., for Intervenor.

Before BUE, JR., *District Judge.*

MEMORANDUM AND OPINION

I. INTRODUCTION

Plaintiffs (hereafter sometimes referred to as "Gibson") filed suit in this Court on September 8, 1975, seeking to enjoin defendants (hereafter sometimes referred to as "Cohen") from complying voluntarily with administrative subpoenas duces tecum issued by the Federal Trade Commission ("FTC"). The subpoenas were issued in furtherance of pre-trial discovery being conducted in an adjudicative proceeding instituted as the result of a complaint filed by the FTC on February 25, 1975, which names both Gibson and Cohen as respondents. *See In the Matter of Herbert Gibson, Sr., et al.*, Docket No. 9016 (February 25, 1975). The FTC has moved to intervene in the instant suit to challenge Gibson's efforts to impede pre-trial discovery directed at Cohen. The motion to intervene is granted, pursuant to Fed. R. Civ. P. 24(a).

To the extent that plaintiffs' complaint is justiciable, the equities invoked therein clearly preponderate in favor of the FTC because the complaint fails to state a claim upon which relief can be granted.

***Not otherwise reported. This case has been reported herein because of the F.T.C.'s participation as an intervenor therein. The decision reached revolves around F.T.C.'s role as intervenor. See also p. 1530 herein. For case before the Commission, see 87 F.T.C. 1389.**

Accordingly, plaintiffs' motions for a temporary restraining order and a preliminary injunction are denied. Additional pleadings and affidavits have been submitted to the Court amplifying the contentions of the original complaint. The failure of the complaint as amplified to state a claim dictates that the FTC's motion to dismiss should be granted. Because the complaint has been amplified, the motion to dismiss will be treated as a motion for summary judgment in accordance with the last sentence of Fed. R. Civ. P. 12(b), and summary judgment is hereby granted in favor of the FTC.

II. FACTS

Gibson and Cohen are co-respondents in an adjudicative proceeding[1] now pending before an Administrative Law Judge. *In the Matter of Herbert Gibson, Sr., et al.*, FTC Docket No. 9016 (February 25, 1975). The proceeding was initiated when the FTC filed a complaint against Gibson, Cohen and others, alleging violations by the respondents of Section 5 of the Federal Trade Commission, 15 U.S.C. § 45(a),[2] and Section 2(c) of the Clayton Act, as amended, 15 U.S.C. § 13(c).[3]

After issue was joined, the FTC attempted to secure voluntary disclosure of documents designated as pertinent through informal means. This failed[4], and on July 30, 1975, the FTC applied to the Administrative Law Judge pursuant to Rules 3.33 and 3.34, 16 C.F.R. §§ 3.33 and 3.34, for depositions and subpoenas duces tecum to compel disclosure by the respondents and others of specified documents and papers. The Hearing Examiner issued an order granting the application on August 25, 1975, and Gibson moved to nullify this order on August 29, 1975, contending that it did not satisfy the requirements of Rule 3.33(a), 16 C.F.R. § 3.33(a).[5] The Hearing Examiner denied this motion, and the subpoenas were issued with a return date of September 12,

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[1] An adjudicative proceeding is a formal proceeding conducted under one or more of the statutes administered by the FTC which is required by statute to be determined on the record after opportunity for an agency hearing. 16 C.F.R. § 3.2; 15 U.S.C. § 45(b).

[2] "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." 15 U.S.C. § 45(a)(1).

[3] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid." 15 U.S.C. § 13(c).

[4] Counsel for both Gibson and Cohen notified FTC Complaint Counsel of their refusal to attempt to comply voluntarily on an informal basis. Additionally, Gibson's counsel indicated to the FTC that although he did not represent certain subsidiary Gibson stores located throughout Texas which were not respondents in No. 9016, he had been informed that these organizations would not voluntarily comply.

[5] "At any time during the course of a proceeding, whether or not issue has been joined, the Administrative Law Judge, in his discretion, may order the taking of a deposition and the production of documents by the deponent. Such order may be entered upon a showing that the deposition is necessary for purposes of discovery, and that such discovery could not be accomplished by voluntary methods. Such order may also be entered in extraordinary circumstances to preserve relevant evidence upon a showing that there is substantial reason to believe that such evidence could not be presented through a witness at the hearing. Insofar as consistent with considerations of fairness

(*Continued*)

1975. This suit was filed thereafter. Understanding this Court's role in adjudicating the instant controversy requires a brief exposition of the nature of administrative pre-trial discovery in an adjudicative proceeding before the FTC and of the role of the judiciary in reviewing the conduct of such a proceeding.

III. ADJUDICATIVE PROCEEDINGS: PRE-TRIAL DISCOVERY AND JUDICIAL REVIEW

A. *Issuance of a Subpoena Duces Tecum*

Pre-trial discovery in an adjudicative proceeding brought by the FTC is circumscribed by detailed agency rules. 16 C.F.R. §§ 3.31–3.39. Application for issuance of an adjudicative subpoena duces tecum, described in 16 C.F.R. § 3.34(b), requires that the requesting party submit a written request to the Administrative Law Judge, specifying the material to be produced and demonstrating the relevancy of the requested material and the reasonableness of the scope of the subpoena. 16 C.F.R. § 3.34(b)(1). A motion to quash may be filed in response to this application, *Id.*, and the Administrative Law Judge thereafter determines the propriety of permitting the requested discovery. 16 C.F.R. § 3.35. The rules further describe the procedures to be followed during the course of the hearing on the substantive charges. 16 C.F.R. §§ 3.41–3.46. The conduct of adjudicative proceedings is governed by the above-cited regulations, in strict accordance with statutory mandate. 5 U.S.C. §§ 554–556.

B. *Enforcement of a Subpoena Duces Tecum*

Subpoenas issued by the FTC pursuant to an adjudication are not self-enforcing. Only courts of the United States may enforce such subpoenas upon application by the Attorney General and only in the event that the subpoenaed person does not voluntarily comply. 15 U.S.C. § 49. The respondent Cohen is thus under no present duty to comply with the subpoena.

C. *Appeal of a Decision in an Adjudicative Proceeding*

At the conclusion of the adjudicative hearing, a decision is rendered by the Administrative Law Judge. 16 C.F.R. § 3.51. This decision may

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and the requirements of due process and the rules in this part, a deposition should not be ordered when it appears that it will result in undue burden to any other party or in undue delay of the proceeding, and it should not be ordered to obtain evidence from a person relating to matters with regard to which he is expected to testify at the hearing, or to obtain evidence which there is reason to believe can be presented at a hearing without the need for deposition, or to circumvent the orderly presentation of evidence at the hearing. Depositions may be taken orally or upon written interrogatories and cross-interrogatories before any person having power to administer oaths who may be designated by the Administrative Law Judge." 16 C.F.R. § 3.33(a).

be appealed to the Commission, 16 C.F.R. § 3.52, and the Commission may adopt, modify or set aside the findings and conclusions of the Administrative Law Judge. 16 C.F.R. § 3.54. Additionally, the rules provide for an interlocutory appeal of a decision by the Administrative Law Judge prior to the time of the hearing. 16 C.F.R. § 3.23(b).

Once the Commission has completed its review of the adjudicative proceedings, it decides whether cease-and-desist orders should be issued for those actions which are proved to be in violation of a statute. 15 U.S.C. § 45(b). This decision is appealable to a United States Court of Appeals, which has exclusive jurisdiction to review the orders of the FTC. 15 U.S.C. §§ 45(c) and (d). The Court of Appeals may affirm, enforce, modify or set aside orders of the Commission. *Id.*

Jurisdiction to review agency action taken as the result of findings of an adjudicative proceeding reposes exclusively with the United States Court of Appeals. 15 U.S.C. §§ 21(d), 45(b). As the United States Court of Appeals for the Fifth Circuit has emphasized, all constitutional, jurisdictional, substantive and procedural issues arising in Commission proceedings may be considered in an appeal, and this statutory right to review has long been viewed as constituting a speedy and adequate remedy at law. *Frito-Lay, Inc.* v. *F.T.C.*, 380 F.2d 8, 9-10 (5th Cir. 1967). The role of courts of the United States during pre-trial discovery of an adjudicative proceeding is quite limited when no enforcement proceeding is filed by the FTC. *See Papercraft Corp.* v. *F.T.C.*, 307 F. Supp. 1401 (W.D. Pa. 1970).

IV. PLAINTIFFS' COMPLAINT

Gibson asserts without elaboration that it has a "proprietary interest" in the records which have been subpoenaed from Cohen (and, by implication, from all others who have been requested to produce documents pertinent to Gibson in the proceeding whether or not they are respondents) and contends that it will be injured when Cohen voluntarily complies with the subpoena at the appointed time.[6] The documents in Cohen's possession that concern Gibson, and to which Gibson raises objection, are business orders appearing on "Gibson Trade Show Sheets". Gibson asserts without elaboration that these sheets automatically qualify as the property of the Gibson Trade Show, a registered assumed name of plaintiff H. R. Gibson, Sr. Plaintiff's Brief, *supra* at 13.

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[6] The return on the subpoenas was originally scheduled for the first week of September. Because this suit was filed, and in an effort to accommodate this Court, the FTC agreed to postpone the deadline date to mid-October.

That Cohen will voluntarily comply is apparently true, but that was not Cohen's original position. As noted above, when Cohen was first approached by the FTC about informally complying without the need to request a subpoena from the Administrative Law Judge, Cohen refused to cooperate, necessitating the application for the subpoena. However, this Court is satisfied by representations of counsel for the FTC that Cohen is indeed planning to cooperate voluntarily without requiring the FTC to first seek compliance pursuant to 15 U.S.C. § 49. If there were some question of Cohen's voluntary compliance, this Court would dismiss Gibson's complaint as being totally hypothetical and not justiciable.

Gibson seeks to have this Court prevent Cohen from complying voluntarily and to force the FTC to attempt to enforce the subpoena via the procedures established in 15 U.S.C. § 49. Gibson contends that only if a hearing is required pursuant to 15 U.S.C. § 49 can it properly protect its proprietary interests and voice its Fourth and Fifth Amendment claims. Resolution of the merits of this case is reached after consideration and treatment of certain preliminary issues.

V. JURISDICTION

Plaintiffs' allegations state a cause of action which arises under the Constitution and laws of the United States. The Court therefore views jurisdiction as proper under 28 U.S.C. § 1331. 13 Wright, Miller & Cooper, Federal Practice and Procedure: Civil § 3562 (1975); *Atlantic Richfield Co.* v. *F.T.C.*, 398 F. Supp. 1, 7 & n.5 (S.D. Tex. 1975).[7]

VI. JUSTICIABILITY: CASE OR CONTROVERSY

This Court's jurisdiction extends only to the adjudication of cases or controversies. In this case, there is a serious question as to whether a proper case or controversy exists between Gibson and Cohen. Gibson, Cohen and others were served with similar adjudicative subpoenas. Aside from its Fifth Amendment due process contention and Fourth Amendment contention, Gibson objected to the Administrative Law Judge as to the alleged irrelevancy and overbreadth of the agency's request and also opposed discovery because of the alleged confidentiality of the material requested, objections also raised initially by counsel for Cohen.

In this suit, Gibson seeks to put distance between itself and its adjudicative proceeding co-respondent Cohen by alleging that they occupy dissimilar positions and that while Cohen has no interest in disclosing information within its files, Gibson has a very strong and protectible interest in challenging disclosure.

The Court concludes that the interests of Gibson and Cohen in the instant suit are not sufficiently adverse so as to give rise to a justiciable case or controversy. Gibson asserts on the one hand that Cohen will comply with the subpoenas issued by the FTC, but Gibson has also succeeded in persuading Cohen to withhold disclosure until such time as this suit is resolved. Cohen has filed no brief or otherwise indicated any opposition to Gibson's position.[8] It cannot be assumed that Cohen actively opposes an attempt to prevent disclosure of information which, if disclosed, could result in the imposition of statutory penalties against it as a respondent in the pending adjudicative proceeding.

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[7] Plaintiffs invoked the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1331, 1332 and 1337. Jurisdiction is not proper under § 1332 because there is not complete diversity of citizenship between the named plaintiffs and named defendants. Jurisdiction is not proper under § 1337. Plaintiffs' allegations relate solely to defects in procedure which allegedly violate rules and regulations required to be promulgated by the FTC in furtherance of its administrative agency authority. 5 U.S.C. §§ 554-556.

With regard to § 1331, plaintiffs' allegations on their face raise questions about potential due process violations and unlawful search and seizure. However, while the complaint alleges that more than $10,000 is in controversy, the complaint nowhere else mentions any amount in controversy, nor do plaintiffs sue for any damages, except to pray for "such other and further relief as they may be entitled to . . . at law."

Commentators have suggested that federal question cases involving interpretation of administrative rules and regulations obviate the need for the presence of a jurisdictional amount. Davis, Administrative Law Treatise, § 23.02 at 789-91 (1970 Supp.); *e.g.*, *Rusk* v. *Cort*, 369 U.S. 367 (1962). The Court concludes from the pleadings that jurisdiction is proper in this case under 28 U.S.C. § 1331. *See generally* Annotation, *Jurisdiction of Federal District Court to Entertain Attacks on Federal Trade Commission's Actions*, 16 A.L.R. Fed. 361 (1973).

In short, this Court concludes, as has the United States Supreme Court in another context, *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971); *cf. United States* v. *Johnson*, 319 U.S. 302 (1943), that both plaintiffs and defendants seek the same or a similar result from this litigation. There is, therefore, no present case or controversy between them, and for that reason the defendants are hereby dismissed from this action.

VII. STANDING; SUBSTANTIVE MERITS OF THE CASE

The judicial contours of this case are therefore properly drawn to encompass only Gibson and the FTC. The real controversy is between them, and the FTC's obvious interest in the outcome coupled with Cohen's invocation of no opposition prompts this Court to grant the FTC's Rule 24(a) motion to intervene. Gibson contends that when a challenge is issued to the validity of a subpoena duces tecum such as the one issued in this case by any party with an alleged protectible interest in the documents, a Court of the United States is required to scrutinize the subpoena to determine whether the information sought is relevant and not for unauthorized purposes. Because judicial review is already provided by 15 U.S.C. § 49 in those instances where the FTC must seek judicial enforcement of a subpoena duces tecum, Gibson asks this Court to prevent Cohen from complying voluntarily so as to necessitate the filing by the FTC of a Section 49 suit.

The case as properly narrowed raises two questions:[9] (1) Can a respondent in an adjudicative proceeding challenge attempts by the FTC to gather via pre-trial discovery information about that respondent or information originally supplied by that respondent to independent business entities which is pertinent to the adjudicative proceeding and which is in the files of such entities?[10] (2) Can a federal district court require the FTC to seek judicial enforcement of an administrative subpoena duces tecum via 15 U.S.C. § 49, when it would otherwise not have to do so, by issuance of an order preventing voluntary compliance on the part of a subpoenaed party solely because of the challenge described in question (1)?[11]

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[8] It must be recognized that Cohen initially opposed disclosure voluntarily on the same basis that Gibson did and continued its position to the extent that the FTC was required to apply for disclosure through the Administrative Law Judge. *See* note 4, *supra*.

[9] The Court reiterates its view that the first question framed hereafter in this case is not ripe for review at this time and that it can be fully litigated before the Court of Appeals pursuant to 15 U.S.C. §§ 21(d) and 45(b) should an appeal be taken *if and when* the FTC renders a decision adverse to Gibson. The hypothetical nature of this case is well-illustrated by the conditional tone of the preceding sentence because if the FTC concludes that no violations of the law have occurred after completing its adjudication, Gibson will have suffered no injury as to which it can complain. 5 U.S.C. §§ 702, 704.

The Court proceeds to adjudicate the two questions hereafter delineated because an arguably justiciable matter does exist with regard to Gibson's allegations of denial of due process. The proper role of federal courts in this situation has become somewhat confused because of the decision by the United States Supreme Court in *Abbott Laboratories, Inc.* v. *Gardner*, 387 U.S. 136 (1967), which this Court has previously confronted in a similar context. *Atlantic Richfield Co.* v. *F.T.C.*, *supra*, 398 F. Supp. at 12–14; *see* Davis, Administrative Law Treatise, *supra*, Chapter [illegible].

A. *Standing to Sue*

The Administrative Procedure Act confers standing to sue upon a person who is "suffering a legal wrong because of agency action". 5 U.S.C. § 702. Gibson, in order to have standing to challenge the validity of the FTC subpoena duces tecum, must show some protectible legal interest in the subpoenaed records that is subject to administrative invasion.

Gibson initiates its endeavor to provoke a Section 49 judicial confrontation by preliminarily characterizing the pending adjudicative proceeding as peculiarly subject to judicial attack. According to Gibson, the FTC has broad authority in the conduct of an investigative proceeding, *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950); *Hannah* v. *Larche*, 363 U.S. 509 (1961), but its authority to conduct an adjudicative proceeding is allegedly substantially more restricted because "all of the traditional requirements of the due process of an adversary proceeding are thrown into play." Brief of Plaintiffs In Support of Complaint and Motion For Temporary Restraining Order and Preliminary Injunction at 6 (September 24, 1975) ("Plaintiffs' Brief").

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[10] The second question listed hereafter denominates conceptually the justiciable substantive legal issue in this case. This first question "looks ahead" of this suit to the practical impact upon a subsequent litigation of granting at this time the instant injunctive relief requested. However, the first question conceptually raises the threshold issue of Gibson's standing to sue, and this inquiry must be adjudicated first.

Practically speaking, the answers to both questions derive from the same legal sources, and they will therefore be discussed together.

[11] This latter question is potentially a question of first impression in this Circuit. *Cf. United States* v. *White*, 477 F.2d 757 (5th Cir.), *aff'd per curiam*, 487 F.2d 1335 (5th Cir. 1973) (en banc), *cert. denied*, 419 U.S. 872 (1974); *Genuine Parts, Inc.* v. *F.T.C., supra*, 445 F.2d 1382; *Frito-Lay, Inc.* v. *F.T.C., supra*, 380 F.2d 8. The reported cases which touch upon the authority of the FTC to subpoena information are all cases brought by the FTC pursuant to 15 U.S.C. § 49. Since, as has been discussed in note 10 above, the central question in this case is whether a respondent such as Gibson can raise any challenge at all to the issuance of such subpoenas, the adjudication of this latter question assumes only secondary importance.

The Court notes, however, that the second question does not lack significance. In a real sense, the public interest is at stake here, since the authority of courts of the United States to interrupt ongoing FTC adjudicative proceedings in pre-trial discovery poses real problems of judicial economy, efficient functioning of agency adjudicative machinery and prompt adjudication of complaints brought by federal agencies on behalf of the public.

Increasingly, adjudicative respondents are seeking whatever means are available to challenge FTC proceedings. *See generally*, Annotation, *supra*, 16 A.L.R. Fed. 361 (1973). In the instant case, Gibson has filed suits similar to this one in virtually every federal district where regional officials of the FTC are conducting corresponding adjudicative proceedings. *See H. R. Gibson, Sr., et al* v. *Plough, Inc.*, Civil Action No. C-75-409 (W.D. Tenn.); *H. R. Gibson, Sr., et al* v. *Harold Hassenfeld*, Civil Action No. 4-75-45 (E.D. Tenn.). Gibson's motion for injunctive relief was denied in the Western District of Tennessee. In the Eastern District of Tennessee, Gibson succeeded in obtaining an ex parte temporary restraining order which has lapsed by its own terms and has not been renewed. *See* Memorandum of Points and Authorities in Support of Motion of Defendant Federal Trade Commission to Dismiss at 2-3, n.3 (October 3, 1975).

Gibson founds its main argument as to standing on the decision by the United States Supreme Court in *Reisman* v. *Caplin*, 375 U.S. 440 (1964). In that case, a witness had been served with an Internal Revenue Summons and had indicated that he would voluntarily comply. The Supreme Court rejected the petitioner's attempt to enjoin the Internal Revenue Service from enforcing the summons because he was found to have an adequate remedy at law.

According to Gibson, the Supreme Court in a later portion of the opinion stated its approval of suits by third parties to enjoin voluntary compliance with agency administrative subpoenas duces tecum by supboenaed parties. Gibson contends that it has standing to assert its position in the instant case because of the following language used by Mr. Justice Clark

> that either the taxpayer or any affected party might restrain compliance, as the Commissioner suggests, until compliance is ordered by a court of competent jurisdiction, 375 U.S. at 445.

In another case dealing with an IRS Summons, the Supreme Court held, according to Gibson, that substantial protection is afforded to a taxpayer because the summons can only be enforced by the courts.

> Once a summons is challenged, it must be scrutinized by a court to determine whether it seeks information relevant to a legitimate investigatory purpose and is not meant "to harass the taxpayer or to put pressure on him to settle a collateral dispute or for any other reason reflecting on the good faith of the particular investigation." *United States* v. *Powell*, 379 U.S. 58.

United States v. *Bisceglia*, 420 U.S. 141 (1975). Gibson further contends that this rule pertaining to an IRS investigative subpoena is applicable by analogy to an FTC adjudicative subpoena and concludes that a failure to ensure review of this adjudicative subpoena by a court of competent jurisdiction would be a denial of due process in contravention of the Fifth Amendment.

1. Adjudicative v. Investigative Subpoenas

While differences between investigative and adjudicative proceedings have previously been recognized by the United States Court of Appeals for the Fifth Circuit, *see Genuine Parts, Inc.* v. *F.T.C.*, *supra*, 445 F.2d 1382, those differences are of little significance in this case. Subpoenas issued by the FTC in either proceeding share the characteristic of non-self-enforceability, and subpoenas issued during the pendency of both types of proceedings must be enforced pursuant to 15 U.S.C. § 49 in those instances where the subpoenaed party refuses to comply voluntarily. In litigation at this stage, the central substantive question remains whether the FTC can be forced to litigate by a third party where litigation would otherwise be unnecessary.[12]

2. IRS Summonses v. FTC Subpoenas

In submitting case authorities to bolster their respective positions, both sides have cited cases to this Court which pertain to the enforceability of summonses issued by the IRS. This Court has independently sought to locate cases discussing the enforceability of FTC adjudicative subpoenas prior to commencement of a Section 49 proceeding and has found only one. *See F.T.C.* v. *Harrell*, 313 F.2d 854 (7th Cir. 1963). While IRS summonses and FTC subpoenas share many similarities, they are crucially different in one respect: no FTC adjudication can result in criminal prosecution in a suit brought to redress alleged violations of 15 U.S.C. §§ 13(c) or 41 *et seq.* This difference is significant because the sole rationale providing the foundation for the Supreme Court's concern about an overly broad IRS summons, as expressed in the *Bisceglia* case quoting *United States* v. *Powell* above, is the fear that improper conduct by the IRS can subvert a taxpayer's constitutional rights should a criminal prosecution occur.

3. Gibson's Interest in the Subject Documents

Gibson has proffered no information to the Court to substantiate its allegation of a protectible proprietary interest in the documents in the possession of Cohen, or for that matter, in any testimony Cohen might give in response to a subpoena ad testificandum, other than to state that business documents containing information relating to Gibson are in the possession and control of Cohen. Accordingly, Gibson has made no prima facie showing that it has a legally protectible interest or privilege in the subpoenaed material. *Cf. Kelley* v. *United States*, 503 F.2d 93 (9th Cir. 1974).[13]

The documents which are the subject of this "suit for protection" are not in Gibson's possession or in the possession or custody of any business official of Gibson's. There can be no vicarious assertion of Fourth Amendment rights, whether by a natural or a corporate person, *Alderman* v. *United States*, 394 U.S. 165, 171-72 (1969), and the plaintiffs therefore have no standing to raise any allegations of unlawful search and seizure.

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[12] Additionally, the Court notes that differences between adjudicative and investigative proceedings may be of little significance even at the "Section 49" stage of the proceedings. Extensive rules have been promulgated by the FTC which it has agreed to be governed by during the course of an adjudicative proceeding. 16 C.F.R. §§ 3.0 *et seq.* Once the agency creates procedural rules under which its actions are to be judged, it denies itself the right to violate these rules, 5 U.S.C. § 556; *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1957); and the rules must be scrupulously observed. *Pacific Molasses Co.* v. *F.T.C.*, 356 F.2d 386, 389 (5th Cir. 1966). Thus, when the FTC seeks judicial enforcement in an appropriate case pursuant to 15 U.S.C. § 49, its decision to seek such enforcement, already authorized by an Administrative Law Judge after a review of the relevance of the subpoenaed material, should enjoy a presumption of regularity in much the same manner that an investigative subpoena does.

The role of the Court of Appeals provides adjudicative respondents with salient relief in cases where subpoenas are allegedly improperly issued. A violation of agency rules from which prejudice results dictates that any action taken as a result of the proceedings cannot stand. *Pacific Molasses Co.* v. *F.T.C.*, *supra*, 356 F.2d at 390. The agency should not be stopped in its tracks during the proceeding only because allegations of denial of due process are sounded in conclusory language. *Bokat* v. *Tidewater Equipment Co.*, 363 F.2d 667, 673 (5th Cir. 1966).

[13] The *Kelley* case is heavily relied upon by Gibson as recent support for its position as to standing. The Court agrees with the FTC, however, that the holding of the United States Court of Appeals for the Ninth Circuit in that case states, at best, that a party raising a contention of protectible interest must be given the right to make a prima facie showing of such an interest. Given the opportunity in this case, Gibson has failed to make such a showing. Indeed,

(Continued)

A more complex, but no more meritorious, legal question is raised in adjudicating plaintiffs' Fifth Amendment rights. It is well-settled that no corporation can invoke the Fifth Amendment privilege against self-incrimination. Similarly, an individual has no right to claim a Fifth Amendment privilege on behalf of a corporation or by his mere possession or custody of corporate documents. Further, there is no right to avoid the adverse effects of evidence rendered by third parties who possess information about a corporate subject or a natural person. *E.g., Couch* v. *United States*, 409 U.S. 322 (1973); *Donaldson* v. *United States*, 400 U.S. 517 (1971). The Supreme Court, following Justice Holmes' conclusion that "[a] party is privileged from producing [incriminating] evidence but not from its production," *Johnson* v. *United States*, 228 U.S. 457, 458 (1913), has stressed that the Fifth Amendment privilege "adheres basically to the person, not to information that may incriminate him". *Couch* v. *United States, supra* at 328. There is no legitimate expectation of privacy so as to provide a basis for invoking the Fourth or Fifth Amendments with respect to records, whether belonging to an adjudicative respondent and surrendered by him to a third party, such as an accountant or a lawyer, or belonging to such third person originally. *Id.* The United States Court of Appeals for the Fifth Circuit has consistently upheld administrative subpoenas in challenges similar to the one raised here. *E.g., United States* v. *White*, 477 F.2d 147 (5th Cir. 1973); *United States* v. *Newman*, 441 F.2d 165 (5th Cir. 1971).

4. The Current Status of the Reisman Case

a. *Donaldson* v. *United States*

Even if there were no fundamental difference between an IRS summons and an FTC subpoena so that Gibson's quoted language from *Reisman* v. *Caplin* were fully applicable, reliance on the *Reisman* case would still be inappropriate because of the subsequent opinions by the Supreme Court in *Donaldson* v. *United States* and *Couch* v. *United States*, cases which clarify and restrict the prior *Reisman* holding.

In *Donaldson* v. *United States, supra*, the Supreme Court was faced with a taxpayer's challenge to an attempt by the IRS to obtain

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considering the nature of the documents described and Gibson's business relationship with Cohen, such a showing as was contemplated by the Ninth Circuit could not be made under the facts of this case.

information about the taxpayer from records of a company which had previously employed the taxpayer. Mr. Justice Blackmun, speaking for the majority, initiated his analysis of the question there presented by reiterating a point made by Judge Tuttle in the opinion for the Court of Appeals, 418 F.2d at 1214: that what was sought in *Donaldson* were records of the employer, not records of the taxpayer. No summons had been issued in that case to the taxpayer, nor was one directed to the taxpayer's records in the hands of his attorney or accountant, with the attendant questions of privilege, or even in the hands of anyone with whom the taxpayer had a confidential relationship. 400 U.S. at 523. Thus, according to Justice Blackmun, each of the *Donaldson* summonses was directed to a third person with respect to whom no established legal privilege existed. *Id.* The records sought there were records owned by a third person, in his hands, relating to that person's business transactions with the taxpayer. *Id.*

The *Donaldson* facts with regard to the nature of the records summonsed are therefore identical to the facts of this case regarding the material subpoenaed from Cohen. After reviewing the prior *Reisman* and *Powell* decisions, upon which Gibson heavily relies in the instant case, the *Donaldson* Court went on to analyze whether under the circumstances presented the taxpayer had a right to intervene in the IRS Summons proceeding pursuant to Fed. R. Civ. P. 24(a). The Court concluded that Donaldson did not have a right to intervene under Rule 24(a). 400 U.S. at 528. Looking to the language in *Reisman* relied upon by Gibson in the instant case,[14] the Court concluded that this language was permissive only and not mandatory, 400 U.S. at 529; further, such language did not dictate that in every proceeding where records were being sought which were in the custody of a third party, the subject of the investigation was entitled to participate in the judicial proceeding which determined whether disclosure was appropriate.

The Court went on to illustrate when a District Court could allow the taxpayer to intervene: (1) where the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution; and (2) where the material sought is protected by the attorney-client privilege. 400 U.S. at 530. The Court therefore expressly overruled those decisions by the Courts of Appeals which had previously held that a taxpayer could intervene simply because it was his tax liability that was the subject of an IRS summons. *Id.*

The Court then turned to the question of Donaldson's "interest" in the summonsed material:

> The nature of the "interest" urged by the taxpayer is apparent from the fact that the

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[14] "[T]he party summoned and one '*affected by a disclosure* may appear or intervene' before the Court." 400 U.S. at 529 *quoting Reisman v. Caplin, supra*, 375 U.S. at 445, 449.

> material in question (once we assume its relevance) would not be subject to suppression if the Government obtained it by other routine means, *such as by Acme's independent and voluntary disclosure prior to summons*, or by way of identifiable deductions in Acme's [Donaldson's employer] own income tax returns, or through Mercurio's [Acme's accountant's] appearance as a trial witness, *or by subpoena of the records for trial*. This interest cannot be the kind contemplated by Rule 24(a)(2) when it speaks in general terms of "an interest relating to the property or transaction which is the subject of the action." (emphasis added) 400 U.S. at 531.

To this Court, the above-quoted language totally disposes of Gibson's contentions in the instant case. Gibson disputes this, contending that the *Donaldson* Court resolved nothing more than an interpretation of Rule 24(a). This Court does not agree. The *Donaldson* Court declared that a person in Gibson's position can have no protectible interest in records of the kind which are subpoenaed in the instant case. Thus, Gibson cannot possibly intervene in any subsequent proceeding instituted by the FTC against Cohen, pursuant to 15 U.S.C. § 49, even if this Court granted Gibson's requested relief and stayed Cohen's attempts to comply with a lawful request. At this stage, therefore, Gibson has no standing to object to Cohen's desire to comply voluntarily with the instant subpoena.

b. *Couch* v. *United States*

Even if Gibson had succeeded somehow in demonstrating to this Court that it had some proprietary interest in the material which is the subject of the Cohen subpoena, this Court would still find that Gibson had no standing in the instant case because of the decision by the Supreme Court in *Couch* v. *United States*, 409 U.S. 322 (1973).

In *Couch*, a taxpayer sought to preclude disclosure to the IRS of records originally in the possession of the taxpayer's accountant (later transferred to her attorney). Justice Powell, speaking for the majority, prefaced his discussion of the substantive issue by indicating how *Couch* differed from *Donaldson:*

> Here petitioner does own the business records which the Government seeks to review and the courts below did permit her to intervene. The essential inquiry is whether her proprietary interest further enables her to assert successfully a privilege against compulsory self-incrimination to bar enforcement of the summons and production of the records, despite the fact that the records no longer remained in her possession. 409 U.S. at 327.

After analyzing the nature of this Fifth Amendment privilege, Justice Powell went on to emphasize that the privilege is a personal one, 409 U.S. at 328, and does not proscribe incriminating statements elicited from another. *Id.* Turning to the facts of the *Couch* case, Justice Powell found that only the taxpayer's accountant was under compulsion to do anything. The taxpayer was not compelled or coerced to testify, and the accountant made no claim that he would be incriminated by the production. 409 U.S. at 329. Justice Powell summarized the limitations on proper invocation of the Fifth Amendment privilege by stating:

> The divulgence of potentially incriminating evidence against petitioner is naturally unwelcome. But petitioner's distress would be no less if the divulgence came not from her accountant *but from some other third party with whom she was connected and who possessed substantially equivalent knowledge of her business affairs.* The basic complaint of petitioner stems from the fact of divulgence of the possibly incriminating information, not from the manner in which or the person from whom it was extracted. Yet *such divulgence,* where it did not coerce the accused herself, *is a necessary part of the process of law enforcement* and tax investigation. (emphasis added)

409 U.S. at 329. He concluded that *possession*, and not ownership, should be the cutting edge of proper invocation of the Fifth Amendment privilege. 409 U.S. at 330-31.

Gibson does not cite or attempt to distinguish *Couch*, but those decisions which Gibson does cite are inapposite. As *Couch* demonstrates, the fundamental question in all cases of this nature is whether any privilege exists which may be invoked properly.

On the basis of *Couch, Donaldson* and subsequent decisions by the United States Court of Appeals for the Fifth Circuit which follow these Supreme Court holdings, *see United States* v. *White, supra*, 477 F.2d 757, 763, this Court concludes: that Gibson has no protectible interest in the documents in question; that the documents are not in Gibson's possession but in the possession of a third party with whom Gibson has no cognizable privileged relationship; and that therefore Gibson can invoke no privilege to preclude appropriate disclosure of the documents. In effect, Gibson lacks standing to challenge voluntary disclosure of the documents.

B. *This Court's Authority in Requiring Proceedings To Be Instituted Under 15 U.S.C. § 49*

Gibson's lack of standing dictates that this Court, whose role in reviewing administrative proceedings of this type is extremely limited to begin with, has no authority whatsoever in this case to enjoin Cohen from complying voluntarily with the subject subpoenas duces tecum so as to require the FTC to institute proceedings pursuant to 15 U.S.C. § 49. To require such a proceeding would be a pointless exercise and would generate substantial waste of judicial and administrative energies for no purpose. Even if such a proceeding were properly instituted where compliance was otherwise voluntary, Gibson could have no part in such a proceeding. *Cf. F.T.C.* v. *Harrell, supra*, 313 F.2d at 856.

VIII. PROPRIETY OF INJUNCTIVE OR DECLARATORY RELIEF

Granting or denying a preliminary injunction rests within the discretion of this Court. 11 Wright & Miller, Federal Practice and Procedure: Civil § 2948, at 427 (1973). The factors to be considered in determining whether preliminary injunctive relief is appropriate are:

(1) whether the plaintiff is likely to prevail on the merits; (2) whether the plaintiff is in danger of suffering irreparable harm; (3) whether the potential harm to the defendants from issuance of the injunction outweighs the possible harm to the plaintiff if injunctive relief is denied; (4) whether issuance of a preliminary injunction will serve the public interest. *Blackshear Residents Organization* v. *Romney*, 472 F.2d 1197 (5th Cir. 1973).

Applying this test to the facts and arguments now before the Court, the Court concludes that no preliminary injunction should issue and that plaintiffs are not entitled to declaratory relief. *See F.T.C.* v. *Harrell, supra*, 313 F.2d 854.

Plaintiffs cannot prevail on the merits in this case. There is no justiciable case or controversy between plaintiffs and defendants. To the extent that there is a justiciable case or controversy between plaintiffs and the Intervenor FTC, the case is arguably not ripe for decision at this time. *Frito-Lay, Inc.* v. *F.T.C., supra*, 380 F.2d 8. If the case is ripe for adjudication, plaintiffs lack standing to sue on the points raised in their complaint.

Plaintiffs are in no danger of suffering irreparable harm. Their objections to the pre-trial discovery sought by the FTC in this adjudicative proceeding will not be lost if defendants voluntarily comply with the instant subpoenas duces tecum. Full review of all of the actions taken by the Commission and the Administrative Law Judge is available before a Court of Appeals. 15 U.S.C. §§ 21(d), 45(b).

Whatever harm can be said to result to plaintiffs as the result of their natural aversion to divulgence of any information which possibly exposes them to civil liability, such harm is significantly outweighed by the potential harm to the FTC as a consequence of the issuance of the requested injunction. *See* note 11, *supra*. Additionally, issuance of an injunction would disserve the public interest. The FTC has adopted extensive rules by which it has agreed to be governed during the course of adjudicative proceedings. 16 C.F.R. §§ 3.0 *et seq.* The FTC and the Administrative Law Judge are bound to abide by these rules, and violation of such rules can result in a dissolving by the Court of Appeals of any order which the Commission might issue.

In this case, charges have been raised concerning potential violations of the antitrust laws of the United States. 15 U.S.C. §§ 13(c), 45. The FTC is charged with enforcing these laws in the public interest. Were Gibson to be granted the relief it seeks in this case, a precedent of judicial interference would be established which erects serious impediments to prompt, efficient adjudication of agency proceedings instituted by the filing of an FTC complaint. Needless expense would be generated if adjudicative respondents were permitted in wholesale fashion to halt pretrial proceedings by filing court actions of the sort filed here in an attempt to arouse opposition in others where none exists and where the complaining respondent has no standing to initiate such attempts. The public interest necessarily would suffer because of the resulting costly delays in law enforcement.

The current system of adjudicative proceedings is designed to function within strict guidelines. Service of the public interest, in the first instance, begins with the observance by the FTC of these guidelines in promptly adjudicating complaints. Once complaints are filed, and all guidelines are properly observed, the public interest is not served when the judiciary interrupts what is otherwise a harmonious attempt to secure pre-trial discovery in pending administrative proceedings by injecting opposition founded on no protectible private interest. *Cf. Fifth Avenue Peace Parade Committee* v. *Gray*, 480 F.2d 326, 332 (2d Cir. 1973); *see generally* Annotation, *Privilege Against Self-Incrimination as Ground for Refusal to Produce Noncorporate Documents in Possession of Person Asserting Privilege But Owned by Another*, 37 A.L.R.3d 1373 (1971); Annotation, *Discovery and Inspection: Compelling Party to Disclose Information in Hands of Affiliated or Subsidiary Corporation, or Independent Contractor, Not Made Party to Suit*, 19 A.L.R.3d 1134 (1968).

IX. CONCLUSION

Plaintiffs' motions for temporary restraining order and preliminary injunction are therefore denied. Since equitable relief is effectively the only relief which plaintiffs are seeking in this case, the denying of plaintiffs' motions by this Court dictates that this case must be, and it hereby is, dismissed.

DONE at Houston, Texas, this 30th day of October 1975.

FINAL JUDGMENT

The Court having considered the plaintiffs' motions for temporary restraining order and preliminary injunction and the motion to intervene by the Federal Trade Commission, and having concluded that the motion to intervene should be granted and the motions for injunctive relief should be denied,

Therefore, it is hereby ORDERED, ADJUDGED AND DECREED that plaintiffs' requested equitable relief be denied in all respects and that this case be, and it hereby is, dismissed.

This is a FINAL JUDGMENT.

DONE at Houston, Texas, this 30th day of October 1975.

BROWN & WILLIAMSON TOBACCO CORP. v. LEWIS A. ENGMAN, ET AL.*

No. 75 Civ. 4047 (CHT) F.T.C. Docket C-2183

PHILIP MORRIS INC. v. LEWIS A. ENGMAN, ET AL.*

No. 75 Civ. 4048 (CHT) F.T.C. Docket C-2181

RJ. REYNOLDS TOBACCO CO. v. LEWIS A. ENGMAN, ET AL.

No. 75 Civ. 4049 (CHT) F.T.C. Docket C-2184

LOEW'S THEATRES, INC. v. LEWIS A. ENGMAN, ET AL.

No. 75 Civ. 4050 (CHT) F.T.C. Docket C-2180

AMERICAN BRANDS, INC. v. FEDERAL TRADE COMMISSION ET AL.*

No. 75 Civ. 4051 (CHT) F.T.C. Docket C-2182

LIGGETT & MYERS INC. v. LEWIS A. ENGMAN, ET AL.

No. 75 Civ. 4052 (CHT) F.T.C. Docket C-2185

(United States District Court, Southern District of New York, November 5, 1975)

In a consolidated action for preenforcement review by six major companies charged with violating F.T.C. consent orders, court held that plaintiffs did not justify their assertions that F.T.C.'s determinations violated their rights of due process. Court, while not categorically rejecting preenforcement review of F.T.C.'s determinations, refused to exercise jurisdiction and dismissed the action, thereby remanding the companies to the promptly instituted civil penalties actions.

Before TENNEY, *District Judge:*

MEMORANDUM

Plaintiffs, the six major producers of tobacco products in the United States, filed six separate actions in this Court on August 15, 1975. These six actions, now consolidated, seek pre-enforcement review of certain determinations made by the Federal Trade Commission ("the Commission") to the effect that the six plaintiff corporations are in violation of a 1972 Consent Order relating to health warnings in cigarette advertising. The defendants are various federal officials (including the Chairman and members of the Commission and the Attorney General of the United States), the Commission, and the United States of America.

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* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶60,607 at 67,672 (1975-2 Trade Cases). See also pp. 1446, 1542 herein. For case before Commission, see 80 F.T.C. 455.

Defendants now seek an order of this Court pursuant to Rule 12(c) of the Federal Rules of Civil Procedure dismissing the complaints of each of the corporate plaintiffs. The six complaints, while not identical, are so substantially similar that the Court need not consider each of them separately.

FACTS

On January 11, 1964, the report of the Surgeon General's Advisory Committee on Smoking and Health was issued alerting the public to the potential health hazards associated with cigarette smoking. The Commission issued a proposed rule calling for the inclusion of a warning statement in all cigarette labeling and advertising, but, prior to implementation of the rule, Congress enacted the Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. §§ 1331 *et seq.* The thrust of the 1965 Act was to mandate the inclusion of a health warning in cigarette labeling while prohibiting, until July 1, 1969, a similar warning in cigarette advertising.

In July of 1969, the Commission again indicated its desire to deal with cigarette advertising, but once again Congress intervened and enacted the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331 *et seq.* While strengthening the warning to be carried on cigarette packages and prohibiting cigarette advertising on the broadcast media, the 1969 Act prohibited the Commission from moving in the area of print advertising until July 1, 1971. 15 U.S.C. § 1336(a). It should be noted that Congress specifically provided that the 1969 Act was not to be read as limiting the authority of the Commission in dealing with deceptive advertising practices. 15 U.S.C. § 1336(b).

Consequently, in July of 1971, the Commission served the plaintiffs herein with proposed complaints charging plaintiffs with a failure to promptly disclose the health hazards associated with the use of their products. There followed an intensive settlement negotiation which culminated in six identical Consent Orders which were signed in January of 1972 and issued by the Commission on March 30, 1972. These Consent Orders were notable for the degree of specificity with which they described the various advertising warnings.

During the fall of 1972, compliance reports were submitted to the Commission by each of the plaintiff corporations. In each case the Commission reported to each of the plaintiffs and then to Congress that, assuming the accuracy of the reports, there appeared to be full compliance with the Consent Orders thereby rendering compliance enforcement actions unnecessary. The Commission's report to Congress in January of 1974 also found substantial compliance.

Subsequently, however, in late 1974 and early 1975, the staff of the Commission raised allegations of numerous instances of noncompliance. These allegations included practices employed prior to the filing of the compliance reports, but which were not disclosed in the reports and practices commenced after the filing of the reports. The plaintiff corporations cooperated with the staff of the Commission in attempting to resolve these alleged differences and simultaneously recommended to the Commission that the staff's position be rejected. Negotiations broke down shortly thereafter and eventually the Commission accepted the staff's recommendations.

By letters to each of the plaintiff corporations dated August 1, 1975, the Commission notified the plaintiffs of its finding of noncompliance. The Commission stated its intention to commence enforcement actions for civil penalties as to certain of the violations and granted a grace period of 180 days to allow for the correction of certain other alleged violations. Plaintiffs thereupon filed the instant actions seeking preenforcement review of the Commission's determination. Plaintiffs also sought a preliminary injunction staying the imposition of civil penalties pending the determination of the matter on the merits. This application was denied by this Court in a Memorandum and Order dated August 28, 1975, and is now *sub judice* in the United States Court of Appeals for the Second Circuit.

Concurrently with the above-mentioned activity, the Commission was engaged in preparing enforcement action complaints. These complaints, along with a notice of intent, were submitted to the Attorney General on August 28, 1975. The Department of Justice reviewed, revised, and agreed to file the complaints. The six complaints were filed in the United States District Court for the District of Columbia on October 17, 1975. These complaints allege all of the violations set forth in the Commission's letters of August 1, 1975, to the plaintiff corporations, except those violations to which the 180 day grace period attached.

Plaintiffs contend that this Court has jurisdiction to grant the preenforcement review which they seek. It is their position that the determination of the Commission as expressed in the August 1, 1975 letter leaves them in an impossible position and one in which they cannot constitutionally be forced to remain. In essence, they feel that they must either acquiesce immediately and correct every alleged violation of the 1972 Consent Order at great financial cost and at the added expense of foregoing judicial review since they contend that there has been no violation *or* they must sit back and await the commencement of a civil action for the enforcement of penalties by the Attorney General or by the Commission while potentially destructive civil penalties mount. It should be noted additionally that as to the violations alleged, plaintiffs contend that the allegations are either erroneous or so vague as to fail to give notice of the alleged violations. They conclude that preenforcement review is appropriate and necessary where the threat of ruinous civil penalties would be so coercive as to discourage judicial review and thereby work a deprivation of due process.

Defendants have premised their argument that this Court lacks jurisdiction to review in the preenforcement situation on alleged "clear and convincing evidence of a contrary Congressional intent" and additionally because the grant of review in this instance would "tend to oust the Attorney General from his statutory role in Federal trade litigation. . . ." (Government's Reply Memorandum, at 1). Furthermore, defendants maintain that, under the Administrative Procedure Act, 5 U.S.C. § 704, preenforcement review must be withheld where plaintiffs have another adequate remedy and that, in this instance, the enforcement action instituted on October 17, 1975, provides these plaintiffs with an adequate forum in which to redress their grievances. Thus, the defendants conclude that these plaintiffs should be remitted to the enforcement action pending in the District of Columbia.

The Administrative Procedure Act provides for judicial review of agency action in two instances:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . . 5 U.S.C. § 704.

In order to sustain jurisdiction it must clearly be demonstrated to this Court either that there is a specific statutory grant entitling these plaintiffs to seek review of the Commission's action at this stage or that there is no other adequate remedy in a court.

In *Floersheim* v. *Engman* 494 F.2d 949 (D. C. Cir. 1973), the Commission had determined that various forms used by Floersheim in his business were deceptive. The Commission's cease and desist order was reviewed by the United States Court of Appeals for the Ninth Circuit and sustained. Floersheim submitted a revised form as part of his compliance report, but this was also rejected, and in consequence of this rejection Floersheim sought preenforcement review. The United States Court of Appeals for the District of Columbia Circuit ordered the dismissal of the action on the ground that the Ninth Circuit, which had originally affirmed the cease and desist order, was the proper court to review its own order in the event that clarification of the order was required.

In reaching its conclusion, the Court noted that the only section of the Federal Trade Commission Act which provides for judicial review is section 5(c), 15 U.S.C. § 45(c). This section provides for review of a cease and desist order by a Court of Appeals within sixty days of the service of such an order. In *Floersheim*, the order had previously been challenged and sustained and section 5(c) was therefore deemed to be inapplicable. In the instant case no review was sought within the statutory period and section 5(c) is equally inapplicable. The Court concluded that "[t]he Federal Trade Commission Act does not in terms authorize review of Commission interpretations of cease and desist orders." *Id.* at 952.

Appellant in *Floersheim* claimed to be faced with the same intolerable situation as plaintiffs in the instant case, *i.e.*, to acquiesce in what was considered to be an erroneous ruling or to litigate in the face of potentially ruinous civil penalties. The Court responded to Floersheim's argument stating:

> Petitioner's sketch of an unfairly onerous choice is too darkly drawn by far. . . . [T]he statutory provision for civil recovery of penalties . . . refers to a maximum, not a minimum. There is room for leniency by the court. . . . *Id.* at 952–53.

The Court went on to state:

> The claim that FTC is taking a more rigorous view of the requirement of the order than the respondent considers sound is not a basis for advance judicial consideration. This is the kind of point that can be raised when an enforcement sanction is pursued . . . for there is opportunity there to obtain a softening of penalty for a construction that is bona fide and reasonable even though ultimately rejected. Advance judicial consideration under the doctrine of *Regal Knitwear* is reserved for the case of exceptional need and unfairness. *Id.* at 954.

The Court found no such exceptional need nor unfairness.

This Court is not prepared to go as far as the *Floersheim* court and holds that the present case is not one of "exceptional need and unfairness." Nor is this Court prepared to categorically reject jurisdiction in the preenforcement situation. The very fact of the initiation of the enforcement action in the District of Columbia makes it unnecessary for this Court to reach the question. The clear course which this Court must chart is to decline to exercise jurisdiction and to defer to the enforcement action as was suggested in *Floersheim*. This conclusion is buttressed by two recent cases.

In *General Motors Corporation* v. *Volpe*, 457 F.2d 922 (3d Cir. 1972), the National Highway Safety Bureau directed General Motors to notify all owners of a certain model pickup truck of a safety defect. General Motors commenced an action for preenforcement review of the National Highway Safety Bureau's direction. The Bureau thereafter commenced an enforcement action. In affirming the district court's dismissal of General Motors' action, the United States Court of Appeals for the Third Circuit noted the district court's finding that "it was 'hard put to understand how this action could possibly be adequate for the protection of GM's statutory rights and yet the [pending] enforcement action be inadequate.' " *Id.* at 923 quoting *General Motors Corporation* v. *Volpe*, 321 F. Supp. 1112, 1125 (D. Del. 1970).

The court of appeals was careful to point out, however, that the case was not one where the district court clearly lacked jurisdiction, but rather was one where, in the exercise of its discretion, the district court declined to exercise that jurisdiction. The court also noted that the result might well have been otherwise if the National Highway Safety Bureau had not brought its enforcement action within a reasonable time.

In *Ford Motor Company* v. *Coleman*, 75 Civ. 1340 (D. D. C., September 22, 1975) (three judge court), plaintiff sought preenforcement review of a defect notification order. Plaintiff attacked the constitutionality of the Motor Vehicle and School-bus Safety Act of 1974. The Court held that there was jurisdiction to review the constitutionality of the statute, but with regard to review of the defect notification order, held that "[i]f the enforcement action is brought promptly by the Government, the action filed by the manufacturer should be consolidated with the enforcement action." *Id.* at 12-13. The court went on to note that

> [w]hile we entertain the possibility of a need for a pre-enforcement action, we think it contrary to the spirit of the Act to encourage forum-shopping by the manufacturer. We agree with the Third Circuit in *General Motors* v. *Volpe*, *supra*, 437 F.2d at 923-24 . . . that the pre-enforcement action should be transferred to the district of the enforcement action, if that action has been promptly instituted. *Id.* at 13, n. 30.

It is the conclusion of this Court that the enforcement action filed in the District of Columbia was promptly instituted. The Court further finds that no undue prejudice will accrue to these plaintiffs if they are remitted to the Government's enforcement action. Potential liability for penalties would be the same in each instance and any claims raised by the plaintiffs in this action can be raised by way of defense in the enforcement action.

Accordingly, this Court will decline to exercise jurisdiction in this action and will dismiss the six complaints in this consolidated action.

H.R. GIBSON, SR., ET AL. v. HAROLD HASSENFELD, ET AL.*

Civ. A. No. Civ.-4-75-45. F.T.C. Docket No. 9016.

(United States District Court, Eastern District of Tennessee, November 10, 1975)

On action for injunctive relief, court held that F.T.C. could intervene in this case and because complaint in this matter failed to state a claim upon which relief could be granted, intervenor's motion to dismiss the complaint in this action is granted.

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*Not otherwise reported. See also, p. 1510 herein. For case before the Commission, see 87 F.T.C. 1389.

Before NEESE, *District Judge.*

MEMORANDUM OPINION AND ORDER

This is an action for injunctive relief. 28 U. S. C. §§ 1331 (a), 1332 (a) (1), (c), 1337. The Federal Trade Commission (FTC) moved to intervene herein as a defendant. Rule 24, Federal Rules of Civil Procedure. Such motion has merit.

The facts are basically undisputed. Several of the respective plaintiffs are respondents in an administrative action, being docket no. 9016, brought by the FTC on February 25, 1975, alleging certain violations of the Clayton Act, 15 U. S. C. § 13, and the Federal Trade Commission Act, 15 U. S. C. § 45; thereafter, certain subpoenas *ad testificandum* and *duces tecum* were issued to the defendants in connection with the aforementioned administrative action; the defendants herein have indicated that they would voluntarily comply with such subpoenas; and the respective plaintiffs herein seek ultimately a permanent injunction, prohibiting compliance with such subpoenas pending judicial enforcement of same.

Although it is clear that the FTC may be permitted permissively to intervene, Rule 24 (b), *supra*, such party is also entitled to intervene herein as a matter of right. Rule 24 (a), *supra*. Such latter rule provides:

* * * * * * *

> * * * Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.* * *

The claimed interest of the FTC is immediately obvious, i.e., to protect the subpoena power provided by 15 U. S. C. § 49, which is also the subject of the action herein. Likewise, as a practical matter, the FTC's ability to protect its subpoena power may be impeded, and its interest herein is not being adequately represented by the existing defendant; e.g.: on September 9, 1975, the existing defendants herein consented to a temporary restraining order prohibiting them from complying with the aforesaid subpoenas. From all of which the Court concludes that the FTC may intervene herein as a defendant as a matter of right. Rule 24 (a), *supra*.

The FTC also moved to dismiss this action for failure to state a claim upon which relief can be granted. Rule 12 (b) (6). Federal Rules of Civil Procedure. Such motion likewise has merit. The plaintiffs correctly contend that the subpoena power of the FTC may be likened to discovery proceeding under the Federal Rules of Civil Procedure, *Adams* v. *F. T. C.*, C. A. 8th (1961), 296 F. (2d) 861, 866 [3], and is comparable to a summons from the Internal Revenue Service (IRS). *United States* v. *Powell* (1964), 379 U. S. 48, 57, 85 S. Ct. 248, 13 L. Ed. (2d) 112, 119 [6]. It is likewise true that the FTC has no enforcement power over its administrative subpoena, but must apply to a United States District Court for such enforcement. 15 U. S. C. § 49, *supra; F. T. C.* v. *Hallmark, Inc.*, C. A. 7th (1959), 265 F. (2d) 433, 437 [2].

The plaintiffs contend that they have a proprietary right in the information sought by the FTC and therefore may restrain the defendants' compliance with the administrative subpoena. However, other than the bald assertion that such an interest is possessed by the plaintiffs, there is no indication that such is the case here.* The plaintiffs rely principally on *Reisman* v. *Caplin* (1964), 375 U. S. 440, 449-450, 84 S. Ct. 508, 11 L. Ed. (2d), 459, 466 (headnote 12), where the Court was dealing with the enforcement of an IRS subpoena and stated: "* * * [If the witness should indicate that he would voluntarily turn the papers over to the commissioner of Internal Revenue], either the taxpayer *or any affected party* might restrain compliance * * * until compliance is ordered by a court of competent jurisdiction. * * *" (Emphasis added).

The same contentions of the plaintiffs were advanced and rejected in *H. R. Gibson, Sr., et al.*, plaintiffs, v. *Plough, Inc., et al.*, defendants, No. C-75-409, in the District Court for the Western District of Tennessee, Western Division, order of September 12, 1975, wherein the Court reconsidered its previous order of September 9, 1975 denying equitable relief and stated:

* * * * * * *

> In *Donaldson* v. *United States*, 400 U.S. 517 (1971), however, the Supreme Court explained and limited to some extent the effect of *Reisman, supra*. In *Donaldson*, the court made clear that not just any "affected party" has a right to intervene in the agency subpoena enforcement proceedings. Only one demonstrating a sufficiently protectable proprietary interest in the subpoenaed evidence and demonstrating a specific basis for extraordinary relife [sic: relief] may intervene as of right pursuant to Fed. R.Civ. P. 24(a)(2), 400 U.S. at 530-531. In *Donaldson*, the court concluded that the "affected party," a taxpayer under I.R.S. investigation, had shown no proprietary interest in the employment records of his former employer and the latter's accountant, only a desire to prevent potentially unfavorable information from coming into the hands of I.R.S.

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* The subpoena *ad testificandum* requests the testimony of the defendant herein Mr. Harold Hassenfeld, and the subpoena *duces tecum* seeks contracts, books, records, checks, and other business records of such defendant and of the Empire Pencil Company and the plaintiffs herein.

> investigators. The court held that the district judge did not err in denying the taxpayer's motion to intervene in the I.R.S. proceeding to assert his objection to the subpoenas.
>
> This action is, of course, a step removed from the situation in *Donaldson*. The case is before the court on a motion for injunction, not a motion to intervene. The only "property right" in the subpoenaed evidence which plaintiff has intimated is the same as that found insufficient in *Donaldson* - a mere desire to keep information from government investigators, information which is part of the records of defendants (relating to business dealings with the plaintiffs).
>
> Plaintiffs have not demonstrated sufficient proprietary interest nor any specific basis of improper subpoena action to justify the evocation of extraordinary equitable remedies. There is no showing of claimed privilege, and the plaintiffs' claim relative to illegal search and seizure are without substance.

* * * * * * *

An analogous situation, factually and otherwise, is presented herein. For such reasons the intervening defendant FTC's motion to dismiss for failure to state a claim upon which relief can be granted hereby is GRANTED, Rule 12(b)(6), *supra*, and the plaintiffs hereby are DENIED all relief. Rule 58 (1), Federal Rules of Civil Procedure.

JUDGMENT ON DECISION BY THE COURT

This action came on for consideration by the Court, upon the intervening defendant The Federal Trade Commission's motion to dismiss for failure to state a claim upon which relief can be granted, and the issues having been duly considered and a decision having been duly rendered,

It is ORDERED and ADJUDGED that the plaintiffs are denied all relief herein and this action hereby is dismissed.

Dated at Greeneville, Tennessee this tenth day of November, 1975.

ASH GROVE CEMENT CO. v. FEDERAL TRADE COMMISSION ET AL.*

C.A. No. 1298-71 F.T.C. Docket 8785

(United States District Court, District of Columbia, November 13, 1975)

On motion for entry of pretrial order directed by the Court of Appeals, court finds that F.T.C. affidavits describing internal memoranda and chronological minutes insufficient for ruling on their immunity from discovery under the Freedom of Information Act. Court will inspect requested documents *in camera* after agency submits detailed descriptions, explanations, and statements for these documents.

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* Not reported in Federal Reporter. Reported Trade Reg. Rep. ¶ 60, 694 at 68,006 (1976-1 Trade Cases). See also pp. 565, 815, 1321, and 1371 herein.

David J. McKean, Washington, D.C. for plaintiff.

Arnold T. Aikens, Washington, D.C., for defendants.

Before RICHEY, *District Judge:*

PRETRIAL ORDER

This case is before the Court on remand from the United States Court of Appeals for this Circuit. 511 F.2d 815, *reh. denied per curiam*, suggestion for rehearing *en banc, denied en banc*. Nos. 73-2212 and 74-1144 (June 23, 1975). Plaintiff has now moved for entry of a pretrial order in accordance with the directions of the Court of Appeals. The defendants' response and accompanying affidavits, however, caused the plaintiff to also file a motion for an injunctive order compelling the defendants to immediately release all of the requested information directly to the plaintiff. This Court does not find it necessary at this time to consider the plaintiff's most recent motion because the Court will enter a pretrial order in accordance with the directives of the Court of Appeals.

In the response to the plaintiff's motion for entry of a pretrial order, the defendants have submitted affidavits purporting to describe the "internal memoranda" and the "chronological minutes." On the basis of these affidavits, the defendants maintain that an *in camera* inspection is unnecessary and that this Court can enter an order finding the memoranda and minutes to be exempt under the Freedom of Information Act, 5 U.S.C. § 552(b)(5). This Court, however, not only finds that these affidavits are "legally insufficient" but also finds that an *in camera* inspection is clearly mandated by the Court of Appeals.

As to the forty-two "internal memoranda" the language of the Court of Appeals is unambiguous:

> Therefore, we *direct* that the District Judge inspect at least a random sample of these forty-two documents sufficient to provide an objectively verifiable basis for deciding whether the agency descriptions are indeed conclusory or indeed reasonably accurate and specific. 511 F.2d at 817 (emphasis added).

The defendants now seek to avoid an *in camera* inspection by submitting descriptions that in their opinion are not "conclusory." But, having found that these descriptions are as conclusory as those previously submitted, this Court must engage in an *in camera* inspection.* The same is true with respect to the "chronological minutes," for which the Court of Appeals also directed an *in camera* inspection be had: ". . . the District Judge *should* examine in camera a representative portion of the minutes." 511 F.2d at 818 (footnote omitted) (emphasis added).

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* This Court does not agree that an *in camera* inspection may be voided merely because it can be said that the descriptions are not per se conclusory. Rather, it appears that the test is whether the Court can properly determine whether in fact the documents should be exempt under the Freedom of Information Act in the absence of an *in camera* inspection. Under the guidelines set forth by the Court of Appeals, an *in camera* inspection appears necessary in this case.

Further, defendants also assert that an *in camera* inspection of all of the documents and minutes is unnecessary. In fact, in the affidavits submitted by the government, only a few randomly selected documents are described. This Court does not agree. First, it does not appear that the documents are so voluminous that at the outset it can be conclusively said that only a random selection and review is feasible. And, second, particularly in this case, it is the Court and not the defendants that will make the selection, if that is necessary. Only this Court can determine if it is unable to inspect all of the documents, and the defendants have not convinced it otherwise. If the Court finds itself unable to inspect all of the documents, it will so state and then randomly select documents upon which to base its ruling. It is this Court's belief that the letter and the spirit of the opinion of the Court of Appeals requires no less.

Therefore, it is, by the Court, pursuant to Rule 1-9(e) of the Local Rules of this Court, this 12th day of November, 1975.

Ordered, that the defendant Federal Trade Commission shall within thirty days of the date of this order:

1. File with the Court a detailed description of each chronological minute or part thereof requested by the complaint, and a detailed justification for withholding each such minute or segregable portion thereof; a copy thereof shall be served upon plaintiff.

2. File with the Court a detailed description of each of the forty-two internal memoranda** still withheld by the Commission, and a detailed justification for withholding each such memorandum or segregable portion thereof; a copy thereof shall be served upon plaintiff.

For the purposes of this order, a "detailed description" and a "detailed justification" shall mean that for each minute and for each internal memorandum and for each appendix or other attachment thereto and for each segregable part, subpart or portion of said chronological minutes requested in whole or in part by the complaint; and it is

Further Ordered, that, of said internal memoranda, the Commission shall state:

A. The date of said chronological minute, internal memorandum, appendix or attachment thereto;

B. The identity of each author, preparer or submitter of each said

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** These forty-two internal memoranda are identified in Plaintiff's July 6, 1973 Memorandum of Remaining Documents for which *In Camera* Inspection is Requested.

chronological minute, internal memorandum, appendix or attachment thereto;

C. The identity of each recipient of each said chronological minute, internal memorandum, appendix or attachment thereto;

D. The identity of each person whose oral or written communications were referred to in each said chronological minute, internal memorandum, appendix or attachment thereto;

E. A detailed factual breakdown and description by title, subtitle and general content of each part or portion of each said chronological minute, internal memorandum, appendix or attachment thereto. Said breakdown and descriptions may and should include reference to the actual language of the document where it is asserted that no portion of the document is either disclosable or segregable.

F. A detailed exposition and factual explanation of the uses for which each said chronological minute, internal memorandum, appendix or attachment thereto were put, of the purpose for preparing each said document or part thereof, and of the factual basis for any claim that disclosure of each said document in whole or part would violate the FOIA. Mere recitations that the document or any portion thereof consists of opinions, proposals, views, recommendations, comments, analysis, or suggestions concerning proposed or actual actions undertaken or considered by the Commission will not satisfy the requirements of this subparagraph. The Commission must make a detailed factual showing for each document and each part thereof why disclosure would not be warranted under the FOIA.

G. For each said chronological minute, internal memoranda, appendix or attachment thereto which the Commission claims should be withheld *in toto*, a detailed showing why no deletions may be made therein and as deleted, released to plaintiff; and

H. For each chronological minute or internal memoranda, an identification of each statement of policy, interpretation, vote, decision, opinion, ruling, or other action or transaction of the Commission which was interpreted, followed, applied, adopted or embodied in said minute or memorandum;

I. For each chronological minute an identification of each of the aforesaid forty-two internal memoranda referred to therein in any manner; and it is

Further Ordered, that thirty (30) days after the Commission has filed the descriptions, explanations and statements required in Part I hereof, the Commission shall submit to the Court for inspection *in camera* each chronological minute required in whole or in part by the complaint and each of the forty-two internal memoranda specified in plaintiff's July 6, 1974 Memorandum of Remaining Documents for which *In Camera* Inspection is Requested.

GIFFORD-HILL & COMPANY, INC. v. FEDERAL TRADE COMMISSION, ET AL.*

No. 74-2024. F.T.C. Docket 8989.

(United States Court of Appeals, District of Columbia Circuit, November 20, 1975)

1. **IF CHALLENGED ACTION CAUSED INJURY IN FACT AND IF ALLEGED INJURY WAS IN ZONE OF INTERESTS TO BE PROTECTED OR REGULATED BY STATUTE CLAIMED TO HAVE BEEN VIOLATED, PLAINTIFF HAS STANDING TO CHALLENGE ACTION IN FEDERAL COURT.**

Plaintiff has standing to challenge an administrative action in federal court if challenged action caused it injury in fact and if the alleged injury was to an interest arguably within zone of interests to be protected or regulated by statute which agencies are claimed to have violated.

2. **N.E.P.A.'S CONCERN IS WITH PROTECTION OF THE ENVIRONMENT, NOT WITH DESIRE OF PARTIES TO PREVENT OR DELAY ADMINISTRATIVE EFFORTS TO ENFORCE ANTITRUST LAWS; THEREFORE, PLAINTIFF HAD NO STANDING TO RAISE ISSUE OF F.T.C. COMPLIANCE WITH N.E.P.A. MANDATED PROCEDURES.**

Plaintiff's desire to prevent or delay administrative efforts to enforce antitrust laws was not arguably within zone of interests to be protected or regulated by National Environmental Policy Act, and plaintiff seeking to challenge Commission's institution of adjudicatory proceeding against plaintiff had no standing to raise issue whether Commission had complied with procedures mandated by National Environmental Policy Act.

3. **DECISION TO INSTITUTE ADJUDICATORY PROCEEDINGS IS NOT "AGENCY ACTION" AND MOST CERTAINLY NOT "FINAL AGENCY ACTION" MADE REVIEWABLE UNDER ADMINISTRATIVE PROCEDURE ACT.**

Decision of Federal Trade Commission to institute adjudicatory proceedings against plaintiff was not "agency action" and most certainly not "final agency action" made reviewable by Administrative Procedure Act.

4. **ACTION CHALLENGING F.T.C. ADJUDICATORY PROCEEDING ON GROUND OF NONCOMPLIANCE WITH N.E.P.A. WAS PREMATURE; ONLY IN EXTRAORDINARY CASES IS LITIGANT ALLOWED TO UNDERMINE CONGRESSIONALLY CREATED METHODS OF JUDICIAL REVIEW BY INTERLOCUTORY APPEAL.**

Except in extraordinary cases, litigant is not allowed to undermine congressionally created method of judicial review of Federal Trade Commission decisions by bringing interlocutory appeal, even though that appeal be brought as an independent suit in district court, and company's challenge to Federal Trade Commission's adjudicatory proceeding on groung that Commission did not comply with National Environmental Policy Act was prèmature.

5. **NATIONAL ENVIRONMENTAL POLICY ACT DOES NOT ENCOMPASS AGENCY DECISIONS TO INSTITUTE ADJUDICATORY PROCEEDINGS OR A FORTIORI INSTITUTE INVESTIGATIONS TO DETERMINE WHETHER ADJUDICATION IS WARRANTED.**

An agency's decision to institute adjudicatory proceedings, and a fortiori its decisions to institute investigations to determine whether adjudication is war[731]ranted are outside scope of National Environmental Policy Act.

(Syllabus, with substituted captions, taken from 354 F.Supp. 521.)

On appeal from denial of preliminary injunction, court held that agency decision to institute adjudicatory proceedings or a fortiori to institute investigations to determine whether adjudication is warranted are outside the scope of the National Environmental Policy Act; plaintiff's desire to delay or prevent administrative enforcement of antitrust claim was not within area of interests protected or regulated by National Environmental Policy Act; and plaintiff had no standing to raise issue under the Act.

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* Reported in 523 F.2d 730 (1975). See also, p.1125 herein. For case before the Commission, see 88 F.T.C. 441.

Peter J. Nickles and *John D. Taurman*, Washington, D.C., were on the brief for appellant.

Carla A. Hills, Asst. Atty. Gen. at the time the brief was filed, *Earl J. Silbert*, U.S. Atty., *Leonard Schaitman* and *Neil H. Koslowe*, Attys., Appellate Section, Dept. of Justice, *Gerald Harwood*, Asst. General Counsel, F.T.C., and *John T. Fischbach* and *Clarence Laing*, Attys., F.T.C., were on the brief for appellees.

Before WRIGHT, TAMM and WILKEY, *Circuit Judges*.

PER CURIAM:

The Federal Trade Commission has instituted an adjudicatory proceeding against plaintiff-appellant Gifford-Hill & Company. FTC Docket No. 8989 (August 7, 1974). In that proceeding the FTC will determine whether Gifford-Hill, a cement manufacturer, violated the antitrust laws by acquiring a producer of construction aggregates.[1] Following issuance of the FTC's administrative complaint, Gifford-Hill filed this suit in the District Court in an effort to have the complaint nullified on the ground that the decision to prosecute had been made without compliance with the procedures mandated by the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (1970). The company claimed that before deciding to proceed with its complaint the FTC should have considered the possibility that undesirable environmental consequences might result from an eventual order requiring it to divest the aggregates producer.[2]

Gifford-Hill's motion for a preliminary injunction was denied, primarily because the District Court concluded that NEPA does not apply to the type of agency action at issue here and that plaintiff's probability of ultimate success on the merits was, therefore, too low to warrant issuing the injunction.[3] This appeal was taken from the denial of the preliminary injunction. 28 U.S.C. § 1292(a)(1) (1970). Without considering the merits of the NEPA complaint, we affirm.

I

[1,2] A plaintiff has standing to challenge an administrative action in

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[1] Gifford-Hill acquired the Becker Sand & Gravel Company, which strip mines sand and gravel, in 1972.

[2] The gravamen of Gifford-Hill's argument is that if it is forced to divest Becker, *see* note 1 *supra*, it will be compelled to open additional strip mines of its own in order to provide the materials it now receives from Becker's mines.

[3] *Gifford-Hill & Co. v. FTC*, D.D.C., 389 F.Supp. 167 (1974).

federal court if the challenged action caused it "injury in fact" and if "the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated."[4] *Sierra Club* v. *Morton*, 405 U.S. 727, 733, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972); *Barlow* v. *Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); *Ass'n of Data Processing Serv. Organizations* v. *Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). Gifford-Hill satisfies the first of these criteria since the FTC's action puts the company to the expense of making its defense and subjects it to the risk of an adverse ruling by the Commission. This "injury in fact," however, does not affect an interest even arguably "within [732] the zone of interests to be protected or regulated" by NEPA. NEPA's concern is with protection of the environment, not with the desire of parties to prevent or delay administrative efforts to enforce the antitrust laws.[5] See *Zlotnick* v. *District of Columbia Redevelopment Land Agency*, D.D.C., 2 *Envir.L.R.* 20235, 20236 (1972), *affirmed by order*, 161 U.S. App.D.C. 238, 494 F.2d 1157 (1974).

Gifford-Hill bases its claim to have standing to raise the NEPA question primarily on *National Helium Corp.* v. *Morton*, 10 Cir., 455 F.2d 650 (1971), *affirming*, D.Kan., 326 F.Supp. 151 (1971), and on the cases which have followed that decision. Reply brief of appellant at 21-23. In *Helium* the Tenth Circuit held that the plaintiff company, which extracted helium from natural gas at the well site and sold the helium to the Government, had standing to challenge the failure of the Secretary of the Interior to file an environmental impact statement before cancelling the Government's contracts to purchase helium. The appellate court essentially agreed with the District Court's conclusion in *Helium* that although

> [i]t may seem passing strange to see plaintiffs, the off-spring of corporate giants of the oil and gas industry, garbing themselves in the status of private attorneys general for the public interest, yet this Court perceives no valid reason why they cannot assert this role as protector of the public interest, along with their own. The Court finds that plaintiffs do have requisite standing to maintain this action. 326 F.Supp. at 157.

We have two substantial reasons for concluding that *Helium* and its progeny do not control this case. First, in *Helium* the mechanism of plaintiff's injury was directly and immediately related to the concerns of NEPA. National Helium's injury resulted from the cancellation of a Government program designed to encourage capture of helium at the well site in order to prevent that gas from being wasted and to assure an adequate supply of helium for necessary uses. As both the Tenth

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[4] The Supreme Court has not had occasion to determine whether the "injury in fact" must be to an interest within the "zone of interests" protected by the statute, but the better interpretation of the language quoted in text and of *Barlow* and *Ass'n of Data Processing Serv. Organizations* is that such a congruence is required. *See, e.g., F. Anderson, NEPA in the Courts* 43 (1973); *K. Davis, Administrative Law Treatise* § 22.00-1 at 709 (Supp.1970).

[5] Gifford-Hill has not, of course, been able to allege that its use or enjoyment of the environment has been harmed or endangered by the FTC's action. *Cf. Sierra Club* v. *Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

Circuit and the District Court explained, the proper use and conservation of depletable natural resources are among NEPA's primary concerns. 455 F.2d at 655; 326 F.Supp. at 154-155. Thus, although the company and the statute were moved by different considerations, they shared a common interest in the helium purchase program. Gifford-Hill can point to no similar interest, shared by it and NEPA, which is injured by the FTC's decision to prosecute.

[3] The second reason for distinguishing *Helium* from the present case is that the former involved a challenge to an "agency action" under the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704 (1970). *See* 455 F.2d at 654; 326 F.Supp. at 154. As the *Helium* District Court explained, the APA's provision that "[a] person 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action' " should have access to judicial review, 5 U.S.C. § 702, played a major role in the court's decision that National Helium had standing to raise the NEPA question. *See* 326 F.Supp. at 157, *discussing Scanwell Laboratories, Inc.* v. *Shaffer*, 137 U.S.App.D.C. 371, 424 F.2d 859 (1970). In the present case, however, Gifford-Hill must demonstrate its right to challenge the FTC's compliance with NEPA without the aid of the APA, since the decision to institute an adjudicatory proceeding is not an "agency action"—and most certainly not a "final agency action"—made reviewable by the latter statute. *See* 5 U.S.C. §§ 551(13), 702, 704.

II

[4] Our conclusion that the FTC's decision to initiate an adjudicatory pro[733]ceeding is not an action made reviewable by the APA indicates the second major difficulty with appellant's action: this suit is premature. Jurisdiction to review antitrust orders of the FTC is conferred on specified Courts of Appeals by 15 U.S.C. § 21(d) (1970). "All constitutional, jurisdictional, substantive, and procedural issues arising in Commission proceedings may be considered" in the statutory review proceeding. *Frito-Lay, Inc.* v. *FTC*, 5 Cir., 380 F.2d 8, 10 (1967). Except in extraordinary cases, there is no reason to allow a litigant to undermine this congressionally created method of judicial review of FTC decisions by bringing an interlocutory appeal, even though that appeal be brought as an independent suit in the District Court. *Id.; cf. Ecology Action* v. *United States Atomic Energy Comm'n*, 2 Cir., 492 F.2d 998 (1974); *Thermal Ecology Must Be Preserved* v. *Atomic Energy Comm'n*, 139 U.S.App.D.C. 366, 433 F.2d 524 (1970) (*per curiam*).

[5] The wisdom of this refusal to entertain most interlocutory appeals is well illustrated by the present case. Gifford-Hill's environmental claim is based on the possible result of a divestiture order which may never be entered, either because the challenged acquisition is found lawful or because some other remedy is deemed more appropri-

ate. Moreover, during the adjudicatory proceeding both Gifford-Hill and the staff of the FTC can present evidence about environmental factors. That evidence can be considered as it relates to shaping a remedy, if the acquisition violates the antitrust laws, and the administrative law judge and the FTC can determine whether an environmental impact statement is required before a final order is entered.[6] In view of these opportunities for the FTC to comply with NEPA's requirements during the adjudicatory proceeding and of the ability of Gifford-Hill to challenge any failure to do so in its appeal from the Commission's final order, allowing this action to be maintained would serve no purpose other than the company's apparent desire for delay.[7]

For the foregoing reasons, the decision of the District Court is affirmed and the case is remanded with instructions to dismiss.

So ordered.

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[6] *See* Note, *Gifford-Hill & Co.* v. *FTC: Does NEPA Apply to Law-Enforcement Adjudicatory Functions of an Agency?*, 1975 *Duke L.J.* 743; Council on Environmental Quality, Advisory Memorandum, brief for defendants-appellees at 24a-27a.

[7] We recognize that our holding effectively means that an agency's decisions to institute adjudicatory proceedings, and *a fortiori* its decisions to institute investigations to determine whether adjudication is warranted, are outside the scope of NEPA. Since these decisions in no way foreclose the agency from considering environmental factors before making a final decision to require some action, we are convinced that this result is proper. The decision to investigate or to adjudicate does not involve the type of "irretrievable commitment of resources" which NEPA insists must follow rather than precede consideration of environmental factors. *Cf. Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Comm'n*, 156 U.S.App.D.C. 395, 414, 481 F.2d 1079, 1098 (1973); 87 *Harv.L.Rev.* 1054-1059 (1974).

BROWN & WILLIAMSON TOBACCO CORP. v. LEWIS A. ENGMAN, ET AL.*

Docket No. 75-6081-398 F.T.C. Docket C-2183

PHILIP MORRIS INCORPORATED v. LEWIS A. ENGMAN, ET AL.*

Docket No. 75-6084-399 F.T.C. Docket C-2181

R.J. REYNOLDS TOBACCO CO. v. LEWIS A. ENGMAN, ET AL.*

Docket No. 75-6085-400 F.T.C. Docket C-2184

LOEW'S THEATRES, INC. v. LEWIS A. ENGMAN, ET AL.*

Docket No. 75-6087-401 F.T.C. Docket C-2180

AMERICAN BRANDS, INC. v. LEWIS A. ENGMAN, ET AL.*

Docket No. 75-6088-402 F.T.C. Docket C-2182

LIGGETT & MYERS INCORPORATED v. LEWIS A. ENGMAN, ET AL.*

Docket No. 75-6090-403 F.T.C. Docket C-2185

(United States Court of Appeals, Second Circuit, December 22, 1975)

1. **THE STATUTORY FRAMEWORK PROVIDING OPPORTUNITY FOR TESTING VALIDITY OF STATUTES OR ADMINISTRATIVE ORDERS WITHOUT INCURRING PENALTIES IF SUIT IS LOST SATISFIES THE CONSTITUTIONAL REQUIREMENT OF DUE PROCESS RIGHT.**

   One has due process right to contest validity of legislative or administrative order affecting his affairs without necessarily having to face ruinous penalties if suit is lost and this constitutional requirement is satisfied by statutory scheme which provides opportunity for testing validity of statutes or administrative orders without incurring prospect of debilitating or confiscatory penalties.

2. **CIGARETTE COMPANIES ENTERING INTO CONSENT ORDERS WHICH WAIVED THEIR RIGHT TO FURTHER CHALLENGE DECREES' VALIDITY, WERE NOT ENTITLED TO STAY OF CUMULATIVE PENALTIES DURING RELATED ENFORCEMENT PROCEEDINGS.**

   Where cigarette companies entered into consent decrees with Federal Trade Commission regarding health warning to be placed on cigarette advertising and waiving right to further challenge their validity, companies were not entitled to stay of cumulative penalties during proceedings relating to enforcement of those decrees.

*** Reported 527 F.2d 115 (1975); *cert. denied* 96 S. Ct. 2237 (1976) *See also* pp. 1446 and 1525 herein. For case before the Commission, see 80 F.T.C. 455.**

3. **ON MOTIONS FOR PRELIMINARY INJUNCTIONS ADDRESSED TO ITS DISCRETION, DISTRICT COURT DECISIONS SHOULD NOT BE DISTURBED, UNLESS ABUSE OF THAT DISCRETION IS SHOWN.**

Motions for preliminary injunction are addressed to discretion of district court and its decision should not be disturbed unless abuse of discretion is shown.

4. **WHERE PUBLIC INTEREST RATHER THAN PRIVATE INTERESTS IS INVOLVED, COURTS OF EQUITY MAY GO MUCH FURTHER IN GIVING OR WITHHOLDING PRELIMINARY INJUNCTIVE RELIEF.**

Courts of equity may go much further both to give or to withhold prelimi[**1116**]nary injunctive relief in furtherance of public interest than only private interests are involved.

(Syllabus, with substituted captions, taken from 527 F.2d 1115.)

In affirming the denial of appellants' motion for a stay of penalties, court held that where cigarette companies entered into Federal Trade Commission consent agreements waiving their rights to further challenge decrees' validity, they were not entitled to a stay of cumulative penalties during enforcement proceedings relating to the orders.

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Richard J. Weisberg, Asst. U.S. Atty. (*Paul J. Curran,* U.S. Atty. for the Southern District of New York, *Steven J. Glassman,* Asst. U.S. Atty., of counsel), for appellees.

Before MULLIGAN, OAKES and MESKILL, *Circuit Judges.*

OAKES, *Circuit Judge:*

This appeal is from the denial of appellants' motion for a stay of penalties under Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l) (1975 Supp.). The motion for a stay was sought by the six appellants who collectively produce about 99 per cent of the cigarettes manufactured in the United States. They have instituted declaratory judgment actions to obtain review of the Federal Trade Commission's interpretation of six cease and desist consent orders previously entered against them. Appellants have sought review prior to any enforcement proceedings brought by the FTC. The United States District Court for the Southern District of New York, Charles H. Tenney, Judge, denied the motion for a stay. He concluded that appellants were not entitled to a stay as a matter of law and that they had failed to show that without the stay they will suffer irreparable injury or that the balance of the equities tipped decidedly in their favor. We affirm.[1]

The consent orders here involved were formally issued by the FTC on March 30, 1972. Essentially they require, in very detailed terms as to size of print, location, color and shape, that appellants include in their newspaper, magazine and other periodical advertising the now famous Surgeon General's warning reading [1117] "Warning: The Surgeon General has determined that cigarette smoking is dangerous to your health." The history underlying the consent orders is not particularly relevant for present purposes, so that it is set out only in the margin.[2] Suffice it to say that the orders were entered into after negotiations resulting from the FTC's serving appellants with proposed complaints charging them with deceptive practices under 15 U.S.C. § 45(a) for the failure to disclose in their advertising the hazards of using cigarettes. The important thing for our purposes is that in the consent order each of the appellants waived "any further procedural steps" and "all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement." It should also be mentioned that the consent orders required the submission of compliance reports. These reports were filed in September 1972, with the result that the FTC reported to Congress in December 1972 and January 1974 that industry practice was in substantial compliance with the orders. Subsequently, however, the FTC claimed that prior to and since September 1972 appellants had engaged in practices which did not comply with the consent orders' detailed requirements. Accordingly the Commission initiated a compliance investigation. From November 1974 through January 1975 attempts apparently were made to settle the FTC's claims of violations of the orders, but the settlement negotiations broke down. The companies claim that the FTC demanded too high a sum as a penalty for past violations and the FTC counters that such a sum was not a condition to further negotiation, and that appellants had refused to accept the staff's interpretation of the consent orders. On March 17, 1975, appellants asked the FTC Commissioners to reject the staff's interpretation. On August 1, 1975, the Commission, by letters to the companies, formally indicated that the Commissioners supported the staff's interpretation and that pursuant to the provisions of 15 U.S.C. § 56(a)[3] it would notify the Attorney General of its intention to commence an action for civil penalties and for other relief on the basis of these violations. The letters of August 1 stated, however, that for certain of the [1118] alleged violations of the orders the Commission would hold the civil penalty action in abeyance for 180 days.[4] Appellants thereafter, on August 14, 1975, commenced actions for a judgment declaring that the "determinations" in the Commission's letters of August 1 are inconsistent with the provisions of the orders and that the appellants are not liable for civil penalties. They also sought an order staying pending final judgment the accumulation of penalties for alleged violations of the orders under Section 5 of the Act, 15 U.S.C. § 45.[5] The six complaints were consolidated, since they contain identical questions of

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[1] In the appellants' reply brief it was brought to our attention that the government filed civil enforcement actions in the United States District Court for the District of Columbia on October 17, 1975. We understand by correspondence from the parties that there are motions by the appellants here and defendants therein to have the civil enforcement action dismissed for lack of jurisdiction and for improper venue, or to have the action transferred to the Southern District of New York. We also are aware that by order dated November 5, 1975, Judge Tenney dismissed the complaints underlying the present appeal, on the basis that he would decline to exercise jurisdiction in the light of the enforcement action in the District of Columbia. Appellants have filed a notice of appeal therefrom and by letter have sought to consolidate that appeal with the instant one. Consolidation is opposed by the Government.

We have considered whether Judge Tenney's order dismissing the action has rendered the present appeal moot. We have concluded, however, that affirmance of the dismissal will not necessarily make this appeal moot because still at issue is the question whether penalties that possibly accrued prior to the commencement of the District of Columbia action or the dismissal of the underlying complaint here should be stayed. As to consolidation, since the appeal herein has already been argued, the more orderly procedure appears to be to consider the issue of preenforcement stay of penalties separately as it has arisen.

[2] As taken essentially from the affidavit of Eric M. Rubin, an FTC staff attorney, the history was as follows. In June, 1964, after the Surgeon General released the Report of his Advisory Committee on Smoking and Health, the FTC issued a proposed rule requiring the inclusion of a health warning in all cigarette labeling and advertising. Congress, however, adopted the Cigarette Labeling and Advertising Act of 1965, Pub.L. No. 89-92, 79 Stat. 282, requiring a health warning on all cigarette packages, but barring until July 1, 1969, the FTC from requiring such a warning in cigarette advertising. 1965 U.S.Code Cong. Admin. News 2350, 2351. When that time expired the FTC again announced its intention to promulgate a trade regulation rule requiring a warning to be included in all cigarette advertising. Congress again intervened to enact the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1331 *et seq.* This act prohibited radio and television advertising of cigarette and little cigars after January 1, 1971, 15 U.S.C. § 1335, and foreclosed any action by the FTC "with respect to its pending trade regulation rule proceeding" before July 1, 1971, 15 U.S.C. § 1336(a). The Act also reaction in this area after July 1, 1971, the Commission had to give six months' notification to Congress of its determination to do so. But Congress specifically left untouched the FTC's authority with respect to unfair or deceptive cigarette advertising acts or practices. 15 U.S.C. § 1336(b). On July 1, 1971, the FTC served on each of the appellants individual complaints charging them with failure to disclose the Surgeon General's warning. Agreements containing consent orders agreeing to such disclosure were negotiated in January of 1972 and in March of 1972 the orders were finally issued and thereafter served.

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[3] 15 U.S.C. § 56 provides in pertinent part:

> Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 54 of this title or under subsection (l) of section 45 of this title, it shall—
>
> (a) certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection. . . .

[4] The alleged violations for which immediate notification of the Department of Justice was to be made included omission of the warnings in vending machine display panels; omission or undersizing in promotional materials such as counter racks and calendars; undersizing or mispositioning of the warning in newspaper, magazine and other periodical advertising; and, in connection with foreign language advertising, mistranslation of the warning or use of a different language therein.

[5] 15 U.S.C. § 45(a)(1) declares unfair or deceptive acts in commerce unlawful. The statute empowers and directs the Commission to prevent such acts, 15 U.S.C. § 45(a)(6). It authorizes the issuance of cease and desist complaints, provides for agency hearings thereon and affords review of FTC orders in the court of appeals. 15 U.S.C. § 45(b)-(d). The penalties for violation of orders are set forth in 15 U.S.C. § 45(l) as follows:

> Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than

(*Continued*)

law, and after a hearing the court denied the motion for a stay of penalties, treating it essentially as an application for a preliminary injunction.

Appellants principally argue that they are entitled to a stay of the accrual of civil penalties as a matter of law. They do so on the basis of a series of Supreme Court decisions which commenced with *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and include *Wadley Southern Railway Co.* v. *Georgia*, 235 U.S. 651, 35 S.Ct. 214, 59 L.Ed. 405 (1915); *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596 (1920), and *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961).[6] The argu[1119]ment is that a party whose conduct is made subject to administrative action must be given the opportunity to obtain a judicial test of the validity of such action and, further, as a matter of due process of law, cannot be subjected to the risk that substantial penalties will accumulate during the course of the judicial proceeding. This line of cases is based on the reasoning that, regardless of the ultimate determination on the merits, due process requires that some real opportunity to challenge administrative action be afforded, and that such opportunity cannot exist where penalties are so great that noncompliance and a judicial challenge cannot be risked. The argument is the more compelling, the appellants suggest, in connection with FTC statutory penalties due to recent decisions, including our own *United States* v. *J. B. Williams Co.*, 498 F.2d 414, 435-36 (2d Cir. 1974), note 5 *supra*, which hold that penalties imposed for noncompliance with the Commission's cease and

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> $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

For a general discussion of the penalty mechanism, *see United States* v. *J. B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974), *noted in* 41 Brooklyn L.Rev. 792 (1975), 43 Geo.Wash.L.Rev. 307 (1975), 88 Harv.L.Rev. 1035 (1975).

[6] *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), held that state statutes establishing maximum rail rates and providing large penalties (including imprisonment) for violation thereof were constitutionally invalid since the parties had been given no opportunity to contest validity of the rates and were effectively denied judicial review of the rates by the magnitude of the penalties. *Id.* at 147-48, 28 S.Ct. 441. *Wadley Southern Ry.* v. *Georgia*, 235 U.S. 651, 669, 35 S.Ct. 214, 59 L.Ed. 405 (1915), held that where a state railroad commission joint rate order was made after hearing and where the carrier did not avail itself of a "safe, adequate, and available" statutory judicial review to test the validity of the order, the statute authorizing a $5,000 a day penalty for violation was not invalid. *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596 (1920), followed *Young* where there was no opportunity for judicial review of a state agency order. *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961), held that fixed statutory forfeitures of $100 per day for failure to file special reports in compliance with FTC orders were not invalid where "petitioner did not try to obtain judicial review prior to the commencement" of the Government's penalty action, and where the petitioner did not "seek a stay once the litigation had begun." *Id.* at 225, 82 S.Ct. at 299. The Court seemed to indicate that a declaratory judgment action would have lain to contest the validity of the orders and pointed out that even after the Government commenced the enforcement action a stay of penalties could have been but was not sought. *Id.* at 225-27, 82 S.Ct. 289.

desist order may be computed on the basis of a separate violation for each day and for each advertisement.[7] Appellants thus claim that the district court's endorsement of the Government's position in this case is directly contrary to definitive Supreme Court decisions which embody the rule that a stay of penalties is required during a good faith judicial challenge to an agency determination.

[1] *Young, Wadley, Love* and *St. Regis,* however, do not go as far as appellants suggest. Rather, they establish that one has a due process right to contest the *validity* of a legislative or administrative order affecting his affairs without necessarily having to face ruinous penalties if the suit is lost. The constitutional requirement is satisfied by a statutory scheme which provides an opportunity for testing the validity of statutes or administrative orders without incurring the prospect of debilitating or confiscatory penalties. As stated in *St. Louis, Iron Mountain & Southern Railway Co.* v. *Williams,* 251 U.S. 63, 65, 40 S.Ct. 71, 72, 64 L.Ed. 139 (1919),

> where such an opportunity [to contest the validity] is afforded and the [statute or administrative order] is adjudged valid, or the carrier fails to avail itself of the opportunity [to contest the validity], it then is admissible, so far as due process of law is concerned, for the state to enforce adherence to the rate by imposing substantial penalties for deviations from it.

See St. Regis, supra, 368 U.S. at 226-27, 82 S.Ct. 289; *Wadley, supra,* 235 U.S. at 667-69, 35 S.Ct. 215. *See also Ford Motor Co.* v. *Coleman,* 402 F.Supp. 475 at 483-484 (D.D.C. 1975).

[2] Here the penalties which the appellants seek to have stayed did not attach prior to their opportunity to contest the validity of the orders. Rather, the risk of penalties began to accrue only after the appellants entered into consent decrees which acknowledged the validity of the decrees and waived the right further to challenge their validity. The statutory scheme of the Federal Trade Commission Act contemplates ample opportunity to the company accused of a deceptive practice to test the initial validity of the order. It can do so by seeking a review in the United States Court of Appeals. 15 U.S.C. § 45(c); note 5 *supra; see United States* v. *J. B. Williams Co., supra,* 498 F.2d at 419 (majority opinion) and at 441 (dissenting opinion). In the instant case, however, it is not the *validity* of the consent orders that appellants contest; rather it is their interpretation by the FTC. The question whether one is entitled to a stay of penalties as a matter of law in a suit involv[1120]ing the enforcement of an admittedly valid administrative order is not concluded by the *Young* line of cases. Appellants have pointed to no cases which support their proposition that at the

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[7] Appellants argue that in the complaints filed in the District of Columbia enforcement action the FTC claims that each copy of every advertisement constitutes a separate violation of the consent order. On this basis, appellants urge that the potential liability for an advertisement in the Sunday New York Daily News with a circulation of 3 million is $30 billion. Their point that substantial penalties may be involved is made even-though we need not accept their characterization of the FTC complaint.

compliance or enforcement stage they are still entitled to a stay. The only cases in which the argument has been made have not accepted it, although they hardly have the weight here that the Commission would attribute to them. *See Floersheim* v. *Weinberger*, 346 F.Supp. 950, 956 (D.D.C.1972), *modified on other grounds and aff'd sub nom. Floersheim* v. *Engman*, 161 U.S.App.D.C. 30, 494 F.2d 949 (D.C.Cir. 1973); *United States* v. *Beatrice Foods Co.*, 322 F.Supp. 139, 141 n. 1 (D.Minn.1971).

We agree, of course, with the principle enunciated by the Supreme Court in *Wadley Southern Railway Co.* v. *Georgia*, *supra*, 235 U.S. at 661, 35 S.Ct. 215, that a right of judicial review is merely "nominal and illusory" if it must be exercised "only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." But the legality of the orders here is entirely certain. The penalties are accruing in this case, if at all, only by virtue of noncompliance with perfectly valid administrative orders. At this stage the right of the government to impose fines and penalties for violation of the laws appears equally indisputable. As *Wadley* states, "there is no room to doubt the power of the state to impose a punishment heavy enough to secure obedience to such orders after they have been found to be lawful; nor to impose a penalty for acts of disobedience, committed after the carrier had ample opportunity to test the validity of administrative orders and failed so to do." 235 U.S. at 667, 35 S.Ct. at 220. *Cf. Calero-Toledo* v. *Pierson Yacht Leasing Co.*, 416 U.S. 663, 684-85 n. 24, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974).

Appellants argue, of course, that it is the risk of huge accumulating penalties during the course of the enforcement proceedings in this case which calls into play the Supreme Court cases and requires the granting of the temporary relief sought. But while the cumulative aspect of Section 45(l) penalties is severe, *see United States* v. *J. B. Williams Co.*, *supra*, 498 F.2d at 435-36, it very plainly was the view of Congress that such cumulative penalties might be the only way to enforce FTC orders in the face of profitable, repeated or continuing violations. See 96 Cong.Rec. 2974 (1950) (remarks of Congressman Cooley); *id.* at 2981 (remarks of Congressman Posage); *id.* at 3018-19 (remarks of Senator George); *id.* at 3025 (remarks of Senator Aiken). The legislative history of the Act, according to *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 231, 95 S.Ct. 926, 932, 43 L.Ed.2d 148 (1975),

> makes clear that Congress was concerned with avoiding a situation in which the statutory penalty would be regarded by potential violators of FTC orders as nothing more than an acceptable cost of violation, rather than as a deterrence to violation. For example, Senator Aiken, chief proponent of the 1950 amendment, said that if daily penalties for certain violations of the Federal Trade Commission Act were not permitted, "the fine

would amount to a license in the amount of $5,000 for misrepresentation, which would be a very cheap fine, indeed."

The cumulative penalty sections of Section 45(l) were held to be fair in *ITT Continental Baking Co.* because they were reasonably related to deterring cumulative violations of FTC orders in two situations: first, where detriment to the public and the advantage to the violator increases with delay of enforcement; and, second, where there exists a continuing ability on the part of the violator to eliminate the effects of his violation if so motivated. 420 U.S. at 232-33, 95 S.Ct. 926. We are satisfied, therefore, that § 45(l) cumulative penalties are not violative of due process under the circumstances of this case and that appellants are not entitled to a stay of [1121] penalties as a matter of law. We may point out in passing that while § 45 penalties are cumulative, they are also subject to the limitation of judicial discretion upon the penalties imposed.[8] Moreover, our own decision in *United States* v. *J. B. Williams Co., supra*, held that in any penalty action there is a right to jury trial on contested issues of fact.

[3,4] Appellants also argue that even under the district court's approach of treating the motion for a stay as an application for preliminary injunction they are entitled to relief. We need not again set forth our settled rule that to obtain such relief the litigant must either demonstrate a combination of probable success on the merits and the possibility of irreparable injury or, in the alternative, that he has raised serious questions going to the merits and that the balance of hardships tips "decidedly" in his favor. *San Filippo* v. *United Brotherhood of Carpenters and Joiners of America*, 525 F.2d 508, 511 (2d Cir. 1975), 6387, 6392; *Stamicarbon, N. V.* v. *American Cyanamid Co.*, 506 F.2d 532, 536 (2d Cir. 1974). Ultimately these motions are addressed to the discretion of the district court and its decision should not be disturbed unless an abuse of discretion is shown. In this regard, and particularly in this type of case, we must recall that courts of equity may go much further both to give or to withhold relief in furtherance of the public interest than where only private interests are involved. *See Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 156, 87 S.Ct. 1507, 18 L.Ed.2d 681

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[8] Indicative of this are the following statements from the floor which attended passage of the 1950 Amendment to 15 U.S.C. § 45(l):

> [I]t is inconceivable to me that any Federal court would impose penalties under this section which are not reasonably related both to the seriousness of the offense charged and the size and resources of the defendant.

96 Cong.Rec. 2974, 3026 (1950) (letter from W. T. Kelley, General Counsel, FTC, to Senator Fulbright).

> In no event would the court sanction any unreasonable penalty, or any such total penalty as would be destructive of legitimate business. So, therefore, I do not think there is any real danger here to legitimate business.

96 Cong.Rec. 3019 (1950) (remarks of Senator George).

The courts have recognized the limitation inherent in this section. *See United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 229 n. 6, 95 S.Ct. 926, 930 (1975) (". . . the statutes prescribe no minimum penalty, and the District Court has discretion to determine the amount of the penalty for each violation whether the transactions are construed as single or as continuing violations"). *See also United States* v. *J. B. Williams Co.*, 498 F.2d 414, 438 (2d Cir. 1974); *Floersheim* v. *Engman*, 494 F.2d 949, 952-54 (D.C.Cir. 1973); *Ford Motor Co.* v. *Coleman*, 404 F.Supp. 475 at 489 (D.D.C. 1975).

(1967); *Yakus* v. *United States*, 321 U.S. 414, 441, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *Gulf & Western Industries, Inc.* v. *Great Atlantic & Pacific Tea Co.*, 476 F.2d 687, 699 (2d Cir. 1973).

We agree with Judge Tenney below that appellants have doubtless posed a serious question on the merits. However, the limitations on the imposition of Section 45(l) penalties which we have discussed above, *see, e. g., Floersheim* v. *Engman*, 494 F.2d 949, 953 (D.C.Cir. 1973) ("There is room for leniency by the court, if petitioner's view of the meaning of the order is plausible and not defiant"), coupled with the strong public interest militating against the stay, preclude any finding that appellants have met their burden of showing that the equities tipped decidedly in their favor. We agree with the court in *Floersheim* v. *Engman*, *supra*, that the "equitable limitations inherent in the Government's remedies are a substantial protection for a respondent with a reasonable and bona fide claim." *See* note 8 *supra*. We also are of the view that if appellants' interpretation of the consent orders is incorrect, granting the stay would infringe the public interest in receiving adequate warnings on the hazards of cigarette smoking. We put no stock in the intimation in the appellants' brief that the public interest is not involved because Congress has specifically required warnings on cigarette packages but not on [1122] advertising. *See* note 2 *supra*. Nowhere has Congress suggested that the FTC should not continue to handle the matter of cigarette advertising, and deceptive advertising practices in general, within the confines of its existing complaint procedures under Section 45. *See* note 2 *supra*. It may be, as appellants claim, that the Commission's views on noncompliance relate to alleged "minuscule variations in type size and type style" and "to technical aspects" of the consent orders, but the Surgeon General's warning is a serious message which substantially affects the public interest. Noncompliance with the Commission's order is not a matter lightly to be endured.

Judgment affirmed.

FIRST NATIONAL CITY BANK, ET AL. v. FEDERAL TRADE COMMISSION, ET AL.*

Civ. A. No. 75 Civ. 4365 (MEF). F.T.C. File No. 99-253.

THE CHASE MANHATTAN BANK, ET AL. v. FEDERAL TRADE COMMISSION, ET AL.*

Civ. A. No. 75 Civ. 4417 (MEF). F.T.C. File No. 99-254.

MELLON NATIONAL CORPORATION v. FEDERAL TRADE COMMISSION, ET AL.*

Civ. A. No. 75 Civ. 4449 (MEF). F.T.C. File No. 99-255.

CHEMICAL NEW YORK CORPORATION, ET AL. v. FEDERAL TRADE COMMISSION, ET AL.*

Civ. A. No. 75 Civ. 4478 (MEF). F.T.C. File No. 99-257.

MORGAN GUARANTY TRUST COMPANY OF NEW YORK, ET AL. v. FEDERAL TRADE COMMISSION, ET AL.*

Civ. A. No. 75 Civ. 4486 (MEF). F.T.C. File No. 99-258.

(United States District Court, Southern District of New York, December 31, 1975)

On motion for preenforcement review, court held that under the authority of *Reisman* v. *Caplin*, 375 U.S. 440, preenforcement review motion of plaintiff banks on the legality of subpoenas issued by F.T.C. in connection with its investigation of the energy industry should be denied.

Shearman & Sterling, New York, N.Y., for plaintiff.

Before FRANKEL, *District Judge.*

MEMORANDUM

In these consolidated cases, plaintiff banks, having exhausted their administrative appeals, seek preenforcement review of the legality of subpoenas issued by the FTC in connection with its investigation of the energy industry. The FTC's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim is now before the court.

The motion to dismiss has generated a series of careful, learned, enlightening memoranda of law, for which the court is grateful. In the end, however, the case seems simple for our *nisi prius* purposes. While there may be questions still open or subject to elaboration at higher levels, controlling precedent appears to support the motion. *Reisman* v. *Caplin*, 375 U.S. 440 (1964); *Anheuser-Busch, Inc.* v. *FTC*, 359 F.2d 487 (8th Cir. 1966). Cases involving preenforcement review of *regulations*, not subpoenas, e.g., *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), seem distinguishable on grounds that defendants brief. In any event, neither those cases nor any others cited cast the slightest doubt upon the continued validity for our purposes of *Reisman* v. *Caplin*, *supra*.

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* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 60, 671 at 67,936 (1975-2 Trade Cases).

Proposed distinctions of *Reisman* are not persuasive. As to the threat of criminal penalties, it might be enough to say that corporations, the only species of plaintiff we have here, are apparently not subject to them. *St. Regis Paper Co.* v. *United States* 368 U.S. 208, 221 (1961). In any event, the problem is directly covered, again, in the *Reisman* decision. Plaintiffs attempt a chain of reasoning linked to a difference in conjunctions—an "or" in Internal Revenue Code § 7210 versus an "and" in § 10 of the FTC Act, 15 U.S.C. § 50. The semantical argument is strained at best. In the absence of evidence that anyone in Congress ever noticed the difference, or meant it to be significant in any pertinent sense, the contention built upon it must fail.

Further on the supposed danger of criminal liability, the court finds unpersuasive the assertion by some of the plaintiffs that the mere bringing of a preenforcement action somehow demonstrates plaintiffs' "good faith" in refusing to comply with the subpoenas, and thereby protects them from potential criminal penalties under section 10 of the FTC Act.

Allowing review of the kind sought here seems especially unjustified now that the Commission has brought the usual form of enforcement proceedings wherein any proper issues the banks propose as plaintiffs may be tendered to support their resistance as respondents.

In short, without retracing all of the doctrine explored in the briefs, the court holds that the complaints in these cases should be, and they are, dismissed.

It is so ordered.

PENALTY PROCEEDINGS

United States v. *Smith Fencer Corp., et al.*—United States District Court, Eastern District of Michigan, Southern District (Flint); judgment in the amount of $3,250 was entered March 23, 1971, upon thirteen counts of the complaint involving violation of an order relating to electric fence controllers. (Docket No. 8169, 59 F.T.C. 122.)

United States v. *Benjamin D. Kalin*—United States District Court, Northern District of Iowa, Western Division; judgment in the amount of $40,000 was entered April 2, 1971, for violation of consent order involving the misbranding, false invoicing and deceptive advertising of fur products. (Docket C-1093, *In re Benjamin D. Kalin trading as Kalin's Furs and Fashions, Etc.*, 70 F.T.C. 498.)

United States v. *Sav-Cote Chemical Laboratories, Inc., et al.*—United States District Court for the District of New Jersey; judgment in an amount to be later determined was entered July 25, 1971, for violation of a consent order prohibiting the misrepresentation of paints and coatings. (Docket C-716, 64 F.T.C. 892.)

United States v. *Royce George Hoffmann*—United States District Court for the District of Kansas; judgment in the amount of $500 was entered September 24, 1971, and a suspended sentence of six months was imposed on defendant, with five years probation, for violation of a consent order prohibiting deceptive practices regarding the sale of correspondence courses for jet-gas turbine and turpo-prop engine mechanics. (Docket No. 8136, *In re Hoffmann Aircraft Company*, *et al.*, 58 F.T.C. 730. See p. 104 herein.)

United States v. *National Bakers Services, Inc.*—United States District Court, Southern District of Florida; judgment in the amount of $40,000 was entered October 5, 1971, for violation of an order involving the calorie count of defendant's Hollywood bread. (Docket No. 7480, 62 F.T.C. 1115.)

United States v. *William N. Bostic*—United States District Court for the District of South Carolina; judgment in the amount of $80,000 was entered January 6, 1972, for violation of an order prohibiting bait and switch tactics in the sale of aluminum products. (Docket No. 8634, *In re Aluminum Industries, Inc., et al., trading as Southern Patio Company, Etc.*, 67 F.T.C. 1, 336 F. Supp. 1312, p. 185 herein; *affirmed* 473 F. 2d 1388 (4th Cir. 1972); *cert. denied* 411 U.S. 966 (1973).)

United States v. *William Smarz*—United States District Court for the District of New Jersey; judgment in the amount of $3,000 was entered January 28, 1972, for violation of consent order prohibiting use of deceptive practices in the collection of delinquent debts. (Docket C-1092, *In re William Smarz trading as Mercantile and Medical Credit Adjusters*, 70 F.T.C. 492.)

United States v. *Techbestos, Inc.*—United States District Court for the District of New Jersey; consent judgment in the amount of $400 was received and subsequent stipulation of dismissal was filed April 17, 1972, for violation of section 6(b) of the Federal Trade Commission Act. (File No. 33-66-431)

United States v. *Van Raalte Co., et al.*—United States District Court, Southern District of New York; consent judgment in the amount of $35,000 was entered May 18, 1972, for violation of order issued under the Flammable Fabrics Act in the sale of dangerously flammable scarves. (Docket No. 6690, *In re Glensder Textile Corporation, et al.*, 53 F.T.C. 1044.)

United States v. *Silver Star Chinchilla, Inc., et al.*—United States District Court for the District of Minnesota; consent judgment in the amount of $2,500 was entered August 15, 1972, for violation of an order issued under the F.T.C. Act concerning the sale of chinchilla breeding stock. (Docket C-1144, 70 F.T.C. 1456, p. 338 herein.)

United States v. *Philip T. Berkley*—United States District Court, Southern District of California; judgment in the amount of $8,000 was entered September 26, 1972, for violation of order issued under the F.T.C. Act. (Docket No. 8673, *In re Philip T. Berkley trading as Berkley Associates*, 69 F.T.C. 657.)

United States v. *Abraham Feder*—United States District Court, Southern District of New York; case settled and discontinued October 18, 1972, when defendant paid $2,000 penalty and furnished affidavit he was out of business and did not intend to return to it. Case involved violation of order issued under the Fur Products Labeling Act. (Docket C-1143, *In re Abraham Feder trading as Al Feder Furs*, 70 F.T.C. 1447.)

United States v. *Chicago Technical College*—United States District Court, Northern District of Illinois; consent judgment in the amount of $5,000 was entered October 30, 1972, for violation of an order prohibiting the misrepresentation of the term "free" in connection with their services. (Docket No. 4080, 35 F.T.C. 569.)

United States v. *G. Fred Davis*—United States District Court, Northern District of Texas; consent judgment in the amount of $5,000 was entered November 10, 1972, for violation of order prohibiting false and misleading advertising in door-to-door sales. (Docket No. 7858, *In re Bankers Loan Company, Inc., et al.*, 57 F.T.C. 569.)

United States v. *AMF Incorporated*—United States District Court for the District of Colorado; consent judgment in the amount of $30,000 was entered December 14, 1972, for violation of a consent order issued under the F.T.C. Act. (Docket C-1323, *In re Head Ski Co., Inc., et al.*, 73 F.T.C. 712)

United States v. *Woonsocket Spinning Co., et al.*—United States District Court, Southern District of New York; consent judgment in the amount of $27,000 was entered December 15, 1972, for violation of an order prohibiting the misbranding of wool yarn. (Docket No. 6474, 53 F.T.C. 218; and Docket No. 7170, *In re Amical Yarns, Inc., et al.*, 55 F.T.C. 811.)

United States v. *Beatrice Foods Company*—United States District Court for the District of Minnesota, Fourth Division; judgment in the amount of $166,200 was entered December 26, 1972, for violation of an order prohibiting certain acquisitions and for failing to timely divest. (Docket No. 6653, 68 F.T.C. 1003, 351 F. Supp. 969, p. 437 herein; *affirmed* 493 F. 2d 1259 (8th Cir. 1974), p. 867 herein.)

United States v. *J.B. Williams Company*—United States District Court, Southern District of New York; judgment in the amount of $812,000 was entered January 22, 1973, for violation of an order prohibiting the dissemination of advertisements creating the impression that tired feelings are caused by iron deficiency or which linked tired symptoms with iron deficiency anemia. (Docket No. 8547, 68 F.T.C. 481; *modified* 72 F.T.C. 865; 354 F. Supp. 521, p. 483 herein.)

United States v. *Aluminum Exterior Designers, Inc.*—United States District Court, Southern District of Indiana; judgment in the amount of $70,000 was entered February 21, 1973, for violation of a consent order prohibiting misrepresentations as to aluminum siding. The conditional judgment was cumulated by the court and distributed to 13 individual complainants. (Docket C-1316, 73 F.T.C. 516.)

United States v. *National Outdoor Display, Inc.*—United States District Court, Western District of Tennessee; judgment in the amount of $20,000 was entered March 2, 1973, for violation of a consent order prohibiting recruitment of personnel through the use of misrepresentations of earnings, opportunities, training, etc. (Docket C-1137, 70 F.T.C. 1369.)

United States v. *Hollywood Film Studios*—United States District Court, Central District of California; judgment in the amount of $500 was entered March 6, 1973, for violation of an order prohibiting false representations in connection with the sale of photographs. (Docket No. 4902, 47 F.T.C. 913; *modified* 73 F.T.C. 893.)

United States v. *Durlacher and Company, Inc.*—United States District Court, Southern District of New York; judgment in the amount of $15,000 was entered March 28, 1973, for violation of an order prohibiting the importation, sale or transportation of flammable scarves. (Docket No. 6355, 53 F.T.C. 77.)

United States v. *Stanley Furs, Inc.*—United States District Court for the District of Colorado; judgment in the amount of $2,000 was entered April 11, 1973, for violation of an order prohibiting the sale of old fur as new. (Docket No. 7135, 55 F.T.C. 1331.)

United States v. *Atlantic School, Inc.*—United States District Court for the District of Kansas; judgment in the amount of $18,000 was entered April 20, 1973, for violation of a consent order prohibiting false advertisements as to the qualifications of students to obtain employment following completion of respondent's correspondence courses. (Docket C-793, 66 F.T.C. 177.)

United States v. *C.W.F. Corporation*—United States District Court for the District of Maryland; judgment in the amount of $12,000 was entered May 9, 1973, for violation of a consent order prohibiting use of bait and switch tactics. (Docket C-1184, 71 F.T.C. 332.)

United States v. *Curtis Brothers, Inc.*—United States District Court for the District of Columbia; judgment in the amount of $25,000 was entered July 9, 1973, for violation of an order prohibiting misrepresentation of prices and amounts of savings. (Docket No. 7411, 56 F.T.C. 677.)

United States v. *Ancorp National Services, Inc.*—United States District Court, Southern District of New York; judgment in the amount of $204,000 and an injunction were entered November 30, 1973, for violation of an order prohibiting inducements of discriminatory promotional allowances. (Docket No. 7396, *In re Amercian News Company, et al.*, 58 F.T.C. 10; *modified* 65 F.T.C. 294; 367 F. Supp. 1221, p. 808 herein.)

United States v. *Swingline, Inc.*—United States District Court, Eastern District of New York; judgment in the amount of $150,000 was entered January 17, 1974, for violation of an order requiring divestiture of an illegally acquired concern. (Docket No. 8759, 76 F.T.C. 407; 371 F. Supp. 37, p. 827 herein.)

United States v. *Helene Curtis Industries, Inc.*—United States District Court, Northern District of Illinois; judgment in the amount of $21,000 was entered May, 1974, for violation of consent order requiring disclosure of the terms and conditions of guarantees in advertising. (Docket C-227, 61 F.T.C. 510.)

United States v. *United Industrial Syndicate, Inc.*—United States District Court, Eastern District of Wisconsin; judgment in the amount of $50,000 was entered May 17, 1974, for violation of a consent order requiring divestitute by a certain date. (Docket C-1860, 78 F.T.C. 310.)

United States v. *Universal Training Service, et al.*—United States District Court, Eastern District of Louisiana, New Orleans Division; judgment in the amount of $80,000 and an injunction was entered June 19, 1974, for violation of an order issued under the F.T.C. Act. (Docket No. 8136, 61 F.T.C. 837.)

United States v. *Irving Rifkin*—United States District Court, Southern District of New York; judgment in the amount of $12,500 was entered November 17, 1974, for violation of an order prohibiting the misbranding of wool products. (Docket No. 7996, *In re Richard F. Jorn, et al. trading as Tessitalia*, 58 F.T.C. 541.)

United States v. *Automation Machine Training Center, Inc.*—United States District Court, Western District of Missouri; judgment in the amount of $24,581.47, plus court costs, was entered January 17, 1975, for violation of a consent order prohibiting various oral misrepresentations in the course of sales presentations to prospective students. (Docket C-1474, 75 F.T.C. 11.)

United States v. *W.T. Grant Company*—United States District Court, Southern District of New York; judgment in the amount of $150,000 was entered February 13, 1975, for violation of an order prohibiting the failure to disclose Truth in Lending Act disclosures. (Docket No. 8931, 83 F.T.C. 1328.)

United States v. *Papercraft Corporation*—United States District Court, Western District of Pennsylvania; judgment in the amount of $3,817,500 was entered May 9, 1975, for violation of an order requiring divestiture of CPS Industries, Inc., under section 7 of the Clayton Act. The court also entered an injunctive order. (Docket No. 8779, 78 F.T.C. 1352; *modified* 79 F.T.C. 420; 393 F. Supp. 415, p. 1329 herein.)

Federal Trade Commission v. *Consolidated Foods, Inc.*—United States District Court, Southern District of New York; judgment in the amount of $25,000 was entered May 27, 1975, for violation of a consent order prohibiting various acts or practices under section 2 of the Clayton Act. (Docket C-2454, 83 F.T.C. 463; 396 F. Supp. 153, p. 1355 herein.)

United States v. *William R. Clark*—United States District Court for the District of Maryland; judgment in the amount of $1,700 was entered June 29, 1975, for violation of an order requiring buyer's right of rescission and Holder-in-Due-Course disclosures. (Docket No. 8761, *In re Household Sewing Machine Co., Inc., et al.*, 76 F.T.C. 207; *modified* 77 F.T.C. 1186.)

United States v. *Greater Kansas City Gas Furnace & Air Conditioning Company*—United States District Court, Western District of Missouri; judgment in the amount of $7,000 was entered September, 1975, for violation of a consent order prohibiting certain misrepresentations in connection with the sale of furnaces. (Docket C-1541, 75 F.T.C. 957.)

United States v. *Raymond Anderson*—United States District Court, Southern District of Ohio; judgment in the amount of $10,000 was entered October 23, 1975, for violation of an order prohibiting bait and switch tactics in the sale of sewing machines. (Docket No. 6844, *In re Universal Sewing Service, Inc., et al.*, 54 F.T.C. 643.)

United States v. *Alvin O. Langdon, et al.*—United States District Court, Eastern District of Tennessee; judgment in the amount of $1,000 was entered October 30, 1975, for violation of an order prohibiting misrepresentations in advertising and sale of correspondence and home study courses and academic degrees. (Docket No. 8820, *In re Ohio Christian College (of Calvary Grace Christian Churches of Faith, Inc.), et al.*, 80 F.T.C. 815.)

United States v. *Arlen Realty & Development Corp., et al.*—United States District Court for the District of Maryland; judgment in the amount of $40,000 was entered November 18, 1975, for violation of a consent order prohibiting the mailing of unsolicated credit cards. (Docket C-2383, 82 F.T.C. 1234.)

United States v. *Charles R. Johnson*—United States District Court, Eastern District of Maryland; judgment in the amount of $40,000 was entered November 21, 1975, for violation of a consent order prohibiting misrepresentations in connection with the sale of computer school courses. (Docket C-1569, *In re Technical Education Corporation, et al.*, 76 F.T.C. 181.)

United States v. *Del L. Young*—United States District Court, Northern District of Illinois; judgment in the amount of $8,500 was entered December 2, 1975, for violation of a consent order prohibiting misrepresentations in the sale of residential siding. (Docket C-1514, *In re GBM Corporation trading as U.S. Construction Co., et al.*, 75 F.T.C. 514.)

United States v. *Amstar Corporation*—United States District Court, Southern District of New York; judgment in the amount of $46,000 ($36,000 in corrective advertising) was entered December 16, 1975, for violation of an order requiring corrective advertisements. (Docket No. 8887, 83 F.T.C. 659.)

STATUTES

FEDERAL TRADE COMMISSION ACT

[Public No. 203, 63D Congress, Approved September 26, 1914 (38 Stat. 717; 15 U.S.C. 41, *et seq.*), as Amended[1]]

AN ACT To create a Federal Trade Commission, to define its powers and duties, and for other purposes.

CREATION AND ESTABLISHMENT OF THE COMMISSION[2] (38 Stat. 717; 15 U.S.C. 41; 52 Stat. 111).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the Commissioners shall be members of the same political party. The first Commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed: *Provided, however,* That upon the expiration of his term of office a Commissioner shall con-

Federal Trade Commission created; composition and appointment.

Tenure of office.

Provisio. Continuance until successor qualifies.

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[1] The Act is set forth as amended by public laws which are listed at the end. Also listed are other statutes affecting the Federal Trade Commission Act.

[2] This caption and each caption that precedes each other section of the Act are not provisions of the Act. Such captions are additions made by the editors of this compilation.

tinue to serve until his successor shall have been appointed and shall have qualified. The Commission shall choose a Chairman from its own membership.[3]

Restriction.

No Commissioner shall engage in any other business, vocation, or employment.

Removal; vacancies.

Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission.

SALARIES, EMPLOYEES. EXPENSES OF THE COMMISSION (38 Stat. 718; 15 U.S.C. 42).

Salaries.

Sec. 2. The Commission shall appoint a secretary, who shall receive a salary payable in the same manner as the salaries of the judges of the courts of the United States, and it shall have authority to

Attorneys, experts, etc.

employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.[4]

With the exception of the secretary, a clerk to each Commissioner, the attorneys, and such special experts and examiners as the Commission may from time to time find necessary for the conduct of its work, all employees of the Commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the Commission and by the Civil Service Commission.

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[3] Under the provisions of section 3 of Reorganization Plan No. 8 of 1950, effective May 24, 1950, 15 F.R. 3175, 64 Stat. 1264, the functions of the Commission with respect to choosing a Chairman from among the membership of the Commission was transferred to the President. Under said plan, prepared by the President and transmitted to the Senate and House on March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949, there were also transferred from the Commission to the Chairman of the Commission, subject to certain limitations, "the executive and administrative functions of the Commission, including functions of the Commission with respect to (1) the appointment and supervision of personnel employed under the Commission, (2) the distribution of business among such personnel and among administrative units of the Commission, and (3) the use and expenditure of funds."

Under the provisions of section 1 of Reorganization Plan No. 4 of 1961, effective July 9, 1961, 26 F.R. 6191, 75 Stat. 837, the Commission, retaining a discretionary right to review, was authorized "to delegate, by published order or rule, any of its functions * * *." In addition, there were transferred from the Commission to the Chairman of the Commission the functions of the Commission with respect to the assignment of Commission personnel, including Commissioners, to perform such functions as may have been delegated by the Commission to Commission personnel, including Commissioners.

[4] The provisions of this section prescribing the annual basic compensation of the Commissioners are omitted to conform to the provisions of the Federal Executive Salary Schedule. See 5 U.S.C. § 5311 *et seq.* The June 10, 1921, Act omitted a salary of $5,000 for the secretary.

Application of civil service laws.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Commission.

Payment of expenses

Until otherwise provided by law, the Commission may rent suitable offices for its use.

The General Accounting Office shall receive and examine all accounts of expenditures of the Commission.[5]

Auditing accounts.

BUREAU OF CORPORATIONS. OFFICE OF THE COMMISSION. PROSECUTION OF INQUIRIES (38 Stat. 718; 15 U.S.C. 43).

Sec. 3. Upon the organization of the Commission and election of its Chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the Commission.

Bureau of Corporations abolished.

Authority vested in the Commission.

All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the Commission at their present grades and salaries. All records, papers, and property of the said bureau shall become records, papers, and property of the Commission, and all unexpended funds and appropriations for the use, and maintenance of the said bureau, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year nineteen hundred and fifteen, or from the departmental printing fund for

Transfer of employees, records, appropriations, etc.

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[5] The Act of June 10, 1921, 42 Stat. 24, abolished the office of the auditor and transferred its functions to the General Accounting Office.

the fiscal year nineteen hundred and fifteen, shall become funds and appropriations available to be expended by the Commission in the exercise of the powers, authority, and duties conferred on it by this Act.

Inquiries elsewhere.

The principal office of the Commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The Commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

"COMMERCE," ETC. DEFINED (38 Stat. 719; 52 Stat. 111; 15 U.S.C. 44).

Sec. 4. The words defined in this section shall have the following meaning when found in this Act, to wit:

"Commerce."

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation."

"Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence."

"Documentary evidence" includes all documents, papers, correspondence, books of account, and financial and corporate records.

"Acts to regulate commerce."

"Acts to regulate commerce" means the Act entitled "An Act to regulate commerce", approved February 14,[6] 1887, and all Acts amendatory thereof and supplementary thereto and the Communications Act of 1934 and all Acts amendatory thereof and supplementary thereto.

"Antitrust Acts"

"Antitrust Acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890; also sections 73 to 77, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", approved August 27, 1894; also the Act entitled "An Act to amend sections 73 and 76 of the Act of August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' ", approved February 12, 1913; and also the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914.

UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES UNLAWFUL. COMPLAINTS, FINDINGS, AND ORDERS OF COMMISSION. APPEALS. PENALTIES, MANDATORY INJUNCTIONS. CIVIL PENALTY ACTION FOR VIOLATION OF RULE, ORDER TO CEASE AND DESIST. DAILY PENALTIES. ISSUES OF FACT. COMPROMISE SETTLEMENTS WITH PUBLIC STATEMENT. (38 Stat. 719; 52 Stat. 111; 64 Stat. 21; 66 Stat. 631; 72 Stat. 942; 87 Stat. 591; 88 Stat. 2193; 89 Stat. 801; 15 U.S.C. 45).[7]

Unfair methods of competition and unfair acts and practices.

Sec. 5 (a) (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

Prevention by Commission.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers, and foreign air carriers subject to the Federal Aviation Act of

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[6] So in original ("An Act to regulate commerce" (Interstate Commerce Commission Act), 49th Congress, was approved on February 4, 1887, 24 Stat. 379.)

[7] Paragraphs (2) through (5) of section 5 (a) were repealed by the Consumer Goods Pricing Act of 1975, Pub. L. 94-145, 89 Stat. 801, and paragraph (6) was redesignated as paragraph (2).

1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406 (b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.[8]

Service of complaint.

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause

Notice of hearing.

Appearance of accused.

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[8] Public No. 85-909, 85th Cong., approved Sept. 2, 1958, amended the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 226, 227, and 72 Stat. 1749, 1750) by striking out subsec. (b) of sec. 406 and inserting in lieu thereof the following:

"(b) The Federal Trade Commission shall have power and jurisdiction over any matter involving meat, meat food products, livestock products in unmanufactured form, or poultry products, which by this Act is made subject to the power or jurisdiction of the Secretary, as follows:

"(1) When the Secretary in the exercise of his duties requests of the Commission that it make investigations and reports in any case.

"(2) In any investigation of, or proceeding for the prevention of, an alleged violation of any Act administered by the Commission, arising out of acts or transactions involving meat, meat food products, livestock products in unmanufactured form, or poultry products, if the Commission determines that effective exercise of its power or jurisdiction with respect to retail sales of any such commodities is or will be impaired by the absence of power or jurisdiction over all acts or transactions involving such commodities in such investigation or proceeding. In order to avoid unnecessary duplication of effort by the Government and burdens upon the industry, the Commissioner shall notify the Secretary of such determination, the reasons therefor, and the acts or transactions involved, and shall not exercise power or jurisdiction with regard to acts or transactions (other than retail sales) involving such commodities if the Secretary within ten days from the date of receipt of the notice notifies the Commission that there is pending in his Department an investigation of, or proceeding for the prevention of, an alleged violation of this Act involving the same subject matter.

"(3) Over all transactions in commerce in margarine or oleomargarine and over retail sales of meat, meat food products, livestock products in unmanufactured form, and poultry products.

"(c) The Federal Trade Commission shall have no power or jurisdiction over any matter which by this Act is made subject to the jurisdiction of the Secretary, except as provided in subsection (b) of this section."

Intervention by other parties. Testimony.

shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Report of findings.

Issuance of cease and desist order.

Modification, etc.

Reopening, altering, etc. or order.

Proviso. Right of appeal.

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act

Review by appropriate court of appeals.

or practice may obtain a review of such order in the court of appeals of the United States within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in Section 2112 of Title 28, United States Code. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors *pendente lite*. The finding of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive,

Jurisdiction.

Findings as to facts conclusive.

Modifications, etc., by Commission of findings as to fact.

and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subjected to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.[9]

Judgment and decree final; review by Supreme Court.

Exclusive jurisdiction of the court of appeals.

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Proceedings given precedence.

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

Service of processes.

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

Verified return; proof of service.

Commission's order final.

(g) An order of the Commission to cease and desist shall become final—

Upon expiration of time for filing petition for review.

(1) Upon the expiration of the time allowed for filing a petition for review, if no such peti-

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[9] Section 240 of the Judicial Code was repealed by the Act of June 25, 1948, Chapter 646, Sec. 39, 62 Stat. 992. Similar provisions are contained in section 1254 of Title 28 of the U.S. Code.

tion has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

Upon expiration of time for filing petition for certiorari.

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

Upon denial of petition for certiorari.

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

Supreme Court mandate affirming Commission order.

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

Order modified or set aside by Supreme Court.

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

By court of appeals; when final.

(i) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals, shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Rehearing.

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

"Mandate."

(k) As used in this section the term "mandate," in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalty for violation.

(l) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

Courts empowered to grant mandatory injunctions.

Penalty action for violation of rule.

(m) (1) (A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a) (1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

Penalty action for violation of order to cease and desist.

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a) (1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

Daily penalties.

(C) In the case of a violation through continuing failure to comply with a rule or with section 5 (a) (1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1) (B) the issues of fact in such action against such defendant shall be tried *de novo*.

Issues of fact tried *de novo*.

Compromise settlement with public statement.

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or set-

tlement is accompanied by a public statement of its reasons and is approved by the court.[10]

INVESTIGATORY AND RELATED POWERS AND DUTIES OF THE COMMISSION (38 Stat. 721; 87 Stat. 592; 88 Stat. 2193, 2198; 15 U.S.C. 46).

Additional powers.

Sec. 6. The Commission shall also have power—

Investigating business operations, etc., of corporations.

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations and to individuals, associations, and partnerships.

Requiring detailed reports, etc., from corporations.

(b) To require, by general or special orders, persons, partnerships, and corporations engaged in or whose business affects commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make

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[10] Section 205(b) of Public Law 93-637 provided that the amendment made by section 205(a) [enacting provisions of subsection (m) relating to civil penalties] did not apply to any violation, act, or practice to the extent that such violation, act, or practice occurred before the date of enactment of the Act (January 4, 1975).

To investigate compliance with anti-trust decrees.

Transmittal of findings, etc.

investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the Commission.

Investigations for the President or the Congress.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

Recommend business adjustments to comply with the law.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

To make public portions of information obtained.

Publishing reports, etc.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

Classifying corporations.

(g) From time to time to classify corporations and (except as provided in section 18 (a) (2) of this Act) to make rules and regulations for the purpose of carrying out the provisions of this Act.

Investigating conditions abroad affecting foreign trade.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

Investigative powers.

Provided, That the exception of "banks and common carriers subject to the Act to regulate commerce" from the Commission's powers defined in clauses (a) and (b) of this section, shall not be construed to limit the Commission's authority to gather and compile information, to investigate, or to require reports or answers from, any person, partnership, or corporation to the extent that such action is necessary to the investigation of any person, partnership, or corporation, group of persons, partnerships, or corporations, or industry which is not engaged or is engaged only incidentally in banking or in business as a common carrier subject to the Act to regulate commerce.

REFERRAL OF ANTITRUST SUITS TO COMMISSION (38 Stat. 722; 15 U.S.C. 47).

Formulation of decrees in antitrust suits.

Sec. 7. In any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the Commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The Commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

Action of court.

INFORMATION AND ASSISTANCE FROM OTHER DEPARTMENTS AND BUREAUS (38 Stat. 722; 15 U.S.C. 48).

Departments and bureaus to cooperate.

Sec. 8 The several departments and bureaus of the Government when directed by the President shall furnish the Commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the Commission as he may direct.

DOCUMENTARY EVIDENCE; SUBPOENAS; WITNESSES (38 Stat. 722; 84 Stat. 929; 88 Stat. 2198; 15 U.S.C. 49).

Power to secure testimony.

Sec. 9. For the purposes of this Act the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Issuance of subpoenas, etc.

Attendance of witnesses.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

District courts to enforce compliance.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation, issue an order requiring such person, partnership, or corporation, to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Writs of mandamus to compel compliance with Act.

Upon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person, partnership, or corporation to comply with the provisions of this Act or any order of the Commission made in pursuance thereof.

Testimony by deposition.

The Commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Compulsory appearance, etc.

Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Fees, etc. of witnesses.

OFFENSES AND PENALTIES (38 Stat. 723; 62 Stat. 909; 88 Stat. 2199; 15 U.S.C. 50).

Sec. 10. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Punishment for disobeying subpoenas, etc.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any person, partnership, or corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memo-

Punishment for false entries, destroying records, refusing inspection, etc.

randa of all facts and transactions appertaining to the business of such person, partnership, or corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such person, partnership, or corporation, or who shall willfully refuse to submit to the Commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such person, partnership, or corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or both such fine and imprisonment.

Penalty for not filing reports

If any persons, partnership, or corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the case of a corporation or partnership in the district where the corporation or partnership has its principal office or in any district in which it shall do business, and in the case of any person in the district where such person resides or has his principal place of business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Recovery, etc.

Punishment for unlawful divulging of information.

Any officer or employee of the Commission who shall make public any information obtained by the Commission without its authority, unless directed by a court, shall be deemed guilty of misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

EFFECT ON ANTITRUST ACTS AND ACT TO REGULATE COMMERCE (38 Stat. 724; 15 U.S.C. 51).

Antitrust laws and interstate commerce law not interfered with.

Sec. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

FALSE ADVERTISEMENT OF FOOD, DRUGS, DEVICES, OR COSMETICS AS UNFAIR OR DECEPTIVE ACT OR PRACTICE AND UNLAWFUL (52 Stat. 114; 88 Stat. 2193; 15 U.S.C. 52).

False advertising.

Sec. 12.[11] (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

By U.S. Mails.

(1) By United States mails, or in or having an effect upon commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

Inducing by any means the purchase in commerce of food, drugs, etc.

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, or cosmetics.

Dissemination of false advertisements an unfair act, etc.

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 5.

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[11] Sections 12 through 17 of the Federal Trade Commission Act, in certain instances, are not applicable to advertisements of prescription drugs. Public Law 87-781 (Act of October 10, 1962), 76 Stat. 792.

INJUNCTION AGAINST DISSEMINATION OF FALSE ADVERTISEMENT. TEMPORARY RESTRAINING ORDERS, INJUNCTIONS AGAINST VIOLATIONS OF ANY PROVISION OF LAW ENFORCED BY FTC (52 Stat. 114; 87 Stat. 592; 15 U.S.C. 53).

Sec. 13. (a) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public,

Suit or injunction.

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

Venue.

(b) Whenever the Commission has reason to believe—

Temporary restraining orders; injunctions.

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon

has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

Newspapers, or other publications.

(c) Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

If restraining of dissemination delays delivery of issue.

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

Delay due to method by which publication usually conducted.

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement.

the court shall exclude such issue from the operation of the restraining order or injunction.

PENALTY—COMMODITY INJURIOUS TO HEALTH OR INTENT TO DEFRAUD (52 Stat. 114; 15 U.S.C. 54).

Commodities injurious to health.

Penalty.

Convictions for subsequent violations.

Proviso. Inspection, etc., under Meat Inspection Act.

Sec. 14. (a) Any person, partnership, or corporation who violates any provision of section 12 (a) shall, if the use of the commodity advertised may be injurious to health because of results from such use under the conditions prescribed in the advertisement thereof, or under such conditions as are customary or usual, or if such violation is with intent to defraud or mislead, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than $5,000 or by imprisonment for not more than six months, or by both such fine or imprisonment; except that if the conviction is for a violation committed after a first conviction of such person, partnership, or corporation, for any violation of such section, punishment shall be by a fine of not more than $10,000 or by imprisonment for not more than one year, or by both such fine and imprisonment: *Provided,* That for the purposes of the section meats and meat food products duly inspected, marked, and labeled in accordance with rules and regulations issued under the Meat Inspection Act approved March 4, 1907, as amended, shall be conclusively presumed not injurious to health at the time the same leave official "establishments."

Liability of advertising medium.

Except on refusal to divulge address of client.

(b) No publisher, radio-broadcast licensee, or agency or medium for the dissemination of advertising, except the manufacturer, packer, disbributor, or seller of the commodity to which the false advertisement relates, shall be liable under this section by reason of the dissemination by him of any false advertisement, unless he has refused, on the request of the Commission, to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, seller, or advertising agency, residing in the United States, who caused him to disseminate such advertisement. No advertising agency shall be liable under this section by reason of the causing by it of the dissemination of any false advertisement, unless it has refused, on the request of the Commission, to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, or seller, residing in the United States, who caused it to cause the dissemination of such advertisement.

"FALSE ADVERTISEMENT," "FOOD," "DRUGS," "DEVICES," "COSMETIC," "OLEOMARGARINE," DEFINED (52 Stat. 114; 64 Stat. 21; 15 U.S.C. 55).

Definitions: "False advertisement."

Sec. 15. For the purposes of sections 12, 13, and 14—

(a) (1) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

Oleomargarine as dairy product.

(2) In the case of oleomargarine or margarine an advertisement shall be deemed misleading in a material respect if in such advertisement representations are made or suggested by statement, word, grade designation, design, device, symbol, sound, or any combination thereof, that such oleomargarine or margarine is a dairy product, except that nothing contained herein shall prevent a truthful, accurate, and full statement in any such advertisement of all the ingredients contained in such oleomargarine or margerine.

"Food." (b) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

"Drug." (c) The term "drug" means (1) articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (4) articles intended for use as a component of any article specified in clause (1), (2), or (3); but does not include devices or their components, parts, or accessories.

"Device." (d) The term "device" (except when used in subsection (a) of this section) means instruments, apparatus, and contrivances, including their parts and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals.

"Cosmetic." (e) The term "cosmetic" means (1) articles to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof intended for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such article; except that such term shall not include soap.

"Oleomargarine." (f) For the purposes of this section and section 407 of the Federal Food, Drug, and Cosmetic Act, as amended, the term "oleomargarine" or "margarine" includes—

(1) all substances, mixtures, and compounds known as oleomargarine or margarine;

(2) all substances, mixtures, and compounds which have a consistence similar to that of butter and which contain any edible oils or fats other than milk fat if made in imitation or semblance of butter.

FEDERAL TRADE COMMISSION—ATTORNEY GENERAL COURT REPRESENTATION (87 Stat. 592; 88 Stat. 2199; 15 U.S.C. 56).

Sec. 16. (a) (1) Except as otherwise provided in paragraph (2) or (3), if—

Commencement, defense, intervention and supervision of litigation and appeal by Commission or Attorney General; procedure for exercise of authority to litigate or appeal.

(A) before commencing, defending, or intervening in, any civil action involving this Act (including an action to collect a civil penalty) which the Commission, or the Attorney General on behalf of the Commission, is authorized to commence, defend or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and

(B) the Attorney General fails within 45 days after receipt of such notification to commence, defend, or intervene in, such action;

the Commission may commence, defend, or intervene in, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose.

(2) Except as otherwise provided in paragraph (3), in any civil action—

(A) under section 13 of this Act (relating to injunctive relief);

(B) under section 19 of this Act (relating to consumer redress);

(C) to obtain judicial review of a rule prescribed by the Commission, or a cease and desist order issued under section 5 of this Act; or

(D) under the second paragraph of section 9 of this Act (relating to enforcement of a subpena) and under the fourth paragraph of such section (relating to compliance with section 6 of this Act);

the Commission shall have exclusive authority to commence or defend, and supervise the litigation of such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose, unless the Commission authorizes the Attorney General to do so. The Commission shall inform the Attorney General of the exercise of such authority and such exercise shall not preclude the Attorney General from intervening on behalf of the United States in such action and any appeal of such action as may be otherwise provided by law.

(3) (A) If the Commission makes a written request to the Attorney General, within the 10-day period which begins on the date of the entry of the judgment in any civil action in which the Commission represented itself pursuant to paragraph (1) or (2), to represent itself through any of its attorneys designated by it for such purpose before the Supreme Court in such action, it may do so, if—

(i) the Attorney General concurs with such request; or

(ii) the Attorney General, within the 60-day period which begins on the date of the entry of such judgment—

(a) refuses to appeal or file a petition for writ of certiorari with respect to such civil action, in which case he shall give written notification to the Commission of the reasons for such refusal within such 60-day period; or

(b) the Attorney General fails to take any action with respect to the Commission's request.

(B) In any case where the Attorney General represents the Commission before the Supreme Court in any civil action in which the Commission represented itself pursuant to paragraph (1) or (2), the Attorney General may not agree to any settlement, compromise, or dismissal of such action, or confess error in the Supreme Court with respect to such action, unless the Commission concurs.

"Attorney General."

(C) For purposes of this paragraph (with respect to representation before the Supreme Court), the term Attorney General includes the Solicitor General.

(4) If, prior to the expiration of the 45-day period specified in paragraph (1) of this section or a 60-day period specified in paragraph (3), any right of the Commission to commence, defend, or intervene in, any such action or appeal may be extinguished due to any procedural requirement of any court with respect to the time in which any pleadings, notice of appeal, or other acts pertaining to such action or

appeal may be taken, the Attorney General shall have one-half of the time required to comply with any such procedural requirement of the court (including any extension of such time granted by the court) for the purpose of commencing, defending, or intervening in the civil action pursuant to paragraph (1) or for the purpose of refusing to appeal or file a petition for writ of certiorari and the written notification or failing to take any action pursuant to paragraph 3 (A) (ii).

(5) The provisions of this subsection shall apply notwithstanding chapter 31 of title 28, United States Code, or any other provision of law.

Criminal proceedings.

(b) Whenever the Commission has reason to believe that any person, partnership, or corporation is liable for a criminal penalty under this Act, the Commission shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate criminal proceedings to be brought.[12]

SEPARABILITY OF PROVISIONS (52 Stat. 114; 15 U.S.C. 57).

Separability clause.

Sec. 17. If any provision of this Act, or the application thereof to any person, partnership, corporation, or circumstance, is held invalid, the remainder of the Act and the application of such provision to any other person, partnership, corporation, or circumstance, shall not be affected thereby.

RULEMAKING. HEARING PROCEDURES, STATEMENT OF BASIS AND PURPOSE. JUDICIAL REVIEW. "RULEMAKING RECORD". "EVIDENCE". BANKS. REGULATIONS PRESCRIBED BY BOARD OF GOVERNORS OF FEDERAL RESERVE SYSTEM. REPORT TO CONGRESS. COMPENSATION. (88 Stat. 2193; 15 U.S.C. 57a)[13]

Authority to prescribe rules and general statements of policy respecting unfair or deceptive acts or practices.

Sec. 18. (a) (1) The Commission may prescribe—

(A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5 (a) (1) of this Act), and

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[12] Section 204 (c) of Public Law 93-637 provided that the amendment of section 16 and repeal of section 5(m) of the Federal Trade Commission Act did not apply to any civil action commenced before the date of enactment of the Act (January 4, 1975).

[13] See footnote next page.

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of such section 5 (a) (1). Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

(2) The Commission shall have no authority under this Act, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5 (a) (1)). The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.

Procedures

(b) When prescribing a rule under subsection (a) (1) (B) of this section, the Commission shall proceed in accordance with section 553 of title 5, United States Code (without regard to any reference in such section to sections 556 and 557 of such title), and shall also (1) publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule; (2) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (3) provide an opportunity for an informal hearing in accordance with subsection (c); and (4) promulgate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in subsection (e)

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[13] Section 202(c) of Public Law 93-637 provides that:

"(1) The amendments made by subsections (a) and (b) of this section shall not affect the validity of any rule which was promulgated under section 6 (g) of the Federal Trade Commission Act prior to the date of enactment of this section. Any proposed rule under section 6(g) of such Act with respect to which presentation of data, views, and arguments was substantially completed before such date may be promulgated in the same manner and with the same validity as such rule could have been promulgated had this section not been enacted.

(2) If a rule described in paragraph (1) of this subsection is valid and if section 18 of the Federal Trade Commission Act would have applied to such rule had such rule been promulgated after the date of enactment of this Act, any substantive change in the rule after it has been promulgated shall be made in accordance with such section 18."

Section 202(d) provides that: "The Federal Trade Commission and the Administrative Conference of the United States shall each conduct a study and evaluation of the rulemaking procedures under section 18 of the Federal Trade Commission Act and each shall submit a report of its study (including any legislative recommendations) to the Congress not later than 18 months after the date of enactment of this Act."

(1) (B)), together with a statement of basis and purpose.

(c) The Commission shall conduct any informal hearings required by subsection (b) (3) of this section in accordance with the following procedure:

Hearing procedures.

(1) Subject to paragraph (2) of this subsection, an interested person is entitled—

(A) to present his position orally or by documentary submissions (or both), and

(B) if the Commission determines that there are disputed issues of material fact it is necessary to resolve, to present such rebuttal submissions and to conduct (or have conducted under paragraph (2) (B)) such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues.

(2) The Commission may prescribe such rules and make such rulings concerning proceedings in such hearings as may tend to avoid unnecessary costs or delay. Such rules or rulings may include (A) imposition of reasonable time limits on each interested person's oral presentations, and (B) requirements that any cross-examination to which a person may be entitled under paragraph (1) be conducted by the Commission on behalf of that person in such manner as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to disputed issues of material fact.

(3) (A) Except as provided in subparagraph (B), if a group of persons each of whom under paragraphs (1) and (2) would be entitled to conduct (or have conducted) cross-examination and who are determined by the Commission to have the same or similar interests in the proceeding cannot agree upon a single representative of such interests for purposes of cross-examination, the Commission may make rules and rulings (i) limiting the representation of such interest, for such purposes, and (ii) governing the

manner in which such cross-examination shall be limited.

(B) When any person who is a member of a group with respect to which the Commission has made a determination under subparagraph (A) is unable to agree upon group representation with the other members of the group, then such person shall not be denied under the authority of subparagraph (A) the opportunity to conduct (or have conducted) cross-examination as to issues affecting his particular interests if (i) he satisfies the Commission that he has made a reasonable and good faith effort to reach agreement upon group representation with the other members of the group and (ii) the Commission determines that there are substantial and relevant issues which are not adequately presented by the group representative.

(4) A verbatim transcript shall be taken of any oral presentation, and cross-examination, in an informal hearing to which this subsection applies. Such transcript shall be available to the public.

Statement of basis and purpose, requirements.

(d) (1) The Commission's statement of basis and purpose to accompany a rule promulgated under subsection (a) (1) (B) shall include (A) a statement as to the prevalence of the acts or practices treated by the rule; (B) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and (C) a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.

"Commission."

(2) (A) The term "Commission" as used in this subsection and subsections (b) and (c) includes any person authorized to act in behalf of the Commission in any part of the rulemaking proceeding.

(B) A substantive amendment to, or repeal of, a rule promulgated under subsection (a) (1) (B) shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under such subsection. An exemption under subsection (g) shall not be treated as an amendment or repeal of a rule.

(3) When any rule under subsection (a) (1) (B) takes effect a subsequent violation thereof shall constitute an unfair or deceptive act or practice in

violation of section 5 (a) (1) of this Act, unless the Commission otherwise expressly provides in such rule.

Judicial review.

(e) (1) (A) Not later than 60 days after a rule is promulgated under subsection (a) (1) (B) by the Commission, any interested person (including a consumer or consumer organization) may file a petition, in the United States Court of Appeals for the District of Columbia circuit or for the circuit in which such person resides or has his principal place of business, for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose. The provisions of section 2112 of title 28, United States Code, shall apply to the filing of the rulemaking record of proceedings on which the Commission based its rule and to the transfer of proceedings in the courts of appeals.

"Rulemaking record."

(B) For purposes of this section, the term "rulemaking record" means the rule, its statement of basis and purpose, the transcript required by subsection (c) (4), any written submissions, and any other information which the Commission considers relevant to such rule.

(2) If the petitioner or the Commission applies to the court for leave to make additional oral submissions or written presentations and shows to the satisfaction of the court that such submissions and presentations would be material and that there were reasonable grounds for the submissions and failure to make such submissions and presentations in the proceeding before the Commission, the court may order the Commission to provide additional opportunity to make such submissions and presentations. The Commission may modify or set aside its rule or make a new rule by reason of the additional submissions and presentations and shall file such modified or new rule, and the rule's statement of basis of purpose, with the return of such submissions and presentations. The court shall thereafter review such new or modified rule.

(3) Upon the filing of the petition under paragraph (1) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of title 5, United States Code, and to grant appropriate relief, including interim relief, as provided in such chapter. The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), or (D) of section 706 (2) of title 5, United States Code (taking due account of the rule of prejudicial error), or if—

5 USC 701.

(A) the court finds that the Commission's action is not supported by substantial evidence in the rulemaking record (as defined in paragraph (1) (B) of this subsection) taken as a whole, or

(B) the court finds that—

(i) a Commission determination under subsection (c) that the petitioner is not entitled to conduct cross-examination or make rebuttal submissions, or

(ii) a Commission rule or ruling under subsection (c) limiting the petitioner's cross-examination or rebuttal submissions,

has precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole.

"Evidence."

The term "evidence", as used in this paragraph, means any matter in the rulemaking record.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of title 28, United States Code.

(5) (A) Remedies under the preceding paragraphs of this subsection are in addition to and not in lieu of any other remedies provided by law.

(B) The United States Courts of Appeal shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of a rule prescribed under subsection (a) (1) (B), if any district court of the United States would have had jurisdiction of such action but for this subparagraph. Any such action shall be brought in the United States Court of Appeals for the District of Columbia circuit, or for any circuit which includes a judicial district in which the action could have been brought but for this subparagraph.

(C) A determination, rule, or ruling of the Commission described in paragraph (3) (B) (i) or (ii) may be reviewed only in a proceeding under this subsection and only in accordance with paragraph (3) (B). Section 706 (2) (E) of title 5, United States Code, shall not apply to any rule promulgated under subsection (a) (1) (B). The contents and adequacy of any statement required by subsection (b) (4) shall not be subject to judicial review in any respect.

Banks.

(f) (1) In order to prevent unfair or deceptive acts or practices in or affecting commerce (including acts or practices which are unfair or deceptive to consumers) by banks, each agency specified in paragraph (2) of this subsection shall establish a separate division of consumer affairs which shall receive and take appropriate action upon complaints with respect to such acts or practices by banks subject to its jurisdiction. The Board of Governors of the Federal Reserve System shall prescribe regulations to carry out the purposes of this section, including regulations defining with specificity such unfair or deceptive acts or practices, and containing requirements prescribed for the purpose of preventing such acts or practices. Whenever the Commission prescribes a rule under subsection (a) (1) (B) of this section, then within 60 days after such rule takes effect such Board shall promulgate substantially similar regulations prohibiting acts or practices of banks which are substantially similar to those prohibited by rules of the Commission and which impose substantially similar requirements, unless such Board finds that (A) such acts or practices of banks are not unfair or deceptive, or (B) that implementation of similar regulations with respect to banks would seriously conflict with essential monetary and payments systems policies of the Board, and publishes any such finding, and the reasons therefor, in the Federal Register.

Regulations.

Publication in Federal Register.

(2) Compliance with regulations prescribed under this subsection shall be enforced under section 8 of the Federal Deposit Insurance Act, in the case of— 12 USC 1818.

(A) national banks and banks operating under the code of law for the District of Columbia, by the division of consumer affairs established by the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than banks referred to in subparagraph (A)) by the division of consumer affairs established by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than banks referred to in subparagraph (A) or (B)), by the division of consumer affairs established by the Board of Directors of the Federal Deposit Insurance Corporation.

(3) For the purpose of the exercise by any agency referred to in paragraph (2) of its powers under any Act referred to in that paragraph, a violation of any regulation prescribed under this subsection shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in paragraph (2), each of the agencies referred to in that paragraph may exercise, for the purpose of enforcing compliance with any regulation prescribed under this subsection, any other authority conferred on it by law.

(4) The authority of the Board of Governors of the Federal Reserve System to issue regulations under this subsection does not impair the authority of any other agency designated in this subsection to make rules respecting its own procedures in enforcing compliance with regulations prescribed under this subsection.

Report to Congress.

(5) Each agency exercising authority under this subsection shall transmit to the Congress not later than March 15 of each year a detailed report on its activities under this paragraph during the preceding calendar year.

(g) (1) Any person to whom a rule under subsection (a) (1) (B) of this section applies may petition the Commission for an exemption from such rule.

(2) If, on its own motion or on the basis of a petition under paragraph (1), the Commission finds that the application of a rule prescribed under subsection (a) (1) (B) to any person or class or persons is not necessary to prevent the unfair or deceptive act or practice to which the rule relates, the Commission may exempt such person or class from all or part of such rule. Section 553 of title 5, United States Code, shall apply to action under this paragraph.

(3) Neither the pendency of a proceeding under this subsection respecting an exemption from a rule, nor the pendency of judicial proceedings to review the Commission's action or failure to act under this subsection, shall stay the applicability of such rule under subsection (a) (1) (B).

Compensation.

(h) (1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

(2) The aggregate amount of compensation paid under this subsection in any fiscal year to all persons who, in rulemaking proceedings in which they receive compensation, are persons who either (A) would be regulated by the proposed rule, or (B) represent persons who would be so regulated, may not exceed 25 percent of the aggregate amount paid as compensation under this subsection to all persons in such fiscal year.

(3) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed $1,000,000.

CONSUMER REDRESS. CIVIL ACTION FOR VIOLATION OF RULE, ORDER TO CEASE AND DESIST. JURISDICTION OF COURT TO GRANT RELIEF. NOTICE OF ACTION. STATUTE OF LIMITATIONS. (88 Stat. 2201; 15 U.S.C. 57b)[14]

Violation of rule respecting unfair or deceptive acts or practices.

Sec. 19. (a) (1) If any person, partnership, or corporation violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 5 (a)), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.

Civil action for violation of order to cease and desist.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 5 (a) (1)) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

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[14] **Section 206(b) of Public Law 93-637 provides that:**

"The amendment made by subsection (a) of this section shall not apply to—

(1) any violation of a rule to the extent that such violation occurred before the date of enactment of this Act, or

(2) any act or practice with respect to which the Commission issues a cease-and-desist order, to the extent that such act or practice occurred before the date of enactment of this Act, unless such order was issued after such date and the person, partnership or corporation against whom such an order was issued had been notified in the complaint, or in the notice or order attached thereto, that consumer redress may be sought."

Consumer redress.

(b) The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

FTC's findings conclusive.

(c) (1) If (A) a cease and desist order issued under section 5 (b) has become final under section 5 (g) with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice, and (B) an action under this section is brought with respect to such person's, partnership's, or corporation's rule violation or act or practice, then the findings of the Commission as to the material facts in the proceeding under section 5 (b) with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final by reason of section 5 (g) (1), in which case such finding shall be conclusive if supported by evidence.

Notice.

(2) The court shall cause notice of an action under this section to be given in a manner which is reasonably calculated, under all of the circumstances, to apprise the persons, partnerships, and corporations allegedly injured by the defendant's rule violation or act or practice of the pendency of such action. Such notice may, in the discretion of the court, be given by publication.

Statute of limitations.

(d) No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a) (1) relates, or the unfair or deceptive act or practice to which an action under subsection (a) (2) relates; except that if a cease and desist order with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice has become final and such order was issued in a proceeding under section 5 (b) which was commenced not later than 3 years after the rule violation or act or practice occurred, a civil action may be commenced under this section against such person, partnership, or corporation at any time before the expiration of one year after such order becomes final.

(e) Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.

AUTHORIZATION OF APPROPRIATIONS (88 Stat. 2203; 90 Stat. 588; 15 U.S.C. 57c).

Sec. 20. There are authorized to be appropriated to carry out the functions, powers, and duties of the Federal Trade Commission not to exceed $42,000,000 for the fiscal year ending June 30, 1975; not to exceed $47,091,000 for the fiscal year ending June 30, 1976; and not to exceed $50,000,000 for the fiscal year ending in 1977.[15] For fiscal years ending after 1977, there may be appropriated to carry out such functions, powers, and duties, only such sums as the Congress may hereafter authorize by law.

TITLE OF ACT (52 Stat. 114; 88 Stat. 2193; 15 U.S.C. 58).

Sec. 21. This Act may be cited as the "Federal Trade Commission Act."

Organic Act approved September 26, 1914.

Wheeler-Lea Amendment approved March 21, 1938.

Magnuson-Moss Warranty—Federal Trade Commission Improvement Act approved January 4, 1975.

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[15] Public Law 94-299, May 29, 1976, struck out "$46,000,000" and inserted in lieu thereof "$47,091,000".

Other Statutes Amending or Affecting the Federal Trade Commission Act

Public Law 447, 75th Congress, approved March 21, 1938, (the Wheeler-Lea Act) 52 Stat. 111.

Public Law 415, 68th Congress, approved February 13, 1925, (An Act to amend the Judicial Code, and to further define the jurisdiction of the circuit courts of appeals and of the Supreme Court, * * *) 43 Stat. 939.

Public Law 706, 75th Congress, approved June 23, 1938, (Civil Aeronautics Act of 1938) 52 Stat. 1028.

Act of June 25, 1948, Chapter 646, Section 39, 62 Stat. 992.

Public Law 72, 81st Congress, approved May 24, 1949, (An Act to amend * * * title 28, entitled Judiciary and Judicial Procedure of the United States Code, * * *) 63 Stat. 107.

Public Law 459, 81st Congress, approved March 16, 1950, (An Act to regulate oleomargarine * * *) 64 Stat. 21.

Reorganization Plan No. 8 of 1950, effective May 24, 1950, 15 F.R. 3175, 64 Stat. 1264.

Public Law 85-726, 85th Congress, approved August 23, 1958, (Federal Aviation Act of 1958) 72 Stat. 809.

Public Law 85-791, 85th Congress, approved August 28, 1958, (Administrative agency proceedings; records) 72 Stat. 942.

Public Law 85-909, 85th Congress, approved September 2, 1958, (An Act to amend the Packers and Stockyards Act, 1921, as amended, * * *) 72 Stat. 1749.

Public Law 86-507), 86th Congress, approved June 11, 1960, (Authorizing use of certified mail) 74 Stat. 200.

Reorganization Plan No. 4, 1961, effective July 9, 1961, 26 F.R. 6191, 75 Stat. 837.

Public Law 91-452, 91st Congress, approved October 15, 1970, (Organized Crime Control Act of 1970) 84 Stat. 929.

Public Law 93-153, 93rd Congress, approved November 16, 1973, (Trans-Alaska Pipeline Authorization Act) 87 Stat. 591.

Public Law 93-637, 93rd Congress, approved January 4, 1975, (Magnuson-Moss Warranty—Federal Trade Commission Improvement Act) 88 Stat. 2183.

Public Law 94-145, 94th Congress, approved December 12, 1975, (Consumer Goods Pricing Act of 1975) 89 Stat. 801.

Public Law 94-299, (The Act of May 29, 1976), 90 Stat. 588.

CLAYTON ACT

[Public No. 212, 63D Congress, Approved October 15, 1914 (38 Stat. 730, as amended; 15 U.S.C. 12), as amended by Public No. 692 (Robinson-Patman Act), 74th Congress, approved June 19, 1936 (49 Stat. 1526) and as amended by Public No. 899 (Celler-Kefauver Antimerger Act), 81st Congress, approved December 29, 1950 (64 Stat. 1125).][1]

AN ACT To supplement existing laws against unlawful restraints and monopolies, and for other purposes.

TERMS DEFINED[2] (38 Stat. 730; 90 Stat. 1397; 15 U.S.C. 12).

Laws included in this Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' " approved February twelfth, nineteen hundred and thirteen; and also this Act.

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[1] The Act is set forth as further amended by the Antitrust Procedures and Penalties Act, P. Law 93-528 approved December 21, 1974, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, P. Law 94-435 approved September 30, 1976.

[2] This caption and each caption that precedes each other section of the Clayton Act as set forth above are not provisions of the Act. Such captions are additions made by the editors of this compilation.

Meaning of terms. "Commerce."

Insular possessions included.

Proviso. Not applicable to Philippines.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

"Person" or "persons."

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

(b) This Act may be cited as the "Clayton Act".

DISCRIMINATION IN PRICE, SERVICES, OR FACILITIES; SELECTION OF CUSTOMERS; BURDEN OF REBUTTING PRIMA FACIE CASE OF DISCRIMINATION; PAYMENT OR ACCEPTANCE OF COMMISSION, BROKERAGE OR OTHER COMPENSATION; PAYMENT FOR SERVICES OR FACILITIES FOR PROCESSING OR SALE; FURNISHING SERVICES OR FACILITIES FOR PROCESSING, HANDLING, ETC.; KNOWINGLY INDUCING OR RECEIVING DISCRIMINATORY PRICE (49 Stat. 1526; 15 U.S.C. 13).

Discrimination in price between different customers.

Sec. 2[3] (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory|or|promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

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[3] This section of the Clayton Act (as set forth above) contains the provisions of the Robinson-Patman Act, Public No. 692, 74th Congress (49 Stat. 1526), approved June 19, 1936, amending Section 2 of the Clayton Act, approved Oct. 15, 1914.

Lessening, etc., competition.

Provisos.
Differentials.

Selection of customers.

Hearing on complaint.

Burden of proof.

Proviso. Lower price made in good faith to meet competition.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Brokerage, etc., payments.

Payment for services rendered.

(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Discriminatory payments by seller to buyer for services, etc.

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Furnishing services or facilities to a buyer upon terms not accorded to all buyers.

(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Inducing or receiving discrimination in price.

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

TYING OR EXCLUSIVE LEASES, SALES, OR CONTRACTS (38 Stat. 731; 15 U.S.C. 14).

Leases, sales, etc., binding purchaser not to use goods of competitor unlawful.

Tying contracts unlawful where competition lessened.

Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

SUITS BY PERSONS INJURED (38 Stat. 731; 15 U.S.C. 15).

Recovery of treble damages for injuries by antitrust violations.

Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SUITS BY UNITED STATES (69 Stat. 282; 15 U.S.C. 15a).

Suit by U.S. for damages.

Sec. 4A. Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit.

STATUTE OF LIMITATIONS (69 Stat. 283; 90 Stat. 1396; 15 U.S.C. 15b).

Time limitation.

Sec. 4B. Any action to enforce any cause of action under section 4, 4A, or 4C shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

PARENS PATRIAE ACTIONS BY STATE ATTORNEYS GENERAL; TREBLE DAMAGE AWARDS; COSTS; NOTICE; MONETARY RELIEF, EXCLUSION; FINAL JUDGMENT; DISMISSAL OR COMPROMISE OF ACTION, NOTICE; ATTORNEYS' FEES (90 Stat. 1394; 15 U.S.C. 15c).[4]

Sec. 4C. (a)(1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of the Sherman Act. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.

Treble damage awards. Costs. Notice.

(2) The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee.

(b)(1) In any action brought under subsection (a)(1) of this section, the State attorney general shall, at such times, in such manner, and with such content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case.

Monetary relief, exclusion.

(2) Any person on whose behalf an action is brought under subsection (a)(1) may elect to exclude from adjudication the portion of the State claim for monetary relief attributable to him by filing notice

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[4] Section 304 of Public Law 94-435 provides that: "The amendments to the Clayton Act made by section 301 of this Act shall not apply to any injury sustained prior to the date of enactment of this Act."

of such election with the court within such time as specified in the notice given pursuant to paragraph (1) of this subsection.

Final judgment.

(3) The final judgment in an action under subsection (a)(1) shall be res judicata as to any claim under section 4 of this Act by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this subsection.

Dismissal or compromise of action, notice.

(c) An action under subsection (a)(1) shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

Attorneys' fees.

(d) In any action under subsection (a)—

(1) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court; and

(2) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

MEASUREMENT OF DAMAGES (90 Stat. 1395; 15 U.S.C. 15d).

Sec. 4D. In any action under section 4C(a)(1), in which there has been a determination that a defendant agreed to fix prices in violation of the Sherman Act, damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

DISTRIBUTION OF DAMAGES (90 Stat. 1395; 15 U.S.C. 15e).

Sec. 4E. Monetary relief recovered in an action under section 4C(a)(1) shall—

(1) be distributed in such manner as the district court in its discretion may authorize; or

(2) be deemed a civil penalty by the court and deposited with the State as general revenues;

subject in either case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief.

ACTIONS BY ATTORNEY GENERAL OF THE UNITED STATES; NOTIFICATION; INVESTIGATIVE FILES, AVAILABILITY (90 Stat. 1395; 15 U.S.C. 15f).

Notification.

Sec. 4F. (a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

Investigative files, availability.

(b) To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act.

DEFINITIONS (90 Stat. 1396; 15 U.S.C. 15g).

Sec. 4G. For the purposes of sections 4C, 4D, 4E, and 4F of this Act:

(1) The term "State attorney general" means the chief legal officer of a State, or any other person

authorized by State law to bring actions under section 4C of this Act, and includes the Corporation Counsel of the District of Columbia, except that such term does not include any person employed or retained on—

(A) a contingency fee based on a percentage of the monetary relief awarded under this section; or

(B) any other contingency fee basis, unless the amount of the award of a reasonable attorney's fee to a prevailing plaintiff is determined by the court under section 4C(d)(1).

(2) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

(3) The term "natural persons" does not include proprietorships or partnerships.

APPLICABILITY OF PARENS PATRIAE ACTIONS (90 Stat. 1396; 15 U.S.C. 14h).

Sec. 4H. Sections 4C, 4D, 4E, 4F, and 4G shall apply in any State, unless such State provides by law for its nonapplicability in such State.

JUDGMENTS: PRIMA FACIE EVIDENCE; CONSENT JUDGMENTS AND COMPETITIVE IMPACT STATEMENTS; PUBLICATION IN FEDERAL REGISTER; AVAILABILITY OF COPIES TO THE PUBLIC; PUBLICATION OF SUMMARIES IN NEWSPAPERS; CONSIDERATION OF PUBLIC COMMENTS BY ATTORNEY GENERAL AND PUBLICATION OF RESPONSE; PUBLIC INTEREST DETERMINATION; PROCEDURE FOR PUBLIC INTEREST DETERMINATION; FILING OF WRITTEN OR ORAL COMMUNICATIONS WITH THE DISTRICT COURT; INADMISSIBILITY AS EVIDENCE OF PROCEEDINGS BEFORE THE DISTRICT COURT AND THE COMPETITIVE IMPACT STATEMENT;SUSPENSION OF LIMITATIONS (38 Stat. 731; 69 Stat. 283; 88 Stat. 1706; 90 Stat. 1396; 15 U.S.C. 16).

Final judgments or decrees.

Sec. 5. (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A.

Consent judgments excepted.

(b) Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United states in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents, which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

Publication in Federal Register.

Competitive impact statement, publication in Federal Register.

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

Publication in newspapers.

(c) The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

(i) a summary of the terms of the proposal for the consent judgement,

(ii) a summary of the competitive impact statement filed under subsection (b),

(iii) and a list of the materials and documents under subsection (b) which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

Comments.

(d) During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b). The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

Response, publication in Federal Register.

Public interest determination.

(e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of public benefit, if any, to be derived from a determination of issues at trial.

(f) In making its determination under subsection (e), the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested per-

sons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

Filing of written or oral communications.

(g) Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 4A of this Act nor constitute a basis for the introduction of the consent judgement as prima facie evidence against such defendant in any such action or proceeding.

Suspension of statute of limitations.

(i) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 or 4C is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

PROVISION RELATING TO LABOR, AGRICULTURAL AND HORTICULTURAL ORGANIZATIONS (38 Stat. 731; 15 U.S.C. 17).

Labor not a commodity, etc.

Labor, etc., organizations not forbidden.

Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

ACQUISITION BY CORPORATION OF STOCK OR ASSETS OF ANOTHER CORPORATION (38 Stat. 731; 15 U.S.C. 18).

Restrictions on acquisition of certain stock, assets, etc.

Sec. 7.[5] That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

Exceptions.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

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[5] Public No. 899 (Cellar-Kefauver Antimerger Act), 81st Congress, approved December 29, 1950, amended Section 7 to read as set forth above (64 Stat. 1125).

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board. Exceptions.

PREMERGER NOTIFICATION: NOTIFICATION AND WAITING PERIOD; FILING; WAITING PERIOD; TERMINATION OF WAITING PERIOD; NOTICE, PUBLICATION IN FEDERAL REGISTER; "VOTING SECURITIES"; EXEMPT TRANSACTIONS; RULES; ACQUISITIONS, ADDITIONAL INFORMATION; WAITING PERIOD, EXTENSION; CIVIL PENALTY; RECOVERY; COMPLIANCE; DISCLOSURE EXEMPTION; REPORT TO CONGRESS (90 Stat. 1390; 15 U.S.C. 18a).[6]

Filing. Sec. 7A. (a) Except as exempted pursuant to subsection (c), no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case ofa tender offer, the acquiring person) file notification pursuant to rules under subsection (d) (1) and the waiting period described in subsection (b) (1) has expired, if—

(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce;

(2) (A) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more;

(B) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more; or

(C) any voting securities or assets of a person with annual net sales or total assets of $100,000,000 or more are being acquired by any person with total assets or annual net sales of $10,000,000 or more; and

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[6] Section 202 of Public Law 94-435 provides that: "The amendment made by section 201 of this Act shall take effect 150 days after the date of enactment of this Act, except that subsection (d) of section 7A of the Clayton Act (as added by section 201 of this Act) shall take effect on the date of enactment of this Act.

(3) as a result of such acquisition, the acquiring person would hold—

(A) 15 per centum or more of the voting securities or assets of the acquired person, or

(B) an aggregate total amount of the voting securities and assets of the acquired person in excess of $15,000,000.

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d).

Waiting period.

(b) (1) The waiting period required under subsection (a) shall—

(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to in this section as the "Assistant Attorney General") of—

(i) the completed notification required under subsection (a), or

(ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance,

from both persons, or, in the case of a tender offer, the acquiring person; and

(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsection (e) (2) or (g) (2).

Wating period, termination.

(2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.

Notice, publication in Federal Register.

(3) As used in this section—

"Voting securities."

(A) The term "voting securities" means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions.

(B) The amount or percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person and each affiliate thereof.

Exempt transactions.

(c) The following classes of transactions are exempt from the requirements of this section—

(1) acquisitions of goods or realty transferred in the ordinary course of business;

(2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

(3) acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisition;

(4) transfers to or from a Federal agency or a State or political subdivision thereof;

(5) transactions specifically exempted from the antitrust laws by Federal statute;

(6) transactions specifically exempted from the antitrust laws by Federal statute if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

(7) transactions which require agency approval under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828 (c)), or section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842);

(8) transactions which require agency approval under section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843), section 403 or 408 (e) of the National Housing Act (12 U.S.C. 1726 and 1730a), or section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464), if copies of all infor-

mation and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed transaction;

(9) acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;

(10) acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of outstanding voting securities of the issuer;

(11) acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of (A) voting securities pursuant to a plan of reorganization or dissolution; or (B) assets in the ordinary course of its business; and

(12) such other acquisitions, transfers, or transactions, as may be exempted under subsection (d) (2) (B).

Rules.

(d) The Federal Trade Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of title 5, United States Code, consistent with the purposes of this section—

(1) shall require that the notification required under subsection (a) be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws; and

(2) may—

(A) define the terms used in this section;

(B) exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws; and

(C) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.

Acquisitions, additional information.

(e) (1) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b) (1) of this section, require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition under subsection (a) of this section prior to the expiration of the waiting period specified in subsection (b) (1) of this section, or from any officer, director, partner, agent, or employee of such person.

Waiting period, extension.

(2) The Federal Trade Commission or the Assistant Attorney General, in its or his discretion, may extend the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b) (1) of this section for an additional period of not more than 20 days (or in the case of a cash tender offer, 10 days) after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case may be, receives from any person to whom a request is made under paragraph (1), or in the case of tender offers, the acquiring person, (A) all the information and documentary material required to be submitted pursuant to such a request, or (B) if such request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance. Such additional period may be further extended only by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g) (2).

(f) If a proceeding is instituted or an action is filed by the Federal Trade Commission, alleging that a proposed acquisition violates section 7 of this Act or section 5 of the Federal Trade Commission Act, or an action is filed by the United States, alleging that a proposed acquisition violates such section 7 or section 1 or 2 of the Sherman Act, and the Federal Trade Commission or the Assistant Attorney General (1) files a motion for a preliminary injunction against consummation of such acquisition pendente lite, and (2) certifies to the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief pendente lite pursuant to this subsection—

(A) upon the filing of such motion and certification, the chief judge of such district court shall immediately notify the chief judge of the United States court of appeals for the circuit in which such district court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes; and

(B) the motion for a preliminary injunction shall be set down for hearing by the district judge so designated at the earliest practicable time, shall take precedence over all matters except older matters of the same character and trials pursuant to section 3161 of title 18, United States Code, and shall be in every way expedited.

Civil penalty.

(g) (1) Any person, or any officer, director, or partner thereof, who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such person is in violation of this section. Such penalty may be recovered in a civil action brought by the United States.

Recovery.

Compliance.

(2) If any person, or any officer, director, partner, agent, or employee thereof, fails substantially to comply with the notification requirement under subsection (a) or any request for the submission of additional information or documentary material under subsection (e) (1) of this section within the waiting period specified in subsection (b) (1) and as may be extended under subsection (e) (2), the United States district court—

(A) may order compliance;

(B) shall extend the waiting period specified in subsection (b) (1) and as may have been extended under subsection (e) (2) until there has been substantial compliance, except that, in the case of a tender offer, the court may not extend such waiting period on the basis of a failure, by the person whose stock is sought to be acquired, to comply substantially with such notification requirement or any such request; and

(C) may grant such other equitable relief as the court in its discretion determines necessary or appropriate,

upon application of the Federal Trade Commission or the Assistant Attorney General.

Disclosure exemption.

(h) Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

(i) (1) Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law.

(2) Nothing contained in this section shall limit the authority of the Assistant Attorney General or the Federal Trade Commission to secure at any time from any person documentary material, oral testimony, or other information under the Antitrust Civil Process Act, the Federal Trade Commission Act, or any other provision of law.

Report to Congress.

(j) Beginning not later than January 1, 1978, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to the Congress on the operation of this section. Such report shall include an assessment of the effects of this section, of the effects, purpose, and need for any rules promulgated pursuant thereto, and any recommendations for revisions of this section.

Legislative recommendations.

INTERLOCKING DIRECTORATES AND OFFICERS (38 Stat. 732; 49 Stat. 717; 15 U.S.C. 19).

Interlocking directorates and officers between banks.

Sec. 8.[7] No private banker or director, officer, or employee of any member bank of the Federal Reserve System or any branch thereof shall be at the same time a director, officer, or employee of any other bank, banking association, savings bank, or trust company organized under the National Bank Act or organized under the laws of any State or of the District of Columbia, or any branch thereof, except that the Board of Governors of the Federal Reserve System may by regulation permit such service as a director, officer, or employee of not more than one other such institution or branch thereof; but the foregoing prohibition shall not apply in the case of any one or more of the following or any branch thereof;

When prohibition applicable.

Exceptions.

(1) A bank, banking association, savings bank, or trust company, more than 90 per centum of the stock of which is owned directly or indirectly by the United States or by any corporation of which the United States directly or indirectly owns more than 90 per centum of the stock.

(2) A bank, banking association, savings bank, or trust company which has been placed formally in liquidation or which is in the hands of a receiver, conservator, or other official exercising similar functions.

(3) A corporation, principally engaged in international or foreign banking or banking in a dependency or insular possession of the United States which has entered into an agreement with the Board of

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[7] The Banking Act of 1935, Public No. 305, 74th Congress, approved August 23, 1935, amended Section 8 of the Clayton Act, as amended, as set forth above (49 Stat. 717).

Governors of the Federal Reserve System pursuant to section 25 of the Federal Reserve Act.

(4) A bank, banking association, savings bank, or trust company, more than 50 per centum of the common stock of which is owned directly or indirectly by persons who own directly or indirectly more than 50 per centum of the common stock of such member bank.

(5) A bank, banking association, savings bank, or trust company not located and having no branch in the same city, town, or village as that in which such member bank or any branch thereof is located, or in any city, town, or village contiguous or adjacent thereto.

(6) A bank, banking association, savings bank, or trust company not engaged in a class or classes of business in which such member bank is engaged.

(7) A mutual savings bank having no capital stock.

Until February 1, 1939, nothing in this section shall prohibit any director, officer, or employee of any member bank of the Federal Reserve System, or any branch thereof, who is lawfully serving at the same time as a private banker or as a director, officer, or employee of any other bank, banking association, savings bank, or trust company, or any branch thereof, on the date of enactment of the Banking Act of 1935, from continuing such service.

Enforcement provision.

The Board of Governors of the Federal Reserve System is authorized and directed to enforce compliance with this section, and to prescribe such rules and regulations as it deems necessary for that purpose.

Restriction on service as director in two or more competing corporations.

Not applicable to banks or carriers.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

Determination of eligibility.

Temporary continuance.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

Service allowed one year after eligibility ceases.

EMBEZZLEMENT BY OFFICERS OF CARRIERS (38 Stat. 733; 18 U.S.C. 412).

[Sec. 9.[8] Repealed.]

PURCHASES AND CONTRACTS BY COMMON CARRIERS IN CASE OF INTERLOCKING DIRECTORATES (38 Stat. 734; 15 U.S.C. 20).

Sec. 10. That after two years from the approval of this Act no common carrier engaged in commerce

Common carriers prohibited from dealing with another corporation if interlocking directors, etc.

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[8] Sec. 9 was repealed by Public Law 772, an act to revise, codify, and enact into positive law, Title 18 of the United States Code (Crimes and Criminal Procedure), 80th Congress, approved June 25, 1948. (62 Stat. 730).

shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors, and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Lowest competitive bidders excepted.

Details of bid required.

Preventing free competition of bids punishable.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Full statement of bids to be filed with I.C.C.

Actions if violations occur.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

Penalty for violation.

If any common carrier shall violate this section it shall be fined not exceeding $25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

ENFORCEMENT OF ACT (38 Stat. 734; 64 Stat. 1125; 72 Stat. 943; 73 Stat. 243; 15 U.S.C. 21).

Jurisdiction to enforce compliance in—
I.C.C.,
F.C.C.,
C.A.B.,
F.R.B.,
F.T.C.

Sec. 11[9] (a) That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronatics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board[10] where applicable to banks, banking associations, and trust companies; and in the Federal Trade Comission where applicable to all other character of commerce to be exercised as follows:

Complaint.

(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its

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[9] This section was amended and reenacted by the Finality Act of 1959, P.L. 86-107, approved July 23, 1959, 73 Stat. 243, U.S.C. § 21.

[10] The Federal Reserve Board is now called the Board of Governors of the Federal Reserve System by authority of the Banking Act of 1935, Public Law 305, 74th Congress, approved August 23, 1935 (49 Stat. 704).

Notice of hearing.

charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within

Testimony.

Issuance of order.

such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Court review of order.

(c) Any person required by such order of the Commission or Board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission or Board, and thereupon the Commission or Board shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission or Board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission or Board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the Commission or Board is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the Commission or Board. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28 of the United States Code.

Supreme Court review.

Filing of record.

(d) Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the Commission or Board shall be exclusive.

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or Board or judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust laws.

Service of complaint, order, etc.

(f) Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (1) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (2) by leaving a copy thereof at the residence or the principal office or place of business of such person; or (3) by mailing by registered or certified mail a copy thereof addressed to such person at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered or certified mail as aforesaid shall be proof of the service of the same.

Finality of orders.

(g) Any order issued under subsection (b) shall become final—

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission or Board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission or Board has been affirmed, or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) upon the denial of a petition for certiorari, if the order of the Commission or Board has been affirmed or the petition for review has been dismissed by the court of appeals; or

(4) upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission or Board be affirmed or the petition for review be dismissed.

Modification.

(h) If the Supreme Court directs that the order of the Commission or Board be modified or set aside, the order of the Commission or Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission or Board shall become final when so corrected.

Appeals.

(i) If the order of the Commission or Board is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission or Board rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission or Board was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission or Board shall become final when so corrected.

Rehearing.

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission or Board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission or Board rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission or Board has been rendered.

"Mandate."

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalty.

(l) Any person who violates any order issued by the Commission or Board under subsection (b) after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission or Board each day of continuance of such failure or neglect shall be deemed a separate offense.

DISTRICT IN WHICH TO SUE CORPORATION (38 Stat. 736; 15 U.S.C. 22).

Venue of actions against corporations.

Sec. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

SUITS BY UNITED STATES; SUBPOENAS FOR WITNESSES (38 Stat. 736; 15 U.S.C. 23).

Subpoenas to run in any district.

Proviso. Witnesses in civil suits.

Sec. 13. That in any suit, action, or proceeding brought by or on behalf of the United States subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district: *Provided*, That in civil cases no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

LIABILITY OF DIRECTORS AND AGENTS OF CORPORATIONS (38 Stat. 736; 15 U.S.C. 24).

Personal liability of officers of corporations for violations.

Punishment.

Sec. 14. That whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

RESTRAINING VIOLATIONS; PROCEDURES (38 Stat. 736; 15 U.S.C. 25).

Jurisdiction of district courts to prevent violation of this Act.

Petition for injunction.

Temporary restraining order.

Sec. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys[11] in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

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[11] Act of June 25, 1948, 62 Stat. 909, substituted "United States attorneys" for "district attorneys of the United States."

Summoning of other parties.

INJUNCTIVE RELIEF FOR PRIVATE PARTIES (38 Stat. 737; 15 U.S.C. 26).

Injunctions allowed against threatened loss, etc.

Sec. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Bond for preliminary injunction.

Proviso. Restriction as to common carrier.

PRELIMINARY INJUNCTIONS (38 Stat. 737; 62 Stat. 869).

Sec. 17.[12] Section two hundred and sixty-three of an Act entitled "An Act to codify, revise,and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

SECURITY (38 Stat. 738; 62 Stat. 869).

[Sec. 18.[13] Repealed (see Rule 65, Federal Rules of Civil Procedure).]

REQUISITES OF ORDER (38 Stat. 738; 62 Stat. 869).

[Sec. 19.[13] Repealed (see Rule 65, Federal Rules of Civil Procedure).]

LABOR DISPUTES (38 Stat. 738; 29 U.S.C. 52).

Labor disputes. Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

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[12] Sec. 17 was repealed (see Rule 65, Federal Rules of Civil Procedure) except for the third paragraph thereof which appears above, by Public Law 773, approved June 25, 1948 (62 Stat. 869).

[13] Sec. 18 and Sec. 19 were repealed by Public Law 773 (see preceeding footnote).

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

CONTEMPTS.

[Sec. 21.[14] Repealed.]
[Sec. 22.[14] Repealed.]
[Sec. 23.[14] Repealed.]
[Sec. 24.[14] Repealed.]
[Sec. 25.[14] Repealed.]

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[14] Sections 21 to 25, inclusive, were repealed by Act of June 25, 1948, c. 645 (62 Stat. 683), which revised, codified and enacted into "positive law," Title 18 of the Code (Crimes and Criminal Procedure). Said act reenacted said matter, excluding Section 23, as to substance, as 18 U.S.C., Section 402 (as amended by Public Law 72, May 21, 1949, 81st Congress), 18 U.S.C., Section 3285 and 18 U.S.C., Section 3691. Section 23 was omitted as no longer required in view of the civil and criminal rules promulgated by the Supreme Court.

The Act of June 25, 1948, c. 646 (62 Stat. 896), which revised, codified and enacted into law, Title 28 of the Code (Judicial Code and Judiciary), repealed the first, second, and fourth paragraphs of Section 17, and repealed Sections 18 and 19, in view of Rule 65, Federal Rules of Civil Procedure, which covers the substance of the matter involved.

SEPARABILITY OF PROVISIONS (38 Stat. 740; 15 U.S.C. 27).

Invalidity of any clause, etc., not to affect remainder of Act.

Sec. 26. If any clause, sentence, paragraph, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Approved, October 15, 1914.*

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*Original act.

ROBINSON-PATMAN ACT

[PUBLIC NO. 692, 74TH CONGRESS, APPROVED JUNE 19, 1936
(49 STAT. 1526).]

AN ACT To amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), is amended to read as follows:

Act of Oct. 15, 1914, amendment.

DISCRIMINATION IN PRICE, SERVICE, OR FACILITIES [1] (49 Stat. 1526; 15 U.S.C. 13).

Discrimination in price between different purchasers.

SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided*, *however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to par-

Lessening competition, etc.

Proviso. Differentials.

Quantity limits

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[1] The captions above for Sec. 2(a), Sec. 2, Sec. 3, and Sec. 4 are not provisions of the Act. These captions are additions made by the editors of this compilation.

Selection of customers.

Price changes

ticular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Hearing on complaint.

Burden of proof.

Proviso. Lower price made in good faith to meet competition.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Brokerage etc., payments.

Payment for services rendered.

(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Discriminatory payments by seller to buyer for services.

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Furnishing services or facilities by seller to a buyer on terms not accorded to all buyers.

(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Inducing or receiving discrimination in price.

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

PENDING LITIGATION (49 Stat. 1527; 15 U.S.C. 21a).

Pending litigation.

SEC. 2. That nothing herein contained shall affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act: *Provided*, That where, prior to the effective date of this amendatory Act, the Federal Trade Commission has issued an order requiring any person to cease and desist from a violation of section 2 of said Act of October 15, 1914, and such order is pending on review or is in effect, either as issued or as affirmed or modified by a court of competent jurisdiction, and the Commission shall have reason to believe that such person has

Proviso. Pending orders of F.T.C.

Proceedings where violations committed.

committed, used or carried on, since the effective date of this amendatory Act, or is committing, using or carrying on, any act, practice or method in violation of any of the provisions of said section 2 as amended by this Act, it may reopen such original proceeding and may issue and serve upon such person its complaint, supplementary to the original complaint, stating its charges in that respect. Thereupon the same proceedings shall be had upon such supplementary complaint as provided in section 11 of said Act of October 15, 1914. If upon such hearing the Commission shall be of the opinion that any act, practice, or method charged in said supplementary complaint has been committed, used, or carried on since the effective date of this amendatory Act, or is being committed, used or carried on, in violation of said section 2 as amended by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and serve upon such person its order modifying or amending its original order to include any additional violations of law so found. Thereafter the provisions of section 11 of said Act of October 15, 1914, as to review and enforcement of orders of the Commission shall in all things apply to such modified or amended order. If upon review as provided in said section 11 the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully and to the same extent as if such supplementary proceedings had not been taken.

Report of findings.

Review and enforcement of Commission orders.

PARTICIPATION; GEOGRAPHICAL PRICE DISCRIMINATION; SELLING AT UNREASONABLY LOW PRICES (49 Stat. 1528; 15 U.S.C. 13a).

Discounts, rebates, allowances, advertising service charges.

SEC. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower

Sales, etc., at discriminatory prices to destroy competition.

than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

COOPERATIVE ASSOCIATIONS (49 Stat. 1528; 15 U.S.C. 13b).

Cooperative associations.

SEC. 4. Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

Approved, June 19, 1936.

NON-PROFIT INSTITUTIONS ACT

[PUBLIC No. 550, 75TH CONGRESS, APPROVED MAY 26, 1938 (52 STAT. 446; 15 U.S.C. 13c).]

AN ACT To amend Public Law Numbered 692, Seventy-fourth Congress, second session.

Schools, churches, etc., excepted from provisions of the Robinson-Patman Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, **That nothing in the Act approved June 19, 1936 (Public, Numbered 692, Seventy-fourth Congress, second session), known as the Robinson-Patman Antidiscrimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.**

Approved, May 26, 1938.

SHERMAN ANTITRUST ACT[1]

AN ACT To protect trade against unlawful restraints and monopolies, Fifty-First Congress, approved July 2, 1890 (26 Stat. 209, as amended; 15 U.S.C. 1).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act may be cited as the "Sherman Act". (90 Stat. 1397; 15 U.S.C. 1, note)

TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; PENALTY (26 Stat. 209; 88 Stat. 1708; 89 Stat. 801; 15 U.S.C. 1).

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Contracts in restraint of trade illegal.

Penalty.

MONOPOLIZING TRADE A FELONY; PENALTY (26 Stat. 209; 88 Stat. 1708; 15 U.S.C. 2).

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or

Persons attempting to monopolize, etc., guilty of felony.

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[1] The Act is set forth as amended by Public Law 93-528 approved Dec. 21, 1974, 88 Stat. 1706; Public Law 94-145 approved Dec. 12, 1975, 89 Stat. 801; and Public Law 94-435 approved Sept. 30, 1976, 90 Stat. 1383.

with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Penalty.

TRUSTS IN TERRITORIES OR DISTRICT OF COLUMBIA ILLEGAL; COMBINATION A FELONY; PENALTY (26 Stat. 209; 88 Stat. 1708).

Trusts, etc., in Territories or District of Columbia illegal.

Sec. 3. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or both said punishments, in the discretion of the court.

Persons engaged therein guilty of felony.

JURISDICTION OF COURTS; DUTY OF UNITED STATES ATTORNEYS; PROCEDURE (26 Stat. 209; 36 Stat. 1167; 62 Stat. 909; 15 U.S.C. 4).

Jurisdiction.

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall

Procedure.

have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Hearing.

Temporary restraining orders.

BRINGING IN ADDITIONAL PARTIES (26 Stat. 210; 15 U.S.C. 5).

Process.

Sec. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

FORFEITURE OF PROPERTY IN TRANSIT (26 Stat. 210; 15 U.S.C. 6).

Trusts, etc., property in transit.

Forfeiture, seizure and condemnation.

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SUITS BY PERSONS INJURED (26 Stat. 210; 69 Stat. 283; 15 U.S.C. 15 and note).

[Sec. 7. Repealed.[2]]

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[2] The Act of July 7, 1955 (69 Stat. 283) repealed Section 7 of the Act. Prior to repeal, Section 7 read as follows:

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

"PERSON" OR "PERSONS" DEFINED (26 Stat. 210; 15 U.S.C. 7).

"Person" or "persons" defined.

Sec. 8. That the word "person", or "persons", wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Approved, July 2, 1890.

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

[Public Law 91-190, 91st Congress, S. 1075, Approved January 1, 1970 (83 Stat. 852)][1]

AN ACT To establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Environmental Policy Act of 1969".

PURPOSE (83 Stat. 852).

Sec. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY (83 Stat. 852; 42 U.S.C. 4331).

Policies and goals.

Sec. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

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[1] The Act is set forth as amended by Public Law 94-52 approved July 3. 1975 (89 Stat. 258), and Public Law 94-83 approved August 9, 1975 (89 Stat. 424).

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enchance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

COOPERATION OF AGENCIES; REPORTS; AVAILABILITY OF INFORMATION; RECOMMENDATIONS; INTERNATIONAL AND NATIONAL COORDINATION OF EFFORTS (83 Stat. 853; 89 Stat. 424; 42 U.S.C. 4332).

Administration.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the

Environmental impact statements, preparation.

human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Copies of statements, etc.; availability.

81 Stat. 54.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

CONFORMITY OF ADMINISTRATIVE PROCEDURES TO NATIONAL ENVIRONMENTAL POLICY (83 Stat. 854; 42 U.S.C. 4333).

Policy review.

Sec. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

OTHER STATUTORY OBLIGATIONS OF AGENCIES (83 Stat. 854; 42 U.S.C. 4334).

Sec. 104. Nothing in Section 102 and 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

EFFORTS SUPPLEMENTAL TO EXISTING AUTHORIZATIONS (83 Stat. 854; 42 U.S.C. 4335).

Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

REPORTS TO CONGRESS; RECOMMENDATIONS FOR LEGISLATION (83 Stat. 854; 42 U.S.C. 4341).

Report to Congress.

Sec. 201. The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban, and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

ESTABLISHMENT; MEMBERSHIP; CHAIRMAN; APPOINTMENTS (83 Stat. 854; 42 U.S.C. 4342).

Council on Environmental Quality.

Sec. 202. There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

EMPLOYMENT OF PERSONNEL, EXPERTS AND CONSULTANTS (83 Stat. 855; 89 Stat. 258; 42 U.S.C. 4343).

Sec. 203. (a) The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In additon, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

(b) Notwithstanding section 3679(b) of the Revised Statutes (31 U.S.C. 665(b)), the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.

Voluntary and uncompensated services.

DUTIES AND FUNCTIONS (83 Stat. 855; 42 U.S.C. 4344).

Sec. 204. It shall be the duty and function of the Council—

Duties and functions.

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 201;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

CONSULTATION WITH THE CITIZENS' ADVISORY COMMITTEE ON ENVIRONMENTAL QUALITY AND OTHER REPRESENTATIVES (83 Stat. 855; 42 U.S.C. 4345).

Sec. 205. In exercising its powers, functions, and duties under this Act, the Council shall—

(1) consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order numbered 11472, dated May 29, 1969, and with such representiatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and

34 F.R. 8693.

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

TENURE AND COMPENSATION OF MEMBERS (83 Stat. 856; 42 U.S.C. 4346).

Tenure and compensation.

Sec. 206. Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315).

80 Stat. 460, 461.

81 Stat. 638.

TRAVEL REIMBURSEMENT BY PRIVATE ORGANIZATIONS AND FEDERAL, STATE, AND LOCAL GOVERNMENTS (89 Stat. 258; 42 U.S.C. 4346a).

Sec. 207. The Council may accept reimbursements from any private nonprofit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

EXPENDITURES IN SUPPORT OF INTERNATIONAL ACTIVITIES (89 Stat. 258; 42 U.S.C. 4346b).

Sec. 208. The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the support of international exchange programs in the United States and in foreign countries.

AUTHORIZATION OF APPROPRIATIONS (83 Stat. 856; 89 Stat. 258; 42 U.S.C. 4347).

Sec. 209. There are authorized to be appropriated to carry out the provisions of this Act not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.

Approved January 1, 1970.

CONSUMER CREDIT PROTECTION ACT[1]

AN ACT To safeguard the consumer in connection with the utilization of credit by requiring full disclosure of the terms and conditions of finance charges in credit transactions or in offers to extend credit; * * * and for other purposes.

[Public Law 90-321 approved May 29, 1968 (82 Stat. 146, 15 U.S.C. 1601), as amended by Public Law 91-508 approved Oct. 26, 1970 (84 Stat. 1126), which added provisions relating to credit cards and the Fair Credit Reporting Act; Public Law 93-495 approved Oct. 28, 1974 (88 Stat. 1511), which added the Fair Credit Billing Act, the More-than-four-installment Rule, the Equal Credit Opportunity Act, and made other amendments to the Truth in Lending Act; Public Law 94-205 approved Jan. 2, 1976 (89 Stat. 1159), which repealed § 121 (c) of the Truth in Lending Act; Public Law 94-222 approved Feb. 27, 1976 (90 Stat. 197), which amended the Truth in Lending Act; Public Law 94-239 approved Mar. 23, 1976 (90 Stat. 251), which amended the Equal Credit Opportunity Act; and Public Law 94-240 approved Mar. 23, 1976 (90 Stat. 257), which added the Consumer Leasing Act of 1976.]

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[1] The Act as set forth herein is a compilation of the various amendments to the original Act, and should not be construed as replacing any of the amendatory Acts or relied upon as an official source in lieu of the United States Code.

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§ 1. Short title of entire Act (82 Stat. 146).

This Act may be cited as the Consumer Credit Protection Act.

TITLE I—CONSUMER CREDIT COST DISCLOSURE

CHAPTER 1—GENERAL PROVISIONS

§ 101. Short title (82 Stat. 146).

This title may be cited as the Truth in Lending Act.

§ 102. Findings and declaration of purpose (82 Stat. 146; 88 Stat. 1511; 90 Stat. 257; 15 U.S.C. 1601).

(a) The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

(b) The Congress also finds that there has been a recent trend toward leasing automobiles and other durable goods for consumer use as an alternative to installment credit sales and that these leases have been offered without adequate cost disclosures. It is the purpose of this title to assure a meaningful disclosure of the terms of leases of personal property for personal, family, or household purposes so as to enable the lessee to compare more readily the various lease terms available to him, limit balloon payments in consumer leasing, enable comparison of lease terms with credit terms where appropriate, and to assure meaningful and accurate disclosures of lease terms in advertisements.

§ 103. Definitions and rules of construction (82 Stat. 147; 84 Stat. 1126; 88 Stat. 1511; 15 U.S.C. 1602).

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this title.

(b) The term "Board" refers to the Board of Governors of the Federal Reserve System.

(c) The term "organization" means a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(d) The term "person" means a natural person or an organization.

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise. For the purposes of the requirements imposed under chapter 4 and sections 127 (a) (6), 127(a)(7), 127(a)(8), 127(b)(1), 127(b)(2), 127(b)(3), 127(b)(9), and 127(b)(11) of chapter 2 of this title, the term "creditor" shall also include card issuers whether or not the amount due is payable by agreement in more than four installments or the payment of a finance charge is or may be required, and the Board shall, by regulation, apply these requirements to such card issuers, to the extent appropriate, even though the requirements are by their terms applicable only to creditors offering open end credit plans. The provisions of this title apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

(g) The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

(h) The adjective "consumer", used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes.

(i) The term "open end credit plan" refers to a plan prescribing the terms of credit transactions which may be made thereunder from time to time and under the terms of which a finance charge may be computed on the outstanding unpaid balance from time to time thereunder.

(j) The term "adequate notice," as used in section 1643 of this title, means a printed notice to a cardholder which sets forth the pertinent facts clearly and conspicuously so that a person against whom it is to operate could reasonably be expected to have noticed it and understood its meaning. Such notice may be given to a cardholder by printing the notice on any credit card, or on each periodic statement of account, issued to the cardholder, or by any other means reasonably assuring the receipt thereof by the cardholder.

(k) The term "credit card" means any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(l) The term "accepted credit card" means any credit card which the cardholder has requested and received or has signed or has used, or authorized another to use, for the purpose of obtaining money, property, labor, or services on credit.

(m) The term "cardholder" means any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person.

(n) The term "card issuer" means any person who issues a credit card, or the agent of such person with respect to such card.

(o) The term "unauthorized use," as used in section 1643 of this title, means a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.

(p) The term "discount" as used in section 167 means a reduction made from the regular price. The term "discount" as used in section 167 shall not mean a surcharge.

(q) The term "surcharge" as used in section 103 and section 167 means any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means.

(r) The term "State" refers to any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(s) Any reference to any requirement imposed under this title or any provision thereof includes reference to the regulations of the Board under this title or the provision thereof in question.

(t) The disclosure of an amount or percentage which is greater than the amount or percentage required to be disclosed under this title does not in itself constitute a violation of this title.

§ 104. Exempted transactions (82 Stat. 147; 88 Stat. 1517; 15 U.S.C. 1603).

This title does not apply to the following:

(1) Credit transactions involving extensions of credit for business or commercial purposes, or to government or governmental agencies or instrumentalities, or to organizations.

(2) Transactions in securities or commodities accounts by a broker-dealer registered with the Securities and Exchange Commission.

(3) Credit transactions, other than real property transactions, in which the total amount to be financed exceeds $25,000.

(4) Transactions under public utility tariffs, if the Board determines that a State regulatory body regulates the charges for the public utility services involved, the charges for delayed payment, and any discount allowed for early payment.

(5) Credit transactions primarily for agricultural purposes in which the total amount to be financed exceeds $25,000.

§105. Regulations (82 Stat. 148; 15 U.S.C. 1604).

The Board shall prescribe regulations to carry out the purposes of this title. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

§ 106. Determination of finance charge (82 Stat. 148; 15 U.S.C. 1605).

Definition.

(a) Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit, including any of the following types of charges which are applicable:

(1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges.

(2) Service or carrying charge.

(3) Loan fee, finder's fee, or similar charge.

(4) Fee for an investigation or credit report.

(5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligator's default or other credit loss.

Life, accident, or health insurance charges.

(b) Charges or premiums for credit life, accident, or health insurance written in connection with any consumer credit transaction shall be included in the finance charge unless

(1) the coverage of the debtor by the insurance is not a factor in the approval by the creditor of the extension of credit, and this fact is clearly disclosed in writing to the person applying for or obtaining the extension of credit; and

(2) in order to obtain the insurance in connection with the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his desire to do so after written disclosure to him of the cost thereof.

Liability insurance charges.

(c) Charges or premiums for insurance, written in connection with any consumer credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property, shall be included in the finance charge unless a clear and specific statement in writing is furnished by the creditor to the person to whom the credit is extended, setting forth the cost of the insurance if obtained from or through the creditor, and stating that the person to whom the credit is extended may choose the person through which the insurance is to be obtained.

Exemptions.

(d) If any of the following items is itemized and disclosed in accordance with the regulations of the Board in connection with any transaction, then the creditor need not include that item in the computation of the finance charge with respect to that transaction:

(1) Fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting or releasing or satisfying any security related to the credit transaction.

(2) The premium payable for any insurance in lieu of perfecting any security interest otherwise required by the creditor in connection with the transaction, if the premium does not exceed the fees and charges described in paragraph (1) which would otherwise be payable.

(3) Taxes.

(4) Any other type of charge which is not for credit and the exclusion of which from the finance charge is approved by the Board by regulation.

Exemptions, real property.

(e) The following items, when charged in connection with any extension of credit secured by an interest in real property, shall not be included in the computation of the finance charge with respect to that transaction:

(1) Fees or premiums for title examination, title insurance, or similar purposes.

(2) Fees for preparation of a deed, settlement statement, or other documents.

(3) Escrows for future payments of taxes and insurance.

(4) Fees for notarizing deeds and other documents.

(5) Appraisal fees.

(6) Credit reports.

§ 107. Determination of annual percentage rate (82 Stat. 149; 15 U.S.C. 1606).

Definition.

(a) The annual percentage rate applicable to any extension of consumer credit shall be determined, in accordance with the regulations of the Board,

(1) in the case of any extension of credit other than under an open end credit plan, as

(A) that nominal annual percentage rate which will yield a sum equal to the amount of the finance charge when it is applied to the unpaid balances of the amount financed, calculated according to the actuarial method of allocating payments made on a debt between the amount financed and the amount of the finance charge, pursuant to which a payment is applied first to the accumulated finance charge and the balance is applied to the unpaid amount financed; or

(B) the rate determined by any method prescribed by the Board as a method which materially simplifies computation while retaining reasonable accuracy as compared with the rate determined under subparagraph (A).

(2) in the case of any extension of credit under an open end credit plan, as the quotient (expressed as a percentage) of the total finance charge for the period to which it relates divided by the amount upon which the finance charge for that period is based, multiplied by the number of such periods in a year.

Computation for balances.

(b) Where a creditor imposes the same finance charge for balances within a specified range, the annual percentage rate shall be computed on the median balance within the range, except that if the Board determines that a rate so computed would not be meaningful, or would be materially misleading, the annual percentage rate shall be computed on such other basis as the Board may by regulation require.

Rounding rates.

(c) The annual percentage rate may be rounded to the nearest quarter of 1 per centum for credit transactions payable in substantially equal installments when a creditor determines the total finance charge on the basis of a single add-on, discount, periodic, or other rate, and the rate is converted into an annual percentage rate under procedures prescribed by the Board.

Rate tables or charts.

(d) The Board may authorize the use of rate tables or charts which may provide for the disclosure of annual percentage rates which vary from the rate determined in accordance with subsection (a) (1) (A) of this section by not more than such tolerances as the Board may allow. The Board may not allow a tolerance greater than 8 per centum of that rate except to simplify compliance where irregular payments are involved.

Reasonable tolerance.

(e) In the case of creditors determining the annual percentage rate in a manner other than as described in subsection (c) or (d) of this section, the Board may authorize other reasonable tolerances.

Form.

(f) Prior to January 1, 1971, any rate required under this subchapter to be disclosed as a percentage rate may, at the option of the creditor, be expressed in the form of the corresponding ratio of dollars per hundred dollars.

§ 108. Administrative enforcement (82 Stat. 150; 88 Stat. 1517; 15 U.S.C. 1607).

Enforcement agencies.

(a) Compliance with the requirements imposed under this title shall be enforced under

(1) section 8 of the Federal Deposit Insurance Act, in the case of

(A) national banks, by the Comptroller of the Currency.

(B) member banks of the Federal Reserve System (other than national banks), by the Board.

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation.

(2) section 5 (d) of the Home Owners' Loan Act of 1933, section 407 of the National Housing Act, and sections 6(i) and 17 of the Federal Home Loan Bank Act, by the Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions.

(3) the Federal Credit Union Act, by the Director of the Bureau of Federal Credit Unions with respect to any Federal credit union.

(4) the Federal Aviation Act of 1958, by the Civil Aeronautics Board with respect to any air carrier or foreign air carrier subject to that Act.

(5) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

(6) the Farm Credit Act of 1971, by the Farm Credit Administration with respect to any Federal land bank, Federal land bank association, Federal intermediate credit bank, or production credit association.

(b) For the purpose of the exercise by any agency referred to in subsection (a) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this title shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (a), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this title, any other authority conferred on it by law.

Additional agency powers.

Federal Trade Commission overall enforcing agency.

(c) Except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other Government agency under subsection (a), the Federal Trade Commission shall enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement imposed under this title shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act.

Rules and regulations.

(d) The authority of the Board to issue regulations under this title does not impair the authority of any other agency designated in this section to make rules respecting its own procedures in enforcing compliance with requirements imposed under this title.

§ 109. **Views of other agencies** (82 Stat. 150; 15 U.S.C. 1608).

In the exercise of its functions under this title, the Board may obtain upon request the views of any other Federal agency which, in the judgment of the Board, exercises regulatory or supervisory functions with respect to any class of creditors subject to this title.

§ 110. **Advisory committee** (82 Stat. 151; 15 U.S.C. 1609).

Repealed by Public Law 94-239 approved March 23, 1976, (90 Stat. 253).

§ 111. **Effect on other laws** (82 Stat. 151; 88 Stat. 1516; 15 U.S.C. 1610).

(a) This title does not annul, alter, or affect, or exempt any creditor from complying with, the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this title or regulations thereunder, and then only to the extent of the inconsistency.

Inconsistent provisions.

(b) This title does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this title extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply.

State credit laws.

(c) In any action or proceeding in any court involving a consumer credit sale, the disclosure of the annual percentage rate as required under this title in connection with that sale may not be received as evidence that the sale was a loan or any type of transaction other than a credit sale.

Disclosures.

(d) Except as specified in sections 125, 130, and 166, this title and the regulations issued thereunder do not affect the validity or enforceability of any contract or obligation under State or Federal law.

Contracts under State or Federal law.

§ 112. Criminal liability for willful and knowing violation (82 Stat. 151; 15 U.S.C. 1611).

Whoever willfully and knowingly—

(1) gives false or inaccurate information or fails to provide information which he is required to disclose under the provisions of this title or any regulation issued thereunder,

(2) uses any chart or table authorized by the Board under section 107 in such a manner as to consistently understate the annual percentage rate determined under section 107(a) (1) (A), or

(3) otherwise fails to comply with any requirement imposed under this title,

shall be fined not more than $5,000 or imprisoned not more than one year, or both.

§ 113. Penalties inapplicable to governmental agencies (82 Stat. 151; 15 U.S.C. 1612).

No civil or criminal penalty provided under this title for any violation thereof may be imposed upon the United States or any agency thereof, or upon any State or political subdivision thereof, or any agency of any State or political subdivision.

§ 114. Reports by Board and Attorney General (82 Stat. 151; 15 U.S.C. 1613).

Not later than January 3 of each year after 1969, the Board and the Attorney General shall, respectively, make reports to the Congress concerning the administration of their functions under this title, including such recommendations as the Board and the Attorney General, respectively, deem necessary or appropriate. In addition, each report of the Board shall include its assessment of the extent to which compliance with the requirements imposed under this title is being achieved.

§ 115. Liability of assignees (88 Stat. 1520; 15 U.S.C. 1614).

Except as otherwise specifically provided in this title, any civil action for a violation of this title which may be brought against the original creditor in any credit transaction may be maintained against any subsequent assignee of the original creditor where the violation from which the alleged liability arose is apparent on the face of the instrument assigned unless the assignment is involuntary.

CHAPTER 2—CREDIT TRANSACTIONS

§ 121. General requirement of disclosure (82 Stat. 152; 88 Stat. 1516, 1519; 89 Stat. 1159; 15 U.S.C. 1631).

(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended, the information required under this chapter or chapter 4.

(b) If there is more than one obligor, a creditor need not furnish a statement of information required under this chapter or chapter 4 to more than one of them.

(c) Repealed by Public Law 94-205 approved Jan. 2, 1976, 89 Stat. 1159.

§ 122. Form of disclosure; additional information (82 Stat. 152; 88 Stat. 1516, 1517; 15 U.S.C. 1632).

(a) Regulations of the Board need not require that disclosures pursuant to this chapter or chapter 4 be made in the order set forth in this chapter or chapter 4, and may permit the use of terminology different from that employed in this chapter or chapter 4 if it conveys substantially the same meaning.

(b) Any creditor may supply additional information or explanations with any disclosures required under this chapter or chapter 4.

§ 123. Exemption for State-regulated transactions (82 Stat. 152; 15 U.S.C. 1633).

The Board shall by regulation exempt from the requirements of this chapter any class of credit transactions within any State if it determines that under the law of that State the class of transactions is subject to requirements substantially similar to those imposed under this chapter, and that there is adequate provision for enforcement.

§ 124. Effect of subsequent occurrence (82 Stat. 152; 15 U.S.C. 1634).

If information disclosed in accordance with this chapter is subsequently rendered inaccurate as the result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of this chapter.

§ 125. Right of rescission as to certain transactions (82 Stat. 153; 88 Stat. 1517, 1519; 15 U.S.C. 1635).

Obligor's right to rescind.

(a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this chapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section.

Return of money or property following rescission.

(b) When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it.

(c) Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this title by a person to whom a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

Modification of rights.

(d) The Board may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

Exemption for first liens.

(e) This section does not apply to the creation or retention of a first lien against a dwelling to finance the acquisition of that dwelling or to a consumer credit transaction in which an agency of a State is the creditor.

Time limit to exercise right.

(f) An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs earlier, notwithstanding the fact that the disclosures required under this section or any other material disclosures required under this chapter have not been delivered to the obligor.

§ 126. Content of periodic statements (82 Stat. 153; 15 U.S.C. 1636).

If a creditor transmits periodic statements in connection with any extension of consumer credit other than under an open end consumer credit plan, then each of those statements shall set forth each of the following items:

(1) The annual percentage rate of the total finance charge.

(2) The date by which, or the period (if any) within which, payment must be made in order to avoid additional finance charges or other charges.

(3) Such of the items set forth in section 127(b) as the Board may by regulation require as appropriate to the terms and conditions under which the extension of credit in question is made.

§ 127. Open end consumer credit plans (82 Stat. 153; 88 Stat. 1511, 1519, 1521; 15 U.S.C. 1637).

Required disclosures by creditor.

(a) Before opening any account under an open end consumer credit plan, the creditor shall disclose to the person to whom credit is to be extended each of the following items, to the extent applicable:

(1) The conditions under which a finance charge may be imposed, including the time period (if any) within which any credit extended may be repaid without incurring a finance charge, except that the creditor may, at his election and without disclosure, impose no such finance charge if payment is received after the termination of such time period.

(2) The method of determining the balance upon which a finance charge will be imposed.

(3) The method of determining the amount of the finance charge, including any minimum or fixed amount imposed as a finance charge.

(4) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and the corresponding nominal annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(5) If the creditor so elects,

(A) the average effective annual percentage rate of return received from accounts under the plan for a representative period of time; or

(B) whenever circumstances are such that the computation of a rate under subparagraph (A) would not be feasible or practical, or would be misleading or meaningless, a projected rate of return to be received from accounts under the plan.

The Board shall prescribe regulations, consistent with commonly accepted standards for accounting or statistical procedures, to carry out the purposes of this paragraph.

(6) The conditions under which any other charges may be imposed, and the method by which they will be determined.

(7) The conditions under which the creditor may retain or acquire any security interest in any property to secure the payment of any credit extended under the plan, and a description of the interest or interests which may be so retained or acquired.

(8) A statement, in a form prescribed by regulations of the Board of the protection provided by sections 161 and 170 to an obligor and the creditor's responsibilities under sections 162 and 170. With respect to each of two billing cycles per year, at semi-annual intervals, the creditor shall transmit such statement to each obligor to whom the creditor is required to transmit a statement pursuant to section 127(b) for such billing cycle.

Statement with each billing cycle.

(b) The creditor of any account under an open end consumer credit plan shall transmit to the obligor, for each billing cycle at the end of which there is an outstanding balance in that account or with respect to which a finance charge is imposed, a statement setting forth each of the following items to the extent applicable:

(1) The outstanding balance in the account at the beginning of the statement period.

(2) The amount and date of each extension of credit during the period and a brief identification on or accompanying the statement of each extension of credit in a form prescribed by regulations of the Board sufficient to enable the obligor to identify the transaction, or relate it to copies of sales vouchers or similar instruments previously furnished.

(3) The total amount credited to the account during the period.

(4) The amount of any finance charge added to the account during the period, itemized to show the amounts, if any, due to the application of percentage rates and the amount, if any, imposed as a minimum or fixed charge.

(5) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and, unless the annual percentage rate (determined under section 107(a) (2)) is required to be disclosed pursuant to paragraph (6), the corresponding nominal annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(6) Where the total finance charge exceeds 50 cents for a monthly or longer billing cycle, or the pro rata part of 50 cents for a billing cycle shorter than monthly, the total finance charge expressed as an annual percentage rate (determined under section 107(a)(2)), except that if the finance charge is the sum of two or more products of a rate times a portion of the balance, the creditor may, in lieu of disclosing a single rate for the total charge, disclose each such rate expressed as an annual percentage rate, and the part of the balance to which it is applicable.

(7) At the election of the creditor, the average effective annual percentage rate of return (or the projected rate) under the plan as prescribed in subsection (a) (5).

(8) The balance on which the finance charge was computed and a statement of how the bal-

ance was determined. If the balance is determined without first deducting all credits during the period, that fact and the amount of such payments shall also be disclosed.

(9) The outstanding balance in the account at the end of the period.

(10) The date by which or the period (if any) within which, payment must be made to avoid additional finance charges, except that the creditor may, at his election and without disclosure, impose no such additional finance charge if payment is received after such date or the termination of such period.

(11) The address to be used by the creditor for the purpose of receiving billing inquiries from the obligor.

Time for making disclosures.

(c) In the case of any existing account under an open end consumer credit plan having an outstanding balance of more than $1 at or after the close of the creditor's first full billing cycle under the plan after the effective date of subsection (a) or any amendments thereto, the items described in subsection (a), to the extent applicable and not previously disclosed, shall be disclosed in a notice mailed or delivered to the obligor not later than the time of mailing the next statement required by subsection (b).

§ 128. Sales not under open end credit plans (82 Stat. 155; 15 U.S.C. 1638).

Required disclosures by creditor.

(a) In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:

(1) The cash price of the property or service purchased.

(2) The sum of any amounts credited as downpayment (including any trade-in).

(3) The difference between the amount referred to in paragraph (1) and the amount referred to in paragraph (2).

(4) All other charges, individually itemized, which are included in the amount of the credit extended but which are not part of the finance charge.

(5) The total amount to be financed (the sum of the amount described in paragraph (3) plus the amount described in paragraph (4)).

(6) Except in the case of a sale of a dwelling, the amount of the finance charge, which may in whole or in part be designated as a time-price differential or any similar term to the extent applicable.

(7) The finance charge expressed as an annual percentage rate except in the case of a finance charge

(A) which does not exceed $5 and is applicable to an amount financed not exceeding $75, or

(B) which does not exceed $7.50 and is applicable to an amount financed exceeding $75.

A creditor may not divide a consumer credit sale into two or more sales to avoid the disclosure of an annual percentage rate pursuant to this paragraph.

(8) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness.

(9) The default, delinquency, or similar charges payable in the event of late payments.

(10) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

Form and time of disclosures.

(b) Except as otherwise provided in this chapter, the disclosures required under subsection (a) shall be made before the credit is extended, and may be made by disclosing the information in the contract or other evidence of indebtedness to be signed by the purchaser.

Mail or telephone orders disclosures.

(c) If a creditor receives a purchase order by mail or telephone without personal solicitation, and the cash price and the deferred payment price and the terms of financing, including the annual percentage rate, are set forth in the creditor's catalog or other printed material distributed to the public, then the disclosures required under subsection (a) may be made at any time not later than the date the first payment is due.

(d) If a consumer credit sale is one of a series of consumer credit sales transactions made pursuant to an agreement providing for the addition of the deferred payment price of that sale to an existing outstanding balance, and the person to whom the credit is extended has approved in writing both the annual percentage rate or rates and the method of computing the finance charge or charges, and the creditor retains no security interest in any property as to which he has received payments aggregating the amount of the sales price including any finance charges attributable thereto, then the disclosures required under subsection (a) for the particular sale may be made at any time not later than the date the first payment for that sale is due. For the purposes of this subsection, in the case of items purchased on different dates, the first purchased shall be deemed first paid for, and in the case of items purchased on the same date, the lowest priced shall be deemed first paid for.

Deferrals or extensions.

§ 129. Consumer loans not under open end credit plans (82 Stat. 156; 15 U.S.C. 1639).

(a) Any creditor making a consumer loan or otherwise extending consumer credit in a transaction which is neither a consumer credit sale nor under an open end consumer credit plan shall disclose each of the following items, to the extent applicable:

Required disclosures by creditors.

(1) The amount of credit of which the obligor will have the actual use, or which is or will be paid to him or for his account or to another person on his behalf.

(2) All charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge.

(3) The total amount to be financed (the sum of the amounts referred to in paragraph (1) plus the amounts referred to in paragraph (2)).

(4) Except in the case of a loan secured by a first lien on a dwelling and made to finance the purchase of that dwelling, the amount of the finance charge.

(5) The finance charge expressed as an annual percentage rate except in the case of a finance charge

(A) which does not exceed $5 and is applicable to an extension of consumer credit not exceeding $75, or

(B) which does not exceed $7.50 and is applicable to an extension of consumer credit exceeding $75.

A creditor may not divide an extension of credit into two or more transactions to avoid the disclosure of an annual percentage rate pursuant to this paragraph.

(6) The number, amount, and the due dates or periods of payments scheduled to repay the indebtedness.

(7) The default, delinquency, or similar charges payable in the event of late payments.

(8) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

Form and time of disclosures.

(b) Except as otherwise provided in this chapter, the disclosures required by subsection (a) shall be made before the credit is extended, and may be made by disclosing the information in the note or other evidence of indebtedness to be signed by the obligor.

Disclosures, requests for extension of credit.

(c) If a creditor receives a request for an extension of credit by mail or telephone without personal solicitation and the terms of financing, including the annual percentage rate for representative amounts of credit, are set forth in the creditor's printed material distributed to the public, or in the contract of loan or other printed material delivered to the obligor, then the disclosures required under subsection (a) may be made at any time not later than the date the first payment is due.

§ 130. Civil liability (82 Stat. 157; 88 Stat. 1518; 90 Stat. 197; 15 U.S.C. 1640).

Failure to disclose.

Individual action.

(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter or chapter 4 or 5 of this title with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

Action relating to consumer lease.

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under chapter 5 of this title, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

Class action.

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

Factors determining amount of award.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

Correction of errors.

(b) A creditor has no liability under this section for any failure to comply with any requirement imposed under this chapter or chapter 5, if within fifteen days after discovering an error, and prior to the institution of an action under this section or the receipt of written notice of the error, the creditor notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to insure that the person will not be required to pay a charge in excess of the amount or percentage rate actually disclosed.

Bona fide errors.

(c) A creditor may not be held liable in any action brought under this section for a violation of this title if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error not withstanding the maintenance of procedures reasonably adapted to avoid any such error.

Liability of subsequent assignees.

(d) Any action which may be brought under this section against the original creditor in any credit transaction involving a security interest in real property may be maintained against any subsequent assignee of the original creditor where the assignee, its subsidiaries, or affiliates were in a continuing business relationship with the original creditor either at the time the credit was extended or at the time of the assignment, unless the assignment was involuntary, or the assignee shows by a preponderance of evidence that it did not have reasonable grounds to believe that the original creditor was engaged in violations of this chapter, and that it maintained procedures reasonably adapted to apprise it of the existence of any such violations.

Jurisdiction of courts.

(e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

Good faith compliance.

(f) No provision of this section or section 112 imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal

Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

Multiple failures to disclose.

(g) The multiple failure to disclose to any person any information required under this chapter or chapter 4 or 5 of this title to be disclosed in connection with a single account under an open end consumer credit plan, other single consumer credit sale, consumer loan, consumer lease or other extension of consumer credit, shall entitle the person to a single recovery under this section but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries.

Offset from amount owed to creditor.

(h) A person may not take any action to offset any amount for which a creditor is potentially liable to such person under subsection (a)(2) against any amount owing to such creditor by such person, unless the amount of the creditor's liability to such person has been determined by judgment of a court of competent jurisdiction in an action to which such person was a party.

§ 131. Written acknowledgment as proof of receipt (82 Stat. 157; 15 U.S.C. 1641).

Except as provided in section 125 (c) and except in the case of actions brought under section 130 (d), in any action or proceeding by or against any subsequent assignee of the original creditor without knowledge to the contrary by the assignee when he acquires the obligation, written acknowledgment of receipt by a person to whom a statement is required to be given pursuant to this title shall be conclusive proof of the delivery thereof and, unless the violation is apparent on the face of the statement, of compliance with this chapter. This section does not affect the rights of the obligor in any action against the original creditor.

§ 132. Issuance of credit cards (84 Stat. 1126; 15 U.S.C. 1642).

Prohibition.

No credit card shall be issued except in response to a request or application therefor. This prohibition does not apply to the issuance of a credit card in renewal of, or in substitution for, an accepted credit card.

§ 133. Liability of holder of credit card (84 Stat. 1126; 15 U.S.C. 1643).

Limits of liability.

(a) A cardholder shall be liable for the unauthorized use of a credit card only if the card is an accepted credit card, the liability is not in excess of $50, the card issuer gives adequate notice to the cardholder of the potential liability, the card issuer has provided the cardholder with a self-addressed, prestamped notification to be mailed by the cardholder in the event of the loss of theft of the credit card, and the unauthorized use occurs before the cardholder has notified the card issuer that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise. Notwithstanding the foregoing, no cardholder shall be liable for the unauthorized use of any credit card which was issued on or after the effective date of this section, and, after the expiration of twelve months following such effective date, no cardholder shall be liable for the unauthorized use of any credit card regardless of the date of its issuance, unless (1) the conditions of liability specified in the preceding sentence are met, and (2) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it. For the purposes of this section, a cardholder notifies a card issuer by taking such steps as may be reasonably required in the ordinary course of business to provide the card issuer with the pertinent information whether or not any particular officer, employee, or agent of the card issuer does in fact receive such information.

(b) In any action by a card issuer to enforce liability for the use of a credit card, the burden of proof is upon the card issuer to show that the use was authorized or, if the use was unauthorized, then the burden of proof is upon the card issuer to show that the conditions of liability for the unauthorized use of a credit card, as set forth in subsection (a), have been met.

Burden of proof.

(c) Nothing in this section imposes liability upon a cardholder for the unauthorized use of a credit card in excess of his liability for such use under other applicable law or under any agreement with the card issuer.

Liability by other laws.

(d) Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card.

§ 134. Fraudulent use of credit card (84 Stat. 1127; 88 Stat. 1520; 15 U.S.C. 1644).

(a) Whoever knowingly in a transaction affecting interstate or foreign commerce, uses or attempts or conspires to use any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain money, goods, services, or anything else of value which within any one-year period has a value aggregating $1,000 or more; or

(b) Whoever, with unlawful or fraudulent intent, transports or attempts or conspires to transport in interstate or foreign commerce a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card knowing the same to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained; or

(c) Whoever, with unlawful or fraudulent intent, uses any instrumentality of interstate or foreign commerce to sell or transport a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card knowing the same to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained; or

(d) Whoever knowingly receives, conceals, uses, or transports money, goods, services, or anything else of value (except tickets for interstate or foreign transportation) which (1) within any one-year period has a value aggregating $1,000 or more, (2) has moved in or is part of, or which constitutes interstate or foreign commerce, and (3) has been obtained with a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card; or

(e) Whoever knowingly receives, conceals, uses, sells, or transports in interstate or foreign commerce one or more tickets for interstate or foreign transportation, which (1) within any one-year period have a value aggregating $500 or more, and (2) have been purchased or obtained with one or more counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit cards; or

(f) Whoever in a transaction affecting interstate or foreign commerce furnishes money, property, services, or anything else of value, which within any one-year period has a value aggregating $1,000 or more, through the use of any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card knowing the same to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained—

Penalty.

shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

§ 135. Business credit cards (88 Stat. 1519; 15 U.S.C. 1645).

Limits on liability of employees.

The exemption provided by section 104(1) does not apply to the provisions of sections 132, 133, and 134, except that a card issuer and a business or other organization which provides credit cards issued by the same card issuer to ten or more of its employees may by contract agree as to liability of the business or other organization with respect to unauthorized use of such credit cards without regard to the provisions of section 133, but in no case may such business or other organization or card issuer impose liability upon any employee with respect to unauthorized use of such a credit card except in accordance with and subject to the limitations of section 133.

CHAPTER 3—CREDIT ADVERTISING

§ 141. Catalogs and multiple-page advertisements (82 Stat. 158; 15 U.S.C. 1661).

For the purposes of this chapter, a catalog or other multiple-page advertisement shall be considered a single advertisement if it clearly and conspicuously displays a credit terms table on which the information required to be stated under this chapter is clearly set forth.

§ 142. Advertising of downpayments and installments (82 Stat. 158; 15 U.S.C. 1662).

No advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit may state

(1) that a specific periodic consumer credit amount or installment amount can be arranged, unless the creditor usually and customarily arranges credit payments or installments for that period and in that amount.

(2) that a specified downpayment is required in connection with any extension of consumer credit, unless the creditor usually and customarily arranges downpayments in that amount.

§ 143. Advertising of open end credit plans (82 Stat. 158; 15 U.S.C. 1663).

No advertisement to aid, promote, or assist directly or indirectly the extension of consumer credit under an open end credit plan may set forth any of the specific terms of that plan or the appropriate rate determined under section 127(a)(5) unless it also clearly and conspicuously sets forth all of the following items:

(1) The time period, if any, within which any credit extended may be repaid without incurring a finance charge.

(2) The method of determining the balance upon which a finance charge will be imposed.

(3) The method of determining the amount of the finance charge, including any minimum or fixed amount imposed as a finance charge.

(4) Where periodic rates may be used to compute the finance charge, the periodic rates expressed as annual percentage rates.

(5) Such other or additional information for the advertising of open end credit plans as the Board may by regulation require to provide for adequate comparison of credit costs as between different types of open end credit plans.

§ 144. Advertising of credit other than open end plans (82 Stat. 158; 15 U.S.C. 1664).

Open end credit plans excluded.

(a) Except as provided in subsection (b), this section applies to any advertisement to aid, promote, or assist directly or indirectly any consumer credit sale, loan, or other extension of credit subject to the provisions of this title, other than an open end credit plan.

Residential real estate.

(b) The provisions of this section do not apply to advertisements of residential real estate except to the extent that the Board may by regulation require.

Rate of finance charge.

(c) If any advertisement to which this section applies states the rate of a finance charge, the advertisement shall state the rate of that charge expressed as an annual percentage rate.

Required disclosures.

(d) If any advertisement to which this section applies states the amount of the downpayment, if any, the amount of any installment payment, the dollar amount of any finance charge, or the number of installments or the period of repayment, then the advertisement shall state all of the following items:

(1) The cash price or the amount of the loan as applicable.

(2) The downpayment, if any.

(3) The number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended.

(4) The rate of the finance charge expressed as an annual percentage rate.

§ 145. Nonliability of media (82 Stat. 159; 15 U.S.C. 1665).

There is no liability under this chapter on the part of any owner or personnel, as such, of any medium in which an advertisement appears or through which it is disseminated.

§ 146. More-than-four-installment rule (88 Stat. 1517; 15 U.S.C. 1665a).

Any advertisement to aid, promote, or assist directly or indirectly the extension of consumer credit repayable in more than four installments shall, unless a finance charge is imposed, clearly and conspicuously state, in accordance with the regulations of the Board:

"THE COST OF CREDIT IS INCLUDED IN THE PRICE QUOTED FOR THE GOODS AND SERVICES."

CHAPTER 4—CREDIT BILLING

§ 161. Correction of billing errors (88 Stat. 1512; 15 U.S.C. 1666).

(a) If a creditor, within sixty days after having transmitted to an obligor a statement of the obligor's account in connection with an extension of consumer credit, receives at the address disclosed under section 127(b)(11) a written notice (other than notice on a payment stub or other payment medium supplied by the creditor if the creditor so stipulates with the disclosure required under section 127(a)(8)) from the obligor in which the obligor—

Written notice to creditor.

(1) sets forth or otherwise enables the creditor to identify the name and account number (if any) of the obligor,

Contents of notice.

(2) indicates the obligor's belief that the statement contains a billing error and the amount of such billing error, and

(3) sets forth the reasons for the obligor's belief (to the extent applicable) that the statement contains a billing error,

Creditor procedure.

the creditor shall, unless the obligor has, after giving such written notice and before the expiration of the time limits herein specified, agreed that the statement was correct—

(A) not later than thirty days after the receipt of the notice, send a written acknowledgement thereof to the obligor, unless the action required in subparagraph (B) is taken within such thirty-day period, and

(B) not later than two complete billing cycles of the creditor (in no event later than ninety days) after the receipt of the notice and prior to taking any action to collect the amount, or any part thereof, indicated by the obligor under paragraph (2) either—

(i) make appropriate corrections in the account of the obligor, including the crediting of any finance charges on amounts erroneously billed, and transmit to the obligor a notification of such corrections and the creditor's explanation of any change in the amount indicated by the obligor under paragraph (2) and, if any such change is made and the obligor so requests, copies of documentary evidence of the obligor's indebtedness; or

(ii) send a written explanation or clarification to the obligor, after having conducted an investigation, setting forth to the extent applicable the reasons why the creditor believes the account of the obligor was correctly shown in the statement and, upon request of the obligor, provide copies of documentary evidence of the obligor's indebtedness. In the case of a billing error where the obligor alleges that the creditor's billing statement reflects goods not delivered to the obligor or his designee in accordance with the agreement made at the time of the transaction, a creditor may not construe such amount to be correctly shown unless he determines that such goods were actually delivered, mailed, or otherwise sent to the obligor and provides the obligor with a statement of such determination.

After complying with the provisions of this subsection with respect to an alleged billing error, a creditor has no further responsibility under this section if the obligor continues to make substantially the same allegation with respect to such error.

Definitions.

(b) For the purpose of this section, a "billing error" consists of any of the following:

(1) A reflection on a statement of an extension of credit which was not made to the obligor or, if made, was not in the amount reflected on such statement.

(2) A reflection on a statement of an extension of credit for which the obligor requests additional clarification including documentary evidence thereof.

(3) A reflection on a statement of goods or services not accepted by the obligor or his designee or not delivered to the obligor or his designee in accordance with the agreement made at the time of a transaction.

(4) The creditor's failure to reflect properly on a statement a payment made by the obligor or a credit issued to the obligor.

(5) A computation error or similar error of an accounting nature of the creditor on a statement.

(6) Any other error described in regulations of the Board.

Action by creditor to collect amount of billing error.

(c) For the purposes of this section, "action to collect the amount, or any part thereof, indicated by an obligor under paragraph (2)" does not include the sending of statements of account to the obligor following written notice from the obligor as specified under subsection (a), if—

(1) the obligor's account is not restricted or closed because of the failure of the obligor to pay the amount indicated under paragraph (2) of subsection (a), and

(2) the creditor indicates the payment of such amount is not required pending the creditor's compliance with this section. Nothing in this section shall be construed to prohibit any action by a creditor to collect any amount which has not been indicated by the obligor to contain a billing error.

Restricting or closing by creditor of account containing billing error.

(d) Pursuant to regulations of the Board, a creditor operating an open end consumer credit plan may not, prior to the sending of the written explanation or clarification required under paragraph (B)(ii), restrict or close an account with respect to which the obligor has indicated pursuant to subsection (a) that he believes such account to contain a billing error solely because of the obligor's failure to pay the amount indicated to be in error. Nothing in this subsection shall be deemed to prohibit a creditor from applying against the credit limit on the obligor's account the amount indicated to be in error.

Noncompliance.

(e) Any creditor who fails to comply with the requirements of this section or section 162 forfeits any right to collect from the obligor the amount indicated by the obligor under paragraph (2) of subsection (a) of this section, and any finance charges thereon, except that the amount required to be forfeited under this subsection may not exceed $50.

§ 162. Regulation of credit reports (88 Stat. 1513; 15 U.S.C. 1666a).

Reports by creditor on obligor's failure to pay amount regarded as billing error.

(a) After receiving a notice from an obligor as provided in section 161(a), a creditor or his agent may not directly or indirectly threaten to report to any person adversely on the obligor's credit rating or credit standing because of the obligor's failure to pay the amount indicated by the obligor under section 161(a)(2), and such amount may not be reported as delinquent to any third party until the creditor has met the requirements of section 161 and has allowed the obligor the same number of days (not less than ten) thereafter to make payment as is provided under the credit agreement with the obligor for the payment of undisputed amounts.

Notification of obligor of parties notified of delinquency.

(b) If a creditor receives a further written notice from an obligor that an amount is still in dispute within the time allowed for payment under subsection (a) of this section, a creditor may not report to any third party that the amount of the obligor is delinquent because the obligor has failed to pay an amount which he has indicated under section 161(a)(2), unless the creditor also reports that the amount is in dispute and, at the same time, notifies the obligor of the name and address of each party to whom the creditor is reporting information concerning the delinquency.

Notification of resolved delinquencies.

(c) A creditor shall report any subsequent resolution of any delinquencies reported pursuant to subsection (b) to the parties to whom such delinquencies were initially reported.

§ 163. Length of billing period (88 Stat. 1514; 15 U.S.C. 1666b).

Length of billing period in credit statement for imposition of finance charge.

(a) If an open end consumer credit plan provides a time period within which an obligor may repay any portion of the credit extended without incurring an additional finance charge, such additional finance charge may not be imposed with respect to such portion of the credit extended for the billing cycle of which such period is a part unless a statement which includes the amount upon which the finance charge for that period is based was mailed at least fourteen days prior to the date specified in the statement by which payment must be made in order to avoid imposition of that finance charge.

Effect of failure of timely mailing or delivery of statement.

(b) Subsection (a) does not apply in any case where a creditor has been prevented, delayed, or hindered in making timely mailing or delivery of such periodic statement within the time period specified in such subsection because of an act of God, war, natural disaster, strike, or other excusable or justifiable cause, as determined under regulations of the Board.

§ 164. Prompt crediting of payments (88 Stat. 1514; 15 U.S.C. 1666c).

Payments received from an obligor under an open end consumer credit plan by the creditor shall be posted promptly to the obligor's account as specified in regulations of the Board. Such regulations shall prevent a finance charge from being imposed on any obligor if the creditor has received the obligor's payment in readily identifiable form in the amount, manner, location, and time indicated by the creditor to avoid the imposition thereof.

§ 165. Crediting excess payments (88 Stat. 1514; 15 U.S.C. 1666d).

Whenever an obligor transmits funds to a creditor in excess of the total balance due on an open end consumer credit account, the creditor shall promptly (1) upon request of the obligor refund the amount of the overpayment, or (2) credit such amount to the obligor's account.

§ 166. Prompt notification of returns (88 Stat. 1514; 15 U.S.C. 1666e).

With respect to any sales transaction where a credit card has been used to obtain credit, where the seller is a person other than the card issuer, and where the seller accepts or allows a return of the goods or forgiveness of a debit for services which were the subject of such sale, the seller shall promptly transmit to the credit card issuer, a credit statement with respect thereto and the credit card issuer shall credit the account of the obligor for the amount of the transaction.

§ 167. Use of cash discounts (88 Stat. 1515; 90 Stat. 197; 15 U.S.C. 1666f).

(a) (1) With respect to credit card which may be used for extensions of credit in sales transactions in which the seller is a person other than the card issuer, the card issuer may not, by contract or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card.

*(2) No seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means.

Credit card surcharge, prohibition.

(b) With respect to any sales transaction, any discount not in excess of 5 per centum offered by the seller for the purpose of inducing payment by cash, check, or other means not involving the use of a credit card shall not constitute a finance charge as determined under section 106, if such discount is offered to all prospective buyers and its availability is disclosed to all prospective buyers clearly and conspicuously in accordance with regulations of the Board.

§ 168. Prohibition of tie-in services (88 Stat. 1515; 15 U.S.C. 1666g).

Notwithstanding any agreement to the contrary, a card issuer may not require a seller, as a condition to participating in a credit card plan, to open an account with or procure any other service from the card issuer or its subsidiary or agent.

§ 169. Prohibition of offsets (88 Stat. 1515; 15 U.S.C. 1666h).

(a) A card issuer may not take any action to offset a cardholder's indebtedness arising in connection with a consumer credit transaction under the relevant credit card plan against funds of the cardholder held on deposit with the card issuer unless—

(1) such action was previously authorized in writing by the cardholder in accordance with a

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*This paragraph added by Public Law 94-222, approved Feb. 27, 1976 (90 Stat. 197), and "shall cease to be effective upon the expiration of three years after the date of enactment of this Act."

credit plan whereby the cardholder agrees periodically to pay debts incurred in his open end credit account by permitting the card issuer periodically to deduct all or a portion of such debt from the cardholder's deposit account, and

(2) such action with respect to any outstanding disputed amount not be taken by the card issuer upon request of the cardholder.

In the case of any credit card account in existence on the effective date of this section, the previous written authorization referred to in clause (1) shall not be requred until the date (after such effective date) when such account is renewed, but in no case later than one year after such effective date. Such written authorization shall be deemed to exist if the card issuer has previously notified the cardholder that the use of his credit card account will subject any funds which the card issuer holds in deposit accounts of such cardholder to offset against any amounts due and payable on his credit card account which have not been paid in accordance with the terms of the agreement between the card issuer and the cardholder.

(b) This section does not alter or affect the right under State law of a card issuer to attach or otherwise levy upon funds of a cardholder held on deposit with the card issuer if that remedy is constitutionally available to creditors generally.

§ 170. Rights of credit card customers (88 Stat. 1515; 15 U.S.C. 1666i).

(a) Subject to the limitation contained in subsection (b), a card issuer who has issued a credit card to a cardholder pursuant to an open end consumer credit plan shall be subject to all claims (other than tort claims) and defenses arising out of any transaction in which the credit card is used as a method of payment or extension of credit if (1) the obligor has made a good faith attempt to obtain satisfactory resolution of a disagreement or problem relative to the transaction from the person honoring the credit card; (2) the amount of the initial transaction exceeds $50; and (3) the place where the initial transaction occurred was in the same State as the mailing address previously provided by the cardholder or was within 100 miles from such address, except that the limitations set forth in clauses (2) and (3) with respect to an obligor's right to assert claims and defenses against a card issuer shall not be applicable to any transaction in which the person honoring the credit card (A) is the same person as the card issuer, (B) is controlled by the card issuer, (C) is under direct or indirect common control with the card issuer, (D) is a franchised dealer in the card issuer's products or services, or (E) has obtained the order for such transaction through a mail solicitation made by or participated in by the card issuer in which the cardholder is solicited to enter into such transaction by using the credit card issued by the card issuer.

(b) The amount of claims or defenses asserted by the cardholder may not exceed the amount of credit outstanding with respect to such transaction at the time the cardholder first notifies the card issuer or the person honoring the credit card of such claim or defense. For the purpose of determining the amount of credit outstanding in the preceding sentence, payments and credits to the cardholder's account are deemed to have been applied, in the order indicated, to the payment of: (1) late charges in the order of their entry to the account; (2) finance charges in order of their entry to the account; and (3) debits to the account other than those set forth above, in the order in which each debit entry to the account was made.

§ 171. **Relation to State laws** (88 Stat. 1516; 90 Stat. 198; 15 U.S.C. 1666j).

(a) This chapter does not annul, alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to credit billing practices, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency. The Board is authorized to determine whether such inconsistencies exist. The Board may not determine that any State law is inconsistent with any provision of this chapter if the Board determines that such law gives greater protection to the consumer.

(b) The Board shall by regulation exempt from the requirements of this chapter any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this chapter or that such law gives greater protection to the consumer, and that there is adequate provision for enforcement.

(c) Notwithstanding any other provisions of this title, any discount offered under section 167(b) of this title shall not be considered a finance charge or other charge for credit under the usury laws of any State or under the laws of any State relating to disclosure of information in connection with credit transactions, or relating to the types, amounts or rates of charges, or to any element or elements of charges permissible under such laws in connection with the extension or use of credit.

CHAPTER 5—CONSUMER LEASES

§ 181. Definitions (90 Stat. 257; 15 U.S.C. 1667).

For purposes of this chapter—

(1) The term "consumer lease" means a contract in the form of a lease or bailment for the use of personal property by a natural person for a period of time exceeding four months, and for a total contractual obligation not exceeding $25,000, primarily for personal, family, or household purposes, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, except that such term shall not include any credit sale as defined in section 103(g). Such term does not include a lease for

agricultural, business, or commercial purposes, or to a government or governmental agency or instrumentality, or to an organization.

(2) The term "lessee" means a natural person who leases or is offered a consumer lease.

(3) The term "lessor" means a person who is regularly engaged in leasing, offering to lease, or arranging to lease under a consumer lease.

(4) The term "personal property" means any property which is not real property under the laws of the State where situated at the time offered or otherwise made available for lease.

(5) The terms "security" and "security interest" mean any interest in property which secures payment or performance of an obligation.

§ 182. Consumer lease disclosures (90 Stat. 258; 15 U.S.C. 1667a).

Each lessor shall give a lessee prior to the consummation of the lease a dated written statement on which the lessor and lessee are identified setting out accurately and in a clear and conspicuous manner the following information with respect to that lease, as applicable:

(1) A brief description or identification of the leased property;

(2) The amount of any payment by the lessee required at the inception of the lease;

(3) The amount paid or payable by the lessee for official fees, registration, certificate of title, or license fees or taxes;

(4) The amount of other charges payable by the lessee not included in the periodic payments, a description of the charges and that the lessee shall be liable for the differential, if any, between the anticipated fair market value of the leased property and its appraised actual value at the termination of the lease, if the lessee has such liability;

(5) A statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the

term and whether or not the lessee has the option to purchase the leased property and at what price and time;

(6) A statement identifying all express warranties and guarantees made by the manufacturer or lessor with respect to the leased property, and identifying the party responsible for maintaining or servicing the leased property together with a description of the responsibility;

(7) A brief description of insurance provided or paid for by the lessor or required of the lessee, including the types and amounts of the coverages and costs;

(8) A description of any security interest held or to be retained by the lessor in connection with the lease and a clear identification of the property to which the security interest relates;

(9) The number, amount, and due dates or periods of payments under the lease and the total amount of such periodic payments;

(10) Where the lease provides that the lessee shall be liable for the anticipated fair market value of the property on expiration of the lease, the fair market value of the property at the inception of the lease, the aggregate cost of the lease on expiration, and the differential between them; and

(11) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the term and the amount or method of determining any penalty or other charge for delinquency, default, late payments, or early termination.

Disclosures in lease contract; estimates.

The disclosures required under this section may be made in the lease contract to be signed by the lessee. The Board may provide by regulation that any portion of the information required to be disclosed under this section may be given in the form of estimates where the lessor is not in a position to know exact information.

§ 183. Lessee's liability on expiration or termination of lease (90 Stat. 259; 15 U.S.C. 1667b).

(a) Where the lessee's liability on expiration of a consumer lease is based on the estimated residual value of the property such estimated residual value shall be a reasonable approximation of the anticipated actual fair market value of the property on lease expiration. There shall be a rebuttable presumption that the estimated residual value is unreasonable to the extent that the estimated residual value exceeds the actual residual value by more than three times the average payment allocable to a monthly period under the lease. In addition, where the lessee has such liability on expiration of a consumer lease there shall be a rebuttable presumption that the lessor's estimated residual value is not in good faith to the extent that the estimated residual value exceeds the actual residual value by more than three times the average payment allocable to a monthly period under the lease and such lessor shall not collect from the lessee the amount of such excess liability on expiration of a consumer lease unless the lessor brings a successful action with respect to such excess liability. In all actions, the lessor shall pay the lessee's reasonable attorney's fees. The presumptions stated in this section shall not apply to the extent the excess of estimated over actual residual value is due to physical damage to the property beyond reasonable wear and use, or to excessive use, and the lease may set standards for such wear and use if such standards are not unreasonable. Nothing in this subsection shall preclude the right of a willing lessee to make any mutually agreeable final adjustment with respect to such excess residual liability, provided such an agreement is reached after termination of the lease.

Estimated residual value not in good faith.

Attorney's fees.

Penalties.

(b) Penalties or other charges for delinquency, default, or early termination may be specified in the lease but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the delinquency, default, or early termination, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

Third party appraisal.

(c) If a lease has a residual value provision at the termination of the lease, the lessee may obtain at his expense, a professional appraisal of the leased property by an independent third party agreed to by both parties. Such appraisal shall be final and binding on the parties.

§ 184. Consumer lease advertising (90 Stat. 259; 15 U.S.C. 1667c).

Required disclosures in advertising.

(a) No advertisement to aid, promote, or assist directly or indirectly any consumer lease shall state the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at inception of the lease unless the advertisement also states clearly and conspicuously and in accordance with regulations issued by the Board each of the following items of information which is applicable:

(1) That the transaction advertised is a lease.

(2) The amount of any payment required at the inception of the lease or that no such payment is required if that is the case.

(3) The number, amounts, due dates or periods of scheduled payments, and the total of payments under the lease.

(4) That the lessee shall be liable for the differential, if any, between the anticipated fair market value of the leased property and its appraised actual value at the termination of the lease, if the lessee has such liability.

(5) A statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and whether or not the lessee has the option to purchase the leased property and at what price and time.

Media not liable.

(b) There is no liability under this section on the part of any owner or personnel, as such, of any medium in which an advertisement appears or through which it is disseminated.

§ 185. Civil liability (90 Stat. 260; 15 U.S.C. 1667d).

(a) Any lessor who fails to comply with any requirement imposed under section 182 or 183 of this chapter with respect to any person is liable to such person as provided in section 130.

(b) Any lessor who fails to comply with any requirement imposed under section 184 of this chapter with respect to any person who suffers actual damage from the violation is liable to such person as provided in section 130. For the purposes of this section, the term "creditor" as used in sections 115, 130, and 131 shall include a lessor as defined in this chapter.

"Creditor."

(c) Notwithstanding section 130(e), any action under this section may be brought in any United States district court or in any other court of competent jurisdiction. Such actions alleging a failure to disclose or otherwise comply with the requirements of this chapter shall be brought within one year of the termination of the lease agreement.

§ 186. Relation to State laws (90 Stat. 260; 15 U.S.C. 1667e).

(a) This chapter does not annul, alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to consumer leases, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency. The Board is authorized to determine whether such inconsistencies exist. The Board may not determine that any State law is inconsistent with any provision of this chapter if the Board determines that such law gives greater protection and benefit to the consumer.

(b) The Board shall by regulation exempt from the requirements of this chapter any class of lease transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this chapter or that such law gives greater protection and benefit to the consumer, and that there is adequate provision for enforcement.

TITLE V—GENERAL PROVISIONS

§ 501. Severability (82 Stat. 167; 15 U.S.C. 1601 note).

If a provision enacted by this Act is held invalid, all valid provisions that are severable from the invalid provision remain in effect. If a provision enacted by this Act is held invalid in one or more of its applications, the provision remains in effect in all valid applications that are severable from the invalid application or applications.

§ 502. Captions and catchlines for reference only (82 Stat. 167; 15 U.S.C. 1601 note).

Captions and catchlines are intended solely as aids to convenient reference, and no inference as to the legislative intent with respect to any provision enacted by this Act may be drawn from them.

§ 503. Grammatical usages (82 Stat. 167; 15 U.S.C. 1601 note).

In this Act:

(1) The word "may" is used to indicate that an action either is authorized or is permitted.

(2) The word "shall" is used to indicate that an action is both authorized and required.

(3) The phrase "may not" is used to indicate that an action is both unauthorized and forbidden.

(4) Rules of law are stated in the indicative mood.

§ 504. Effective dates (82 Stat. 167; 15 U.S.C. 1601 note; 84 Stat. 1128; 15 U.S.C. 1681 note).

(a) Except as otherwise specified, the provisions of this Act take effect upon enactment.

(b) Chapters 2 and 3 of title I take effect on July 1, 1969.

(c) Title III takes effect on July 1, 1970.

(d) Title VI takes effect on April 24, 1971.

TITLE VI—CONSUMER CREDIT REPORTING

§ 601. Short title (84 Stat. 1128).

This title may be cited as the Fair Credit Reporting Act.

§ 602. Findings and purpose (84 Stat. 1128; 15 U.S.C. 1681).

(a) The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

§ 603. Definitions and rules of construction (84 Stat. 1128; 15 U.S.C. 1681a).

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this title.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 604. The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under section 615.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(i) The term "medical information" means information or records obtained, with the consent of the individual to whom it relates, from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilities.

§ 604. Permissible purposes of reports (84 Stat. 1129; 15 U.S.C. 1681b).

A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) to a person which it has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

§ 605. Obsolete information (84 Stat. 1129; 15 U.S.C. 1681c).

(a) Except as authorized under subsection (b), no consumer reporting agency may make any consumer report containing any of the following items of information:

(1) Bankruptcies which, from date of adjudication of the most recent bankruptcy, antedate the report by more than fourteen years.

(2) Suits and judgments which, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.

(3) Paid tax liens which, from date of payment, antedate the report by more than seven years.

(4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.

(5) Records of arrest, indictment, or conviction of crime which, from date of disposition, release, or parole, antedate the report by more than seven years.

(6) Any other adverse item of information which antedates the report by more than seven years.

(b) The provisions of subsection (a) are not applicable in the case of any consumer credit report to be used in connection with—

(1) a credit transaction involving, or which may reasonably be expected to involve, a principal amount of $50,000 or more;

(2) the underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of $50,000 or more; or

(3) the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal $20,000, or more.

§ 606. Disclosure of investigative consumer reports (84 Stat. 1130; 15 U.S.C. 1681d).

(a) A person may not procure or cause to be prepared an investigative consumer report on any consumer unless—

(1) it is clearly and accurately disclosed to the consumer that an investigative consumer report including information as to his character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made, and such disclosure (A) is made in a

writing mailed, or otherwise delivered, to the consumer, not later than three days after the date on which the report was first requested, and (B) includes a statement informing the consumer of his right to request the additional disclosures provided for under subsection (b) of this section; or

(2) the report is to be used for employment purposes for which the consumer has not specifically applied.

(b) Any person who procures or causes to be prepared an investigative consumer report on any consumer shall, upon written request made by the consumer within a reasonable period of time after the receipt by him of the disclosure required by subsection (a)(1), shall make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure shall be made in a writing mailed, or otherwise delivered, to the consumer not later than five days after the date on which the request for such disclosure was received from the consumer or such report was first requested, whichever is the later.

(c) No person may be held liable for any violation of subsection (a) or (b) of this section if he shows by a preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance with subsection (a) or (b).

§ 607. Compliance procedures (84 Stat. 1130; 15 U.S.C. 1681e).

(a) Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 605 and to limit the furnishing of consumer reports to the purposes listed under section 604. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 604.

(b) Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

§ 608. Disclosures to governmental agencies (84 Stat. 1131; 15 U.S.C. 1681f).

Notwithstanding the provisions of section 604, a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former address, place of employment, or former places of employment, to a governmental agency.

§ 609. Disclosures to consumers (84 Stat. 1131; 15 U.S.C. 1681g).

(a) Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

(1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.

(2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: *Provided,* That in the event an action is brought under this title, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(3) The recipients of any consumer report on the consumer which it has furnished—

(A) for employment purposes within the two-year period preceding the request, and

(B) for any other purpose within the six-month period preceding the request.

(b) The requirements of subsection (a) respecting the disclosure of sources of information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this title except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.

§ 610. Conditions of disclosure to consumers (84 Stat. 1131; 15 U.S.C. 1681h).

Times and notice.

(a) A consumer reporting agency shall make the disclosures required under section 609 during normal business hours and on reasonable notice.

Consumer identification.

(b) The disclosures required under section 609 shall be made to the consumer

(1) in person if he appears in person and furnishes proper identification; or

(2) by telephone if he has made a written request, with proper identification, for telephone disclosure and the toll charge, if any, for the telephone call is prepaid by or charged directly to the consumer.

Trained personnel.

(c) Any consumer reporting agency shall provide trained personnel to explain to the consumer any information furnished to him pursuant to section 609.

Person accompanying consumer.

(d) The consumer shall be permitted to be accompanied by one other person of his choosing, who shall furnish reasonable identification. A consumer reporting agency may require the consumer to furnish a written statement granting permission to the consumer reporting agency to discuss the consumer's file in such person's presence.

Limited liability.

(e) Except as provided in sections 616 and 617, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 609, 610, or 615, except as to false information furnished with malice or willful intent to injure such consumer.

§ 611. Procedure in case of disputed accuracy (84 Stat. 1132; 15 U.S.C. 1681i).

Dispute; reinvestigation.

(a) If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information. The presence of contradictory information in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute is frivolous or irrelevant.

Statement of dispute.

(b) If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.

Subsequent consumer reports.

(c) Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrevelant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

(d) Following any deletion of information which is found to be inaccurate or whose accuracy can no

Deletion of disputed information.

longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information. The consumer reporting agency shall clearly and conspicuously disclose to the consumer his rights to make such a request. Such disclosure shall be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received.

§ 612. Charges for certain disclosures (84 Stat. 1132; 15 U.S.C. 1681j).

A consumer reporting agency shall make all disclosures pursuant to section 609 and furnish all consumer reports pursuant to section 611(d) without charge to the consumer if, within thirty days after receipt by such consumer of a notification pursuant to section 615 or notification from a debt collection agency affiliated with such consumer reporting agency stating that the consumer's credit rating may be or has been adversely affected, the consumer makes a request under section 609 or 611(d). Otherwise, the consumer reporting agency may impose a reasonable charge on the consumer for making disclosure to such consumer pursuant to section 609, the charge for which shall be indicated to the consumer prior to making disclosure; and for furnishing notifications, statements, summaries, or codifications to person designated by the consumer pursuant to section 611(d), the charge for which shall be indicated to the consumer prior to furnishing such information and shall not exceed the charge that the consumer reporting agency would impose on each designated recipient for a consumer report except that no charge may be made for notifying such persons of the deletion of information which is found to be inaccurate or which can no longer be verified.

§ 613. Public record information for employment purposes (84 Stat. 1133; 15 U.S.C. 1681k).

A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall—

(1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or

(2) maintain strict procedures designated to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.

§ 614. Restrictions on investigative consumer reports (84 Stat. 1133; 15 U.S.C. 1681l).

Whenever a consumer reporting agency prepares an investigative consumer report, no adverse information in the consumer report (other than information which is a matter of public record) may be included in a subsequent consumer report unless such adverse information has been verified in the process of making such subsequent consumer report, or the adverse information was received within the three-month period preceding the date the subsequent report is furnished.

§ 615. Requirements on users of consumer reports (84 Stat. 1133; 15 U.S.C. 1681m).

Adverse action based on report of reporting agency.

(a) Whenever credit or insurance for personal, family, or household purposes, or employment involving a consumer is denied or the charge for such credit or insurance is increased either wholly or partly because of information contained in a consumer report from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action has been taken and supply the name and address of the consumer reporting agency making the report.

Adverse action based on reports other than reporting agency.

(b) Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

Reasonable procedures for compliance.

(c) No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of subsections (a) and (b).

§ 616. Civil liability for willful noncompliance (84 Stat. 1134; 15 U.S.C. 1681n).

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

§ 617. Civil liability for negligent noncompliance (84 Stat. 1134; 15 U.S.C. 1681o).

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

§ 618. Jurisdiction of courts; limitation of actions (84 Stat. 1134; 15 U.S.C. 1681p).

An action to enforce any liability created under this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this title to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this title, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

§ 619. Obtaining information under false pretenses (84 Stat. 1134; 15 U.S.C. 1681q).

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined not more than $5,000 or imprisoned not more than one year, or both.

§ 620. Unauthorized disclosures by officers or employees (84 Stat. 1134; 15 U.S.C. 1681r).

Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be fined not more than $5,000 or imprisoned not more than one year, or both.

§ 621. Administrative enforcement (84 Stat. 1134; 15 U.S.C. 1681s).

Federal Trade Commission; powers.

(a) Compliance with the requirements imposed under this title shall be enforced under the Federal Trade Commission Act by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other government agency under subsection (b) hereof. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this title shall constitute an unfair or deceptive act or practice in commerce in violation of section

5(a) of the Federal Trade Commission Act and shall be subject to enforcement by the Federal Trade Commission under section 5(b) thereof with respect to any consumer reporting agency or person subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this title and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title. Any person violating any of the provisions of this title shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions thereof were part of this title.

(b) Compliance with the requirements imposed under this title with respect to consumer reporting agencies and persons who use consumer reports from such agencies shall be enforced under—

Other administrative bodies.

(1) section 8 of the Federal Deposit Insurance Act, in the case of:

(A) national banks, by the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), by the Federal Reserve Board; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation.

(2) section 5 (d) of the Home Owners Loan Act of 1933, section 407 of the National Housing Act, and sections 6 (i) and 17 of the Federal Home Loan Bank Act, by the Federal Home Loan Bank Board (acting directly or through

the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions;

(3) the Federal Credit Union Act, by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(4) the Acts to regulate commerce, by the Interstate Commerce Commission with respect to any common carrier subject to those Acts;

(5) the Federal Aviation Act of 1958, by the Civil Aeronautics Board with respect to any air carrier or foreign air carrier subject to that Act; and

(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

Other authority.

(c) For the purpose of the exercise by any agency referred to in subsection (b) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this title shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this title any other authority conferred on it by law.

§ 622. Relation to State laws (84 Stat. 1136; 15 U.S.C. 1681t).

This title does not annul, alter, affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency.

TITLE VII—EQUAL CREDIT OPPORTUNITY

§ 701. Prohibited discrimination; reasons for adverse action (88 Stat. 1521; 90 Stat. 251; 15 U.S.C. 1691).

(a) It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

(2) because all or part of the applicant's income derives from any public assistance program; or

(3) because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

(b) It shall not constitute discrimination for purposes of this title for a creditor—

(1) to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness;

(2) to make an inquiry of the applicant's age or of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of credit-worthiness as provided in regulations of the Board;

(3) to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations of the Board, except that in the operation of such system the age of an elderly applicant may not be assigned a negative factor or value; or

(4) to make an inquiry or to consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant.

(c) It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to—

(1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;

(2) any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or

(3) any special purpose credit program offered by a profitmaking organization to meet special social needs which meets standards prescribed in regulations by the Board;

if such refusal is required by or made pursuant to such program.

Notice.

(d) (1) Within thirty days (or such longer reasonable time as specified in regulations of the Board for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.

Statement of reasons.

(2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by—

(A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or

"Adverse action."

(B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.

(5) The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken, as determined under regulations of the Board.

"Adverse action."

(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

§ 702. Definitions (88 Stat. 1522; 15 U.S.C. 1691a).

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this title.

(b) The term "applicant" means any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

(c) The term "Board" refers to the Board of Governors of the Federal Reserve System.

(d) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.

(e) The term "creditor" means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.

(f) The term "person" means a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(g) Any reference to any requirement imposed under this title or any provision thereof includes reference to the regulations of the Board under this title or the provision thereof in question.

§ 703. Regulations (88 Stat. 1522; 90 Stat. 252; 15 U.S.C. 1691b).

(a) The Board shall prescribe regulations to carry out the purposes of this title. These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith. In particular, such regulations may exempt from one or more of the provisions of this title any class of transactions not primarily for personal, family, or household purposes, if the Board makes an express finding that the application of such provision or provisions would not contribute substantially to carrying out the purposes of this title. Such regulations shall be prescribed as soon as possible after the date of enactment of this Act, but in no event later than the effective date of this Act.

Consumer Advisory Council. Establishment.

(b) The Board shall establish a Consumer Advisory Council to advise and consult with it in the exercise of its functions under the Consumer Credit

Protection Act and to advise and consult with it concerning other consumer related matters it may place before the Council. In appointing the members of the Council, the Board shall seek to achieve a fair representation of the interests of creditors and consumers. The Council shall meet from time to time at the call of the Board. Members of the Council who are not regular full-time employees of the United States shall, while attending meetings of such Council, be entitled to receive compensation at a rate fixed by the Board, but not exceeding $100 per day, including travel time. Such members may be allowed travel expenses, including transportation and subsistence, while away from their homes or regular place of business.

§ 704. Administrative enforcement (88 Stat. 1522; 90 Stat. 253; 15 U.S.C. 1691c).

(a) Compliance with the requirements imposed under this title shall be enforced under:

(1) Section 8 of the Federal Deposit Insurance Act, in the case of—

(A) national banks, by the Comptroller of the Currency.

(B) member banks of the Federal Reserve System (other than national banks), by the Board.

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation.

(2) Section 5(d) of the Home Owners' Loan Act of 1933, section 407 of the National Housing Act, and sections 6(i) and 17 of the Federal Home Loan Bank Act, by the Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions.

(3) The Federal Credit Union Act, by the Administrator of the National Credit Union Ad-

ministration with respect to any Federal Credit Union.

(4) The Acts to regulate commerce, by the Interstate Commerce Commission with respect to any common carrier subject to those Acts.

(5) The Federal Aviation Act of 1958, by the Civil Aeronautics Board with respect to any air carrier or foreign air carrier subject to that Act.

(6) The Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

(7) The Farm Credit Act of 1971, by the Farm Credit Administration with respect to any Federal land bank, Federal land bank association, Federal intermediate credit bank, and production credit association;

(8) The Securities Exchange Act of 1934, by the Securities and Exchange Commission with respect to brokers and dealers; and

(9) The Small Business Investment Act of 1958, by the Small Business Administration, with respect to small business investment companies.

(b) For the purpose of the exercise by any agency referred to in subsection (a) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this title shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (a), each of the agencies referred to in that subsection may exercise for the purpose of enforcing compliance with any requirement imposed under this title, any other authority conferred on it by law. The exercise of the authorities of any of the agencies referred to in subsection (a) for the purpose of enforcing compliance with any requirement imposed under this title shall in no way preclude the exercise of such authorities for the purpose of enforcing compliance with any other provision of law not relating to the prohibition of discrimination on the basis of sex or marital status with respect to any aspect of a credit transaction.

(c) Except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other Government agency under subsection (a), the Federal Trade Commission shall enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement imposed under this title shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act including the power to enforce any Federal Reserve Board regulation promulgated under this title in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

(d) The authority of the Board to issue regulations under this title does not impair the authority of any other agency designated in this section to make rules respecting its own procedures in enforcing compliance with requirements imposed under this title.

§ 705. Relation to State laws (88 Stat. 1523; 90 Stat. 253; 15 U.S.C. 1691d).

(a) A request for the signature of both parties to a marriage for the purpose of creating a valid lien, passing clear title, waiving inchoate rights to property, or assigning earnings, shall not constitute discrimination under this title: *Provided, however,* That this provision shall not be construed to permit a creditor to take sex or marital status into account in connection with the evaluation of creditworthiness of any applicant.

(b) Consideration or application of State property laws directly or indirectly affecting creditworthiness shall not constitute discrimination for purposes of this title.

(c) Any provision of State law which prohibits the separate extension of consumer credit to each party to a marriage shall not apply in any case where each party to a marriage voluntarily applies for separate credit from the same creditor: *Provided,* That in any case where such a State law is so preempted, each party to the marriage shall be solely responsible for the debt so contracted.

(d) When each party to a marriage separately and voluntarily applies for and obtains separate credit accounts with the same creditor, those accounts shall not be aggregated or otherwise combined for purposes of determining permissible finance charges or permissible loan ceilings under the laws of any State or of the United States.

(e) Where the same act or omission constitutes a violation of this title and of applicable State law, a person aggrieved by such conduct may bring a legal action to recover monetary damages either under this title or under such State law, but not both. This election of remedies shall not apply to court actions in which the relief sought does not include monetary damages or to administrative actions.

(f) This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with, the laws of any State with respect to credit discrimination, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. The Board is authorized to determine whether such inconsistencies exist. The Board may not determine that any State law is inconsistent with any provision of this title if the Board determines that such law gives greater protection to the applicant.

(g) The Board shall by regulation exempt from the requirements of sections 701 and 702 of this title any class of credit transactions within any State if it determines that under the law of that

State that class of transactions is subject to requirements substantially similar to those imposed under this title or that such law gives greater protection to the applicant, and that there is adequate provision for enforcement. Failure to comply with any requirement of such State law in any transaction so exempted shall constitute a violation of this title for the purposes of section 706.

§ 706. Civil liability (88 Stat. 1524; 90 Stat. 253; 15 U.S.C. 1691e).

(a) Any creditor who fails to comply with any requirement imposed under this title shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

(b) Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under this title shall be liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000, in addition to any actual damages provided in subsection (a), except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of $500,000 or 1 per centum of the net worth of the creditor. In determining the amount of such damages in any action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

(c) Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this title.

(d) In the case of any successful action under subsection (a), (b), or (c), the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection.

(e) No provision of this title imposing liability shall apply to any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(f) Any action under this section may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction. No such action shall be brought later than two years from the date of the occurrence of the violation, except that—

> (1) whenever any agency having responsibility for administrative enforcement under section 704 commences an enforcement proceeding within two years from the date of the occurrence of the violation,
>
> (2) whenever the Attorney General commences a civil action under this section within two years from the date of the occurrence of the violation,

then any applicant who has been a victim of the discrimination which is the subject of such proceeding or civil action may bring an action under this section not later than one year after the commencement of that proceeding or action.

(g) The agencies having responsibility for administrative enforcement under section 704, if unable to obtain compliance with section 701, are authorized to refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted.

(h) When a matter is referred to the Attorney General pursuant to subsection (g), or whenever he has reason to believe that one or more creditors are engaged in a pattern or practice in violation of this title, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including injunctive relief.

(i) No person aggrieved by a violation of this title and by a violation of section 805 of the Civil Rights Act of 1968 shall recover under this title and section 812 of the Civil Rights Act of 1968, if such violation is based on the same transaction.

(j) Nothing in this title shall be construed to prohibit the discovery of a creditor's credit granting standards under appropriate discovery procedures in the court or agency in which an action or proceeding is brought.

§ 707. Annual reports to Congress (90 Stat. 255; 15 U.S.C. 1691f).

Not later than February 1 of each year after 1976, the Board and the Attorney General shall, respectively, make reports to the Congress concerning the administration of their functions under this title, including such recommendations as the Board and the Attorney General, respectively, deem necessary or appropriate. In addition, each report of the Board shall include its assessment of the extent to which compliance with the requirements of this title is being achieved, and a summary of the enforcement actions taken by each of the agencies assigned administrative enforcement responsibilities under section 704.

§ 708. Effective date (88 Stat. 1525; 90 Stat. 255; 15 U.S.C. 1691 note).

This title takes effect upon the expiration of one year after the date of its enactment. The amendments made by the Equal Credit Opportunity Act Amendments of 1976 shall take effect on the date of enactment thereof and shall apply to any violation occurring on or after such date, except that the amendments made to section 701 of the Equal Credit Opportunity Act shall take effect 12 months after the date of enactment.

§ 709. Short title (90 Stat. 251; 15 U.S.C. 1691 note).

This title may be cited as the "Equal Credit Opportunity Act."

U.S. CODE, Title 5,[1]
Chapter 5, Subchapter II—
ADMINISTRATIVE PROCEDURE

[AS REVISED BY PUBLIC LAW 89-554, 89TH CONGRESS, APPROVED SEPTEMBER 6, 1966 (80 STAT. 378, AS AMENDED; 5 U.S.C. 551).]

AN ACT To enact title 5, United States Code, "Government Organization and Employees", codifying the general and permanent laws relating to the Government of the United States and to its civilian officers and employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the laws relating to the organization of the Government of the United States and to its civilian officers and employees, generally, are revised, codified, and enacted as title 5 of the United States Code, entitled "Government Organization and Employees", and may be cited as "5 U.S.C., §   ", as follows:

DEFINITIONS AND RULES OF CONSTRUCTION (80 Stat. 381; 90 Stat. 1247; 5 U.S.C. 551).

Sec. 551. For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organiza-

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[1] The provisions of this title were originally enacted by Act of June 11, 1946, 60 Stat. 237, known as the "Administrative Procedure Act". That Act was repealed as part of the general revision of title 5, enacted by Public Law 89-554, September 6, 1966, 80 Stat. 378. As set forth herein. title 5 incorporates the amendments made by Public Law 90-23, June 5, 1967, 81 Stat. 54; Public Law 90-623, October 22, 1968, 82 Stat. 1312; Public Law 93-502, November 21, 1974, 88 Stat. 1561-1564; Public Law 93-579, December 31, 1974, 88 Stat. 1896; Public Law 94-183, December 31, 1975, 89 Stat. 1057; and Public Law 94-409, September 13, 1976, 90 Stat. 1241.

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tions of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "Sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

PUBLIC INFORMATION; AGENCY RULES, OPINIONS, ORDERS, RECORDS, AND PROCEEDINGS (80 Stat. 383; 81 Stat. 54; 88 Stat. 1561-1564; 5 U.S.C. 552).

Sec. 552. (a) Each agency shall make available to the public information as follows:

Publication in Federal Register.

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

Inspection and copying.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

Indexes, publication and distribution.

Publication in Federal Register.

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which

Records, availability to public.

(A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

Document search and duplication fees, regulations.

(4) (A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

Withheld agency records, court examination.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

Complaints, response by defendant.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

Attorney fees and costs.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

CSC proceeding against officer or employee.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

Noncompliance, penalty.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

Administrative deadlines.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

"Unusual circumstances."

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

Time extension for agency review.

(b) This section does not apply to matters that are—

Nonapplicability.

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

National defense and foreign policy, exemption.

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

Investigatory records for law enforcement purposes, exemption.

(7) investigatory records compiled for law enforcement purposes, but only to the extent

that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Segregable portions of records.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

Congressional reservation.

Reports to Speaker of the House and President of the Senate.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

Contents.

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a) (6), the result of such ap-

peals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a) (4) (F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a) (4) (E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section. Annual report.

(e) For purposes of this section, the term "agency" as defined in section 551 (1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency. "Agency."

RECORDS MAINTAINED ON INDIVIDUALS. DEFINITIONS; CONDITIONS OF DISCLOSURE; ACCOUNTING OF CERTAIN DISCLOSURES; ACCESS TO RECORDS; AGENCY REQUIRE-

MENTS; AGENCY RULES; CIVIL REMEDIES; RIGHTS OF LEGAL GUARDIANS; CRIMINAL PENALTIES; GENERAL EXEMPTIONS; SPECIFIC EXEMPTIONS; ARCHIVAL RECORDS; GOVERNMENT CONTRACTORS; MAILING LISTS; REPORT ON NEW SYSTEMS (88 Stat. 1897; 89 Stat. 1057; 5 U.S.C. 552a).

Sec. 552a. Records maintained on individuals.

(a) Definitions.

For purposes of this section—

(1) the term "agency" means agency as defined in section 552 (e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term "routine use" means, with respect to the disclosure of a record, the use of

such record for a purpose which is compatible with the purpose for which it was collected.

(b) Conditions of disclosure.

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a) (7) of this section and described under subsection (e) (4) (D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired

and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) pursuant to the order of a court of competent jurisdiction.

(c) Accounting of certain disclosures.

Each agency, with respect to each system of records under its control shall—

(1) except for disclosures made under subsections (b) (1) or (b) (2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b) (7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute mad by the agency in accordance with subsection (d) of

this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records.

Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

Personal review.

(2) permit the individual to request amendment of a record pertaining to him and—

Amendment request.

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determi-

Review.

nation unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g) (1) (A) of this section;

Notation of dispute.

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agengy deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements.

Each agency that maintains a system of records shall—

(1) maintain in its record only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses

to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4) (D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

Publication in Federal Register.

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b) (2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

Rules of conduct.

(9) establish rules of conduct for persons invloved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person wieh respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

Confidentiality of records.

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4) (D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

Publication in Federal Register.

(f) Agency rules.

In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

Fees.

The Office of the Federal Register shall annually compile and publish the rules promulgated under

Publication in Federal Register.

this subsection and agency notices published under subsection (e) (4) of this section in a form available to the public at low cost.

(g) (1) Civil remedies.

Whenever any agency

(A) makes a determination under subsection (d) (3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d) (1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

Jurisdiction.

(2) (A) In any suit brought under the provisions of subsection (g) (1) (A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

Amendment of record.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3) (A) In any suit brought under the provisions of subsection (g) (1) (B) of this section, the court

may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

Injunction.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g) (1) (C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

Damages.

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this

section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians.

For the purpose of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) Criminal penalties.

Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e) (4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General exemptions.

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b) (1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c) (1) and (2), (e) (4) (A) through (F), (e) (6), (7), (9), (10), and (11), and (i) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions.

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b) (1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c) (3), (d), (e) (1), (e) (4) (G), (H), and (I) and (f) of this section if the system of records is—

(1) subject to the provisions of section 552(b) (1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j) (2) of this section: *Provided, however,* That if any individual

is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of

the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l)(1) Archival records.

Each agency record which is accepted by the Administrator of General Services for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Administrator of General Services shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e) (4) (A) through (G) of this section) shall be published in the Federal Register.

Publication in Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this

section except subsections (e) (4) (A) through (G) and (e) (9) of this section.

(m) Government contractors.

When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(n) Mailing lists.

An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Report on new systems.

Notice to Congress and OMB.

Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers.

(p) Annual report.

Report to Speaker of the House and President of the Senate.

The President shall submit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing for each Federal agency the number of records contained in any system of records which were exempted from the application of this section under the provisions of subsections (j) and (k) of this section during the preceding calendar year, and the reasons for the exemptions, and such other information as indicates efforts to administer fully this section.

(q) Effect of other laws.

No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

OPEN MEETINGS. DEFINITIONS; EXCEPTIONS; RECORDED VOTING, PUBLIC AVAILABILITY OF VOTE, REGULATION FOR CLOSED MEETINGS, PUBLIC ANNOUNCEMENT; SCHEDULING, CHANGES, PUBLIC ANNOUNCEMENT, PUBLICATION IN FEDERAL REGISTER; CERTIFICATION FOR CLOSED MEETING, TRANSCRIPTS, RECORDINGS OR MINUTES, PUBLIC AVAILABILITY, RETENTION; IMPLEMENTING REGULATIONS; JUDICIAL PROCEEDINGS; LITIGATION COSTS, ASSESSMENT; REPORT TO CONGRESS (90 Stat. 1241; 5 U.S.C. 552b).

Sec. 552b. Open meetings.

(a) For purposes of this section— Definitions.

(1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwar-

ranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would—

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise

involving a determination on the record after opportunity for a hearing.

Recorded voting.

(d) (1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

Copies, availability.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

Meeting closure, regulation.

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9) (A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof

in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: *Provided,* That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

Public announcement.

(e) (1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

Scheduling, public announcement.

(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the

Scheduling changes, public announcement.

vote of each member upon such change at the earliest practicable time.

Scheduling notice, publication in Federal Register.

(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

Closed meetings, certification.

Transcripts, recordings or minutes.

(f) (1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9) (A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

Public availability.

(2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony

as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later.

Retention.

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.

Regulations.
Notice, publication in Federal Register.

Judicial proceeding.

(h) (1) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which

Jurisdiction.

Civil actions.

the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of the transcript, electronic recording, or minutes of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

Relief.

Inquiry.

(2) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose.

Litigation costs, assessment.

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

(j) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

Report to Congress.

(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open.

(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.

RULE MAKING (80 Stat. 383; 5 U.S.C. 553).

Sec. 553. (a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

Participation in rule making.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

ADJUDICATIONS (80 Stat. 384; 5 U.S.C. 554).

Sec. 554. (a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

Adjudication required.

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

Persons entitled to notice.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

Investigator may not participate.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

ANCILLARY MATTERS (80 Stat. 385; 5 U.S.C. 555).

Sec. 555. (a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

Counsel.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

Interested parties may appear.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

Transcripts.

(d) Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an

Subpoenas.

order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

HEARINGS; PRESIDING EMPLOYEES; POWERS AND DUTIES; BURDEN OF PROOF; EVIDENCE; RECORD AS BASIS OF DECISION (80 Stat. 386; 5 U.S.C. 556).

Sec. 556. (a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

Functions of presiding officers.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

Disqualification.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

Authority of presiding officers.

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

Burden of proof.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Testimony and exhibits.

(e) The transcript of testimony and exhibits, together with all papers and request filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

INITIAL DECISIONS; CONCLUSIVENESS; REVIEW BY AGENCY; SUBMISSIONS BY PARTIES; CONTENTS OF DECISIONS; RECORD; EX PARTE COMMUNICATION (80 Stat. 387; 90 Stat. 1246; 5 U.S.C. 557).

Sec. 557. (a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

Discussion of the case: by whom made.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. Whn the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tenative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

Findings and conclusions of decisions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

"Ex parte communication."

(d) (1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

Applicability.

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

IMPOSITION OF SANCTIONS; DETERMINATION OF APPLICATIONS FOR LICENSES; SUSPENSION, REVOCATION, AND EXPIRATION OF LICENSES (80 Stat. 388; 5 U.S.C. 558).

Sec. 558. (a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

Sanction Procedure.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

License application.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

EFFECT ON OTHER LAWS; EFFECT OF SUBSEQUENT STATUTE (80 Stat. 388; 82 Stat. 1312; 5 U.S.C. 559).

Sec. 559. This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301 (2) (E), 5362, and 7521 of this title, and the provisions of section 5335(a) (B) of this title that relate to hearing examiners, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301 (2) (E), 5362, or 7521 of this title, or the provisions of section 5335(a) (B) of this title that relate to hearing examiners, except to the extent that it does so expressly.

JUDICIAL REVIEW

APPLICATION; DEFINITIONS (80 Stat. 392; 5 U.S.C. 701).

Sec. 701. (a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

Definitions

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

RIGHT OF REVIEW (80 Stat. 392; 90 Stat. 2721; 5 U.S.C. 702).

Administrative agency action. Judicial review procedures.

Sec. 702. A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

FORM AND VENUE OF PROCEEDING (80 Stat. 392; 90 Stat. 2721; 5 U.S.C. 703).

Sec. 703. The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including ac-

Form and Venue.

tions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

ACTIONS REVIEWABLE (80 Stat. 392; 5 U.S.C. 704).

Sec. 704. Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

RELIEF PENDING REVIEW (80 Stat. 393; 5 U.S.C. 705).

Effective date may be postponed.

Sec. 705. When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

SCOPE OF REVIEW (80 Stat. 393; 5 U.S.C. 706.)

Sec. 706. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

Power of reviewing court.

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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